
(2002) 03 GAU CK 0036
In the Gauhati High Court
Case No : Election Petition No. 12 of 2001

Mary Rasul

APPELLANT

Vs

Isahak Ali

RESPONDENT

Date of Decision : 21-03-2002

Acts Referred:

Constitution of India, 1950 — Article 324
Election Symbols (Reservation and Allotment) Order, 1968 — Order 13A
Representation of the People Act, 1951 — Section 33(6)

Citation : AIR 2002 Guw 138 : (2002) 2 GLT 239

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : A.B. Choudhury, J. Abedin and M. Mahanta, for the Appellant; M.A. Sheikh, A. Begum, P. Saikia and B. Choudhury, for the Respondent

Judgement

Ranjan Gogoi, J.—By means of the present election petition, the petitioner has called into question the election of the respondent No. 1 to the Assam Legislative Assembly from the No. 44, Jania Legislative Assembly Constituency held on 10.5.2001.

2. The case of the election petitioner as pleaded in the petition, in short, is that by notification dated 31.3.2001, election to the Legislative Assembly of the State of Assam including No. 44 Jania Legislative Assembly Constituency was called with the following Schedule :

1. Last date of filing nomination - 23.4.2001

2. Date of Scrutiny - 24.4.2001

3. Date of withdrawal of candidature - 26.4.2001

4. Date of Poll - 10.5.2001

5. Date of counting - 13.5.2001

3. According to the petitioner she was set up as a candidate from the No. 44

Jania L.A.C. by the Assam Gana Parasid (hereinafter referred to as AGP), a registered and recognised Political Party of Assam. To the said effect a letter dated 16.4.2001 was issued in favour of the petitioner. The further case of the petitioner is that thereafter Form A prescribed under the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the Symbols Order) was issued by the AGP showing the Party President Shri Prafulla Kumar Mahanta as the authorised person and the said form A was duly communicated to the Chief Electoral Officer, Assam as required under the provisions of the Symbols Order. Thereafter, according to the petitioner, the authorised person namely, Shri Prafulla Kumar Mahanta issued a Form B under the Symbols Order notifying the name of the petitioner as the approved candidate of the AGP in respect of the No. 44 Jania L.A.C. The petitioner has averred that in the aforesaid Form B issued in her favour there was no substitute candidate nominated by the party. As such the entries made in column 2 of the aforesaid Form B were so inserted by mistake. The petitioner, it is claimed on the basis of the Form B issued in her favour by the authorised person, submitted her nomination papers signed by one Kafiur Rahman as a proposer. The aforesaid nomination of the petitioner was submitted on 20.4.2001. The petitioner's further case is that on 23.4.2001 at about 2.15 PM, one Newajul Haque also filed his nomination papers as a candidate set up by the AGP. It is stated that another Form B Notice was issued on 17.4.2001 setting up the aforesaid Newajul Haque as the approved candidate of the AGP rescinding the earlier Form B issued in the name of the petitioner. Further by the subsequent Form B notice, the petitioner was set up as a substitute candidate. The aforesaid developments, according to the petitioner, were not communicated to her and she was not given any prior information about the changes made.

The petitioner has further averred in the election petition that the nomination papers in respect of the No. 44 Jania L.A.C. were taken up for scrutiny and in the said scrutiny the nomination paper submitted by the election petitioner was rejected by the Returning Officer. According to the petitioner, the aforesaid rejection was made on the ground that the earlier Form B issued in favour of the election petitioner was rescinded by a subsequent Form B issued in the name of Shri Newajul Haque in which subsequent Form B, the petitioner was shown as the substitute candidate on the aforesaid basis, the Returning Officer took the view that as the nomination paper submitted by Shri Newajul Haque was valid the same had to be accepted and those submitted by the election petitioner had to suffer rejection.

The petitioner has alleged that the nomination papers submitted by her were improperly rejected and, therefore the election of the respondent No. 1 is void under the provisions of Section 100(1)(c) of the Representation of People Act, 1951 (hereinafter referred to Act of 1951). In the election petition, the legality and validity of paragraph 13A of the Symbols Order inserted by the amendment made in the year 1999 has also been assailed as illegal, void and unconstitutional.

4. The respondent No. 1 has contested the claim made in the election petition by filing a written statement. In the written statement filed by the said respondent, it has been averred that Form B issued in favour of the election petitioner on 16.4.2001 was cancelled by the authorised person on the same day itself as would be evident from the entries made against column No. 2 of the aforesaid Form B. According to the returned candidate, only one notice in Form B was issued by the AGP and the same was in favour of Shri Newajul Haque in which Form B, the name of the election petitioner was shown as the substitute candidate. Upon acceptance of the nomination of the aforesaid Newajul Haque as the candidate set up by the AGP. the nomination papers of the election petitioner had to be rejected. There was also no scope in law to accept the nomination papers of the election petitioner as an independent candidate. The returned candidate in the written statement filed has further averred that Form B initially issued in favour of the election petitioner was cancelled on 16.4.2001 itself and immediately on the next date, i.e., on 17.4.2001

Shri Newajul Haque was set up as the approved candidate of the AGP and the petitioner was made a substitute candidate. The election petitioner must, therefore, deemed to have sufficient notice of the aforesaid position and the allegations made to the contrary by the election petitioner are claimed to be in correct. The returned candidate has also stated in the written statement filed that it was always open for the election petitioner to file her nomination as an Independent candidate by complying with the provision of the law applicable in this regard and the consequences which have occurred upon the rejection of the nomination papers filed as a candidate sponsored by a registered and recognised party was on her own doing.

5. On the basis of the pleadings of the parties, the following issues have been framed for trial:

1. Whether the nomination of the election petitioner was improperly rejected by the Returning Officer. If so, whether the election of the Respondent No. 1 is liable to be declared to be void ?

2. Whether the nomination of the election petitioner as a substitute candidate of a recognised political party ought to have been accepted by the Returning Officer as a valid nomination as Independent candidate ?

4. Whether paragraph 13A of the Election Symbols (Reservation and Allotment) Order, 1968 in so far as it empowers a recognised political party to rescind Form B and setting up another candidate as a substitute candidate, thereby putting the earlier approved candidate in jeopardy, depriving such candidate of his or her chance of contesting the election is illegal, void and unconstitutional.

5. Whether the provisions contained in paragraph 13A of the Election Symbols (Reservation and Allotment) Order, 1968 is unguided and uncanalised in respect of the power given to a recognised political party and as such whether the said provision is liable to be struck off as unconstitutional and void.

6. The election petitioner has examined herself and one Abdul Basit Choudhury in the case. In the course of her deposition, the election petitioner has proved the letter dated 16.4.2001 written by the President of the AGP intimating the election petitioner that she had been selected as the party candidate from the No. 44 Jania L.A.C. The said document has been exhibited as Exhibit "1". She has also proved the Form B issued in her name on 16.4.2001 by the authorised person, i.e., the President of the AGP as Exhibit-2. The petitioner has deposed that on the basis of the aforesaid Form B, she had submitted her nomination papers on 20.4.2001. The petitioners had filed four sets of nomination papers and one set of such papers has been proved by her as Exhibit 3. On receipt of the aforesaid nomination papers from the petitioner, the Returning Officer had issued an acknowledgement in writing which has been exhibited as Exhibit 4. According to the petitioner the scrutiny of the nomination papers was scheduled to be held on 24.4.2001. Accordingly, she was present on the said date and in course of the scrutiny she was informed by the Returning Officer that another Form B notice dated 17.4.2001 has been issued showing one Newajul Haque as the approved candidate of the AGP. In the said Form B Notice, the name of the petitioner was mentioned as the substitute candidate. The aforesaid Form B notice has been exhibited as Exhibit-5. The petitioner has deposed that pursuant to the said Exhibit-5, the aforesaid Newajul Haque had submitted his nomination on 23.4.2001 at 2.12 PM vide Exhibit 6. According to the petitioner, at the time of scrutiny, the petitioner raised an objection as to how two candidates could be set up by one political party from the same constituency. According to the petitions she had prayed for time before the Returning Officer to enable her to clarify the matter. But the Returning Officer did not grant such time and instead passed an order rejecting her nomination papers. The aforesaid order of the Returning Officer has been exhibited as Exhibit-7. In course of cross examination, the election petitioner had denied that the Form B notice issued in her favour on 16.4.2001 (Exhibit 2) was cancelled on the same date by means of the entries against the column No. 2 of the said Form B. The petitioner has ascribed the aforesaid entries in Column No. 2 as a mistake committed by the authorised person. In cross examination, the election petitioner has further submitted that if time as prayed for had been granted by the Returning Officer she could have filed her nomination papers as an Independent candidate. The PW 2 examined in the case has corroborated the evidence of PW 1 as noticed herein above.

7. Insofar as Issue Nos. 1 and 2 framed for trial in the present case is concerned, the controversy between the parties does not raise any significant problem. Under the second proviso to Section 33(1) of the Act of 1951, a candidate not set up by a recognised political party shall not be deemed to be duly nominated for election from the Constituency unless the nomination paper is subscribed by 10 proposers being the electorates of the Constituency. The nomination paper of a candidate seeking to contest the election as an independent candidate must, therefore, be subscribed by at least 10 proposers. In the instant case, the nomination papers of the election petitioner was subscribed by only one

proposer. Under the first proviso to Paragraph 13A of the Symbols Order introduced by the amendment made in the year 1999, it has been clarified that the political party which had given notice in Form B in favour of a candidate may rescind such notice and may give a revised notice in Form B in favour of another candidate. The proviso to paragraph 13A requires that such revised notice in Form B must reach the Returning Officer of the constituency not later than 3PM of the last date for submission of nomination. The second proviso to Paragraph 13A provides that in a situation where two Form B notices are issued and the subsequent notice does not indicate that the earlier Form B notice had been rescinded, the Returning Officer shall accept the notice in Form B in respect of the candidate whose nomination papers were, first delivered to him. The said second proviso further enjoins upon the Returning Officer not to treat the remaining candidate/candidates in respect of whom notice/notices in Form B have been received by him as the candidate set up by the political party. In the Instant case, the first Form B notice issued on 16.4.2001 showing the election petitioner to be an approved candidate (Exhibit 2) must be deemed to be a valid notice notwithstanding the entries made against column No. 2 of the said notice. In the aforesaid Form B notice, no substitute candidate has been named. Therefore, the entries against the column No. 2 must be necessarily understood to be redundant and irrelevant. The said entries against Column 2 of the First Form B notice were also construed in the same manner by the Returning Officer as evident from the order dated 24.4.2001. Passed by him rejecting the nomination of the Election Petitioner (Exhibit-7). The materials on record of the case go to indicate that after the said Form B notice was issued on 16.4.2001 the petitioner submitted her nomination papers on 20.4.2001. However, the Second Form B notice was issued by the authorised person of the political party in question on 17.4.2001 showing one Newajul Haque as the approved candidate of the party and the election petitioner as the substitute candidate. The earlier Form B notice showing the election petitioner as the approved candidate was specifically rescinded by the subsequent notice dated 17.4.2001. In such a situation, under the provisions of Paragraph 13A of the Symbols Order 1968, the Returning Officer could not have accepted the nomination papers of the election petitioner as a candidate of AGP. The Returning Officer also could not have accepted the nomination papers of the election petitioner by treating the election petitioner as an independent candidate inasmuch as the nomination papers submitted by the election petitioner do not conform to the requirements of the second proviso to Section 33(i) of the Act of 1951. The aforesaid issues, therefore, have to be decided against the election petitioner and in favour of the returned candidate. The Returning Officer was right in rejecting the nomination papers of the election petitioner. This brings us to the other issues framed in the present case.

8. The power of the High Court while exercising jurisdiction in an election dispute under the provision of the Act of 1951 to adjudicate upon the validity of any statutory provision is no longer in doubt. The matter has been set at rest by the

decision of the Apex Court in the case of Hari Sankar Jain v. Sonia Gandhi reported in AIR 2001 Sc 3557. The Apex Court in the aforesaid decision, however, stipulated two limitations on the exercise of such powers. First the adjudication of such a question must be necessary for the purpose of trial of the election petition and secondly a specific case for going into the validity of any law is made out in the pleadings advanced by the election petitioner.

9. Mr. A.B. Choudhury, learned counsel appearing for the election Petitioner in a short and precise argument had contended that the nomination papers of the election petitioner in the instant case have been rejected by the Returning Officer on the basis of the power conferred on him by the provisions of the paragraph 13A of the Symbols Order 1968. The learned counsel has submitted that the first proviso to the aforesaid Paragraph 13A requires the Form B notice rescinding another such notice to be delivered to the Returning Officer at any time prior to 3 PM on the last day of filing of the nomination. The learned counsel has argued that the aforesaid proviso to Paragraph 13A contains an inbuilt possibility of abuse and misuse of power thereby prejudicially affecting the electoral fortunes of an intending candidates in whose favour the earlier Form B notice had been issued. More specifically, the learned counsel argues that in view of time limit fixed under Paragraph 13A for submission of the subsequent Form B notice, a candidate who had already filed nomination on the basis of a valid Form B notice issued earlier may be taken by surprise. Then nomination pursuant to such subsequent Form B notice may be filed before the Returning Officer just on the eve of the closure of nominations giving little or no time to the aforesaid candidate to file fresh nomination papers as an Independent candidate.

10. The learned counsel further argues that is precisely what has happened in the instant case. The Election Petitioner came to know of the subsequent Form B notice in favour of Shri Newajul Haque only on the date of scrutiny of nominations and, therefore, she had been deprived of the opportunity of filing a fresh set of nomination papers as an independent candidate. On the said basis, the learned counsel argues that the question of the validity of Paragraph 13A of the Symbols Order has a reasonable nexus to the question that has arisen in the present election dispute, i.e., whether the nomination paper of the election petitioners to as improperly rejected. The learned counsel has further submitted that necessary pleadings in this regard have been made in the election petition and, therefore, this Court may proceed to adjudicate the question regarding the validity of Paragraph 13A of the Symbols Order as has been raised by the election petitioner.

11. I have considered the submissions advanced by Mr. Choudhury and the pleadings made by the election petitioner. I am in complete agreement that issue Nos. 3 and 4 raised in the present case need to be gone into and adjudicated by this Court in the present proceeding.

12. Mr. A.B. Choudhury, learned counsel in support of the challenge made with regard to the validity of the paragraph 13A of the Symbols order has submitted

that the first proviso to the Paragraph 13A of the Symbols Order is not authorised by the provisions of Article 324 of the Constitution which vests in the Election Commission the powers of "superintendence/direction and control of the preparation of the electoral roll, conduct of elections to Parliament and Legislative Assembly of every State.....". According to Mr. Choudhury, the provisions of Paragraph 13A of the Symbols Order have a reasonable nexus with part V of the Act of 1951 inasmuch as by virtue of the provisions of the said Paragraph 13A, the right of a candidate to seek nomination as an Independent Candidate upon rescission of the Form B notice issued to him, is effected and/or regulated. Mr. Choudhury while conceding that the Supreme Court in the case of Kanhiya Lal Omar Vs. R.K. Trivedi and Others, has taken the view that the power to frame Symbols Order 1968, is traceable to Article 324 of the Constitution, has however sought to contend that in the aforesaid decision of the Apex Court, the provisions of Paragraph 13A were not considered as the same had been introduced by the amendment to the Symbols Order made in the year 1999. That apart Mr. Choudhury has argued that Paragraph 13A of the Symbols Order 1968 contains an inherent and in built scope for ill devised and improper exercise of the power vitally affecting the rights of the parties and this is precisely what has happened in the instant case. The subsequent Form B notice issued on 17.4.2001 rescinding the earlier notice issued in favour of election petitioner was placed before the Returning Officer at the eleventh hour, the nomination papers of the newly set up candidate in place of the election petitioner was also filed at the eleventh hour leaving no room or opportunity to the election petitioner to submit a fresh set of nomination papers as an independent candidate. The provision of any law containing such inherent possibility of abuse and misuse according to the learned counsel, must be nullified as invalid.

13. Mr. M.A. Sheikh, learned counsel for the respondent No. 1 while controverting the submissions advanced by Mr. A.B. Choudhury, learned counsel for the Election Petitioner, has contended that paragraph 13A inserted by the amendment of 1999 is merely declaratory of the existing law as would be evident from the use of the words "For the removal of any doubt" appearing in the opening part of the paragraph 13A of the Symbols Order. According to the learned counsel for the respondent, paragraph 13A being merely declaratory, the issues raised by the election petitioner regarding the power of the Election Commission to introduce the aforesaid paragraph 13A by way of an amendment is no longer open in view of the decision in the case of Kanbhuiya Lal Omar v. R.K. Trivedi (supra).

14. Insofar as the second submission of Mr. Choudhury is concerned, it has been argued by Mr. Sheikh that even assuming the initial Form B Notice issued in favour of the petitioner on 16.4.2001 (Ext. 2) to be valid, the subsequent Form B notice rescinding the said earlier notice (Ext. 5) was issued on 17.4.2001. According to the learned counsel, in view of the volatile scenario usually prevailing at the time prior to filing of the nominations, the story set up by the Election petitioner that she could come to know of the subsequent Form B notice

only on 24.4.2001, at the time of scrutiny, is inherently incapable of acceptance. The petitioner must be attributed with requisite knowledge of Exhibit 5 much earlier than what has been claimed. No steps having been taken by the election petitioner to file any fresh nomination as an independent candidate, the petitioner must be made to suffer for such lapses. The learned counsel further argues that in any event no statute or subordinate legislation is liable to be declared as invalid merely because of the possibility of misuse or abuse of powers conferred by such statute or subordinate legislation.

15. The rival submissions advanced on behalf of the parties have been duly taken note of. Insofar as the challenge to the validity of paragraph 13A of the Symbol Order on the ground of lack of power is concerned, the matter should not detain the court. The use of the expression "For the removal of any doubt" as appearing in the opening sentence of the said paragraph 13A has made it amply clear that the power to rescind an earlier Form-B notice was always available and present. The power to rescind, even in absence of paragraph 13A, must be conferred and recognised in the authority which had issued the earlier Form-B notice, on the principles contained in the provisions of General Clauses Act. Furthermore, the Apex Court having upheld the validity of the Symbols Order by holding the power to enact the said order as traceable to Article 324 of the Constitution, the first submission advanced on behalf of the election petitioner regarding the validity of paragraph 13A must necessarily fail. Paragraph 13A of Symbol Orders must, therefore, be held, to have been validly introduced by the amendment of 1999.

Insofar as the second argument advanced on behalf of the election petitioner with regard to the validity of the paragraph 13A of the Symbol Orders is concerned, this Court is inclined to hold that on the basis of the oral evidence adduced, the election petitioner has succeeded in proving that the later Form-B (Ext-5) issued in favour of Newajul Haque came to her knowledge only on 24.4.01, i.e., the date of scrutiny of nominations. What logically follows from the said fact is really a failure of the political party concerned to maintain a minimum fairness in its conduct and dealings. The shortcoming that has occasioned prejudice to the election petitioner as claimed, is not on account of the provisions of the Statute. Such prejudice, if any, has been caused by the omissions of the political party concerned to maintain the expected standard of conduct in its actions and dealings. It will be highly undesirable to acknowledge the existence of any power in the Court to negative a legislative exercise or even a piece of subordinate legislation on any such basis. Wrongful actions under a statute or a subordinate legislation does not render the Statute invalid. The actions taken may be legitimately questioned in an appropriate forum by person aggrieved.

16. Moreover, it is really for the Election Commission to examine the matter and consider the necessity of further amendment to Paragraph 13A in the light of its experience in the matter of implementation of the aforesaid Paragraph 13A. The second ground of challenge insofar as the validity of Paragraph 13A is concerned, therefore, also has to fail.

17. Before parting with the records one further submission of the learned counsel for the election petitioner must be noticed. Mr. Choudhury has argued that in the instant case the election petitioner prayed for time to clarify the matter and has also stated in her deposition that if time as prayed for was allowed she could have filed her nomination papers as an independent candidate. Mr. Choudhury by referring to Section 36(5) of the Act of 1951 has contended that in the instant case the refusal of the Returning Officer to grant time and instead in proceeding to reject the nomination of the election petitioner was an arbitrary exercise of power which according to the learned counsel has been disapproved in the Judgment of the Apex Court in the case of Rakesh Kumar Vs. Sunil Kumar, The facts of the aforesaid case are distinguishable. In the said case the political party in question had not rescinded the earlier Form B notice. The Returning Officer after rejecting the request of one of the candidates for time to produce the official confirmation of his candidature by the party, rejected the nomination of both the candidates set up by the party as well as the nomination of the substitute candidates. It is in the context of the aforesaid facts that Section 36(5) of the Act of 1951 was considered by the Apex Court and the eventual conclusion that the Returning Officer was wrong in rejecting the request for time was reached.

18. The facts of the present case as noticed are altogether different. The Form B notice issued in favour of the Election Petitioner was rescinded and the subsequent Form B notice was issued by which the petitioner had been set up as the substitute candidate. The request for time to enable the election petitioner to file her fresh nomination as an independent candidate, could not have been granted as the last date for submissions of nomination has already expired. The contention raised by Mr. Choudhury, therefore, fails, once again.

19. For the foregoing discussions I do not find any merit in the election petition. Consequently, the same shall stand dismissed with cost which is quantified at Rs. 2000 (Rupees two thousand),

20. A copy of this judgment be sent by the Registrar General to the Secretary. Election Commission of India for necessary action in the light of the observations contained in paragraph 15 and 16 of the present judgment.