

(2021) 03 KL CK 0239

In the High Court Of Kerala

Case No : Writ Petition (C) No. 7358, 7359, 7369, 7371, 7372 Of 2021

N. Haridasan And Ors

APPELLANT

Vs

State Of Kerala And Ors

RESPONDENT

Date of Decision : 22-03-2021

Acts Referred:

Representation Of The People Act, 1951 — Section 33(1), 33(4), 36(4), 36(5)
Constitution Of India, 1950 — Article 226, 324, 329, 329(b)

Citation : (2021) 03 KL CK 0239

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : S. Sreekumar, S. Manu, Harikrishnan S, K.V. Sohan, P. Vijayakumar, Deepu Lal Mohan, K. Ramakumar, Krishnadas P. Nair, T. Raman Unni, S.M. Prasanth, Haridas P. Nair, M.A. Vinod, K.L. Sreekala, P.Vandana

Final Decision : Dismissed

Judgement

1. The writ petitioners are candidates who have submitted their nominations for contesting in Assembly Constituencies in the ensuing election to the Kerala Legislative Assembly. The petitioners are before this Court aggrieved by the rejection of their nominations.

2. The petitioner in W.P.(C) No.7358/2021 submitted nomination for contesting in 013-Thalassery Assembly Constituency. The nomination was submitted at 01.15 p.m. on 19.03.2021, the last date prescribed. Along with nomination, duly filled up Form-A and Form-B were submitted. However, Form-A submitted at 01.15 p.m. did not contain signature of National President of the political party. When the defect was noted, the petitioner submitted Ext.P4 request seeking one hour time to clear the mistake. According to the petitioner, the the Returning Officer did not grant time. On 20.03.2021, the date of scrutiny of nominations, the petitioner produced Form-A (Ext.P5) duly signed by the National President of the political party, along with Ext.P6 affidavit.

3. After scrutiny, the Returning Officer rejected the nomination observing as

follows:-

"Since Form-A has not been submitted in required format in due time (3 p.m. of 19.03.2021), we scrutinised the nomination as that of an independent candidate but since it is not supported by 10 proposers, this nomination form is rejected."

On the same day, the Returning Officer returned to the petitioner a copy of the duly signed Form-A, as per Ext.P8.

4. The petitioner in W.P.(C) No.7359/2021 submitted nomination for contesting in 063-Guruvayur Assembly Constituency on 19.03.2021 at 2.42 p.m. Among the documents submitted, Form-A and Form-B were unfilled. However, at 2.59 p.m., the petitioner submitted Form-A and Form-B. Form-A so submitted was duly signed by National President of the Party. But, Form-B did not contain the signature of the Authorised State President of the Party. In this case also, on 20.03.2021, the date of scrutiny, the petitioner submitted Form-B duly signed by the State President. However, the Returning Officer rejected the nomination observing that as per the Hand-book of the Election Commission, it should have been submitted on 19.03.2021. The petitioner is challenging rejection of his nomination.

5. W.P.(C) No.7369/2021 is filed by a candidate who submitted nomination to 127-Varkala Assembly Constituency. The petitioner filed nomination for election to the general seat on 19.03.2021. She submitted nomination as a candidate of a political party with the official election symbol. Her nomination was rejected on the ground that the Part Number of one among the proposers in the nomination paper, is not in the final voters list. According to the petitioner, the Part Number was properly and clearly written in the old voters list. The rejection of her nomination paper on super technical grounds, is illegal and unsustainable.

6. The petitioner in W.P.(C) No.7371/2021 wanted to contest in 85-Piravom Constituency and submitted his nomination on 19.03.2021, as candidate of a political party. When the petitioner submitted his nomination, certain defects were noted and the petitioner was given time to produce Form-A and Form-B at the latest by 20.03.2021. According to the petitioner, before the petitioner could submit the Forms on 20.03.2021, the nomination of the petitioner was rejected on the ground that for a valid nomination, i.e., for a registered unrecognised party, 10 proposers are needed.

7. The learned Senior Counsel appearing in W.P.(C) No.7358/2021 contended that in the matter of scrutiny of nomination, there is total non-compliance of Section 36(5) of the Representation of the People Act, 1951. The additional 4th respondent did not evaluate the defect in Form-A in a transparent and open manner. The additional 4th respondent should have given an opportunity to the petitioner to cure the defect. The order of the Returning Officer interferes with the free flow of election and hinders the progress of the election, contended the learned Senior Counsel.

8. The learned counsel for the petitioner pointed out that the 4th respondent issued Ext.P3 check list of documents. At Serial No.3 of the check list, the 4th respondent indicated that no Form-A or Form-B was filed. This is against the facts. The petitioner had indeed submitted Form-A and Form-B, though the Form-A submitted first did not contain the signature of National President. However, in Ext.P7, the Returning Officer has stated that since Form-A has not been submitted "in required format" in time, his nomination is being rejected. Ext.P7 would show that the petitioner had submitted Form-A on 19.03.2021. The learned Senior Counsel pointed out that in Ext.P3 checklist, the 4th respondent had stated that he is giving time to the petitioner to produce Form-A and Form-B till 3 p.m. on 19.03.2021. When the petitioner had submitted Form-A, the Returning Officer should not have stated that he is giving time till 3 p.m. If Form-A actually submitted by the petitioner suffered any defect, the Returning Officer ought to have directed the petitioner to cure the defects. Ext.P3 would evidence the non application of mind by the Returning Officer.

9. The learned counsel for the petitioner pointed out that the petitioner has been subjected to discriminatory treatment. In respect of another candidate, who contested in 085-Piravom Constituency, the Returning Officer granted time to the said candidate to produce the documents upto 20.03.2021, the date of scrutiny. In respect of the said candidate also, the defect was non production of Form-A and Form-B. Though the petitioner requested time to the 4th respondent, the 4th respondent did not grant time to the petitioner. Even though the petitioner produced Form-A duly signed on 20.03.2021, the Returning Officer rejected the nomination of the petitioner. At the same time, in Piravom Constituency, Form-A and Form-B produced by a candidate were entertained on 20.03.2021, which is evident from Ext.P11, contended the learned counsel.

10. Relying on the judgment of the Apex Court in Election Commission of India v. Ashok Kumar and Others [(2000) 8 SCC 216], the learned counsel for the petitioner urged that the Hon'ble Apex Court has held that the courts must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. The petitioner is only seeking an equal treatment. The petitioner is seeking only to correct a minor defect which is not material. Therefore, if this Court directs the respondents to accept the defectless Form-A submitted by the petitioner, that would not amount to retarding, interrupting, protracting or stalling of the election proceedings. The bar under Article 329 will not come in the way of this Court in exercising jurisdiction under Article 226 of the Constitution of India. If this Court directs the respondents to accept Form-A submitted by the petitioner, that will only further democratic electoral process and it will be in the interest of justice also.

11. The learned counsel for the petitioner further relied on a Division Bench judgment of the Gujarat High Court in Marutiben Dhudabhai Gamar v. State Election Commission and another [2018 KHC 3943] to contend that the High Courts in exercise of Article 226 can pass orders directing to accept the

nominations of the candidates to meet the ends of justice. The petitioner had in fact filed the nomination in time. The delay in submitting a defectless Form-A need not result in rejection of the nomination, contended the learned counsel for the petitioner.

12. The learned Senior Counsel appearing in W.P.(C) No.7359/2021 urged that the mandate of Rule 4 of Conduct of Election Rules are clear and a defect in Form-A or Form-B cannot result in rejection of a nomination. The Returning Officer, instead of taking his decision on statutory rules, has relied on the Handbook issued by the Election Commissioner, which are only in-house instructions. Acceptance of nomination and allocation of symbol are distinct and different. Form-A and Form-B relates to allocation of symbols. Non submission of Form-B cannot vitiate a nomination properly filled and submitted, contended the learned Senior Counsel. The learned Senior Counsel further submitted that when the decision making process of the respondents are faulty, this Court will be amply justified in interfering with the matter and giving directions to the respondents.

13. The learned Senior Counsel pointed out that in *Prahladan v. Varkala Kahar* [2012 (3) KHC 753], this Court in similar circumstances interfered and directed the respondents to accept the nomination of a candidate. In the said case, the nomination paper was rejected on the ground that it was improperly stamped. This Court found that for the said reason, nomination cannot be rejected. In the present case also, the defect noted is not a material defect and the respondents committed grave error in rejecting the nominations submitted by the petitioner.

14. The learned counsel for the petitioner in W.P.(C) No.7372/2021 pointed out that his nomination was rejected on the ground that Form-26 submitted by the petitioner did not contain requisite statements and that Form-26 is typewritten. The learned counsel for the petitioner pointed out that what was submitted by the petitioner is Form-26 in old format. In other Constituencies in the State of Kerala, the Returning Officers have accepted Form-26 submitted in old formats. One Santhosh Madhavan submitted nomination in Udumbanchola Constituency. The said Santhosh Madhavan submitted Form-26 in the old format. The nomination of said Santhosh Madhavan was accepted. Similarly, one Sangeetha submitted nomination along with Form-26 in the old format, for contesting in Idukki Assembly Constituency. The said Form-26 in old format and her nomination were accepted. However, in the case of the petitioner alone, his nomination has been rejected on the ground that Form-26 submitted by the petitioner is in the old format.

15. The learned counsel further urged that defect in the format of affidavit used by the petitioner is not a matter of substantial character that requires the Returning Officer to reject the nomination. Rejection of nomination on that ground amount to gross violation of Section 36(4) of the Representation of the People Act. Form-26 submitted by the petitioner contained all the requisite facts which are to be stated. Even if there is any deficiency in the old format, the said

defect was curable. Rejection of nomination on that ground is highly arbitrary and liable to be interfered with.

16. The learned counsel further urged that respondent No.3 was not consistent in the decision making process. If the 3rd respondent evaluated the affidavit in Form-26 as it truly appears and had the 3rd respondent evaluated the affidavit in a transparent manner he would have given an opportunity to the petitioner to cure the defect. In the circumstances of the case, the bar under Article 329 of the Constitution is not attracted as the petitioner is not seeking orders to delay the electoral process. The petitioner is only seeking to remedy the situation arising out of an arbitrary action of the Returning Officer. Granting relief to the petitioner would only ensure free and fair election, contended the learned counsel for the petitioner.

17. In W.P.(C) No.7369/2021, the learned counsel for the petitioner argued that his nomination has been rejected on the ground that part number of the proposer was incorrect. That is not a material defect. Section 33(4) of the Representation of the People Act casts a duty on the 2nd respondent to satisfy himself that the names and electoral roll number of the candidates as entered in the nomination paper are same as entered in the electoral roll. Law mandates that there should be a substantial compliance with Section 33(1) of the Act in completing the form and in delivering the same. In the circumstances of the case, the respondents are liable to be compelled to accept the nomination paper of the petitioner to the general election.

18. The learned counsel for the petitioner in W.P.(C) No.7371/2021 stated that it was thoroughly improper on the part of the respondents to reject his nomination, after granting the petitioner time to produce Form-A and Form-B by 20.03.2021. Cancelling the granted time for curing defects, the Returning Officer should not have rejected the nomination, when the petitioner was ready with requisite documents, contended the learned counsel for the petitioner.

19. The learned Standing Counsel appearing for the Election Commission of India, relying on the judgment of the Apex Court in *Shyamdeo Pd. Singh v. Nawal Kishore Yadav* [(2000) 8 SCC 46] urged that one of the principles underlying the plenary bar on judicial proceedings in election matters created by Article 329(b) is the pre-emptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings by way of challenging the steps and stages in between the commencement and the conclusion. The learned counsel for the petitioner pointed out that the Hon'ble Apex Court has been taking a consistent view that once the election process is started by publishing election notification, the High Courts in exercise of the jurisdiction under Article 226 should not entertain writ petitions which will cause hindrance to the electoral process.

20. Relying on the judgment of the Apex Court in *Manda Jaganath v. K.S. Rathnam and Others* [(2004) 7 SCC 492], the learned Standing Counsel pointed

out that only those actions of the Returning Officer which have the effect of interfering in the free flow of scheduled elections or hinder the progress of election are amenable to correction in writ jurisdiction of courts.

21. The learned Standing Counsel pointed out that the Hon'ble Apex Court has held in the judgment in Election Commission of India v. Ashok Kumar and Others [(2000) 8 SCC 216] that 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 large 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. The learned Standing Counsel relied on Annexure-R2(a) judgment of this Court in W.P.(C) No.31990/2015 wherein it was held that whether the defect noticed is of substantial character or not, is a matter of evidence and this Court cannot go into such matters in exercise of the powers under Article 226 of the Constitution of India.

22. I have heard the learned counsel for the petitioners and counsel appearing on behalf of the respondents.

23. The learned counsel for the petitioner in W.P.(C) No.7358/2021 stressed on the fact that while the petitioner was not granted time to cure the defect and still be cured the defect on the date of scrutiny, his nomination has been rejected. At the same time, the Returning Officers entertained the documents produced by certain other candidates, on the date of scrutiny. This is grossly discriminatory, arbitrary and unjust.

24. The learned counsel for the petitioner in W.P.(C) No.7372/2021 pointed out that when the petitioner's nomination was rejected on the ground that the petitioner produced Form-26 in the old format, the nomination submitted by many other candidates in the old format of Form-26 was entertained and they were permitted to contest in the elections. If this is true, indeed it will be grossly discriminatory. Such divergent considerations and differential treatment would indeed tell upon the impartiality of the electoral officers and Returning Officers.

25. However, to what extent interference of this court is possible in the electoral process, in exercise of the jurisdiction under Article 226 of the Constitution, is the question. The Hon'ble Apex Court in the judgment in Manda Jaganath v. K.S. Rathnam and Others [(2004) 7 SCC 492] has clarified the position that errors that could be corrected by judicial interference while the election is in progress are errors of the nature which interfere with the free flow of the scheduled election or hinder the progress of the election. The scheme of the Constitution and the Representation of the People Act do not contemplate two attacks with matters in connection with election proceedings, one by invoking the powers of the High Court under Article 226 and the other by means of the election petition

and that the scheme of the constitutional and statutory provisions is that any matter which has the effect of vitiating the election should be brought up only at the appropriate stage in an appropriate manner before the Special Tribunal and should not be brought up at the intermediate stage before any court.

26. In the judgment in Election Commission of India v. Ashok Kumar and Others [(2000) 8 SCC 216], the Hon'ble Apex Court held that the court must be weary and act with caution while entertaining any election dispute though not hit by Article 329. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings.

27. A learned Single Judge of this Court considered the judgments of the Apex court from N.P. Ponnuswami v. Returning Officer [AIR 1952 SC 64] onwards in the judgment in Vinod and another v. Returning Officer [2021 (1) KHC 105] held as follows:-

"In a country with a democratic constitution in which Legislatures have to play a very important role, it will lead to serious consequences, if the elections are unduly protracted or obstructed on account of judicial interference in the intermediate stage of the election. In other words, the view expressed in the said case is that howsoever erroneous or howsoever malicious the decision of the Returning Officer in rejecting the nomination be, judicial intervention is not contemplated against the same at the intermediate stage of the election."

Therefore, howsoever erroneous be the rejection of a nomination of a candidate by the Returning Officer, judicial intervention is not contemplated against the same at the intermediate stage of the election. The said judgment was upheld by a Division Bench of this Court in WA No.166/2021.

28. A Division Bench of this Court again considered the issue in Abdulla v. Kerala State Election Commission [2020 (6) KHC 577 (DB)]. This Court also held that the word election is used to embrace the whole procedure of election and final result thereof. This Court held that law does not contemplate two attacks of the matters connected with the election i.e., one under Article 226 treating the process of election and the other when it is completed by election petition under the Act, 1951. Rejection or acceptance of nomination papers cannot be challenged under Article 226 of the Constitution. The Division Bench held that interfering with the rejection of nomination is a matter interrupting the progress of election which is deprecated by Constitution Bench judgment of the Apex Court.

29. In view of the judgment of the Apex Court referred to above and in the light of the judgment of a Division Bench of this Court in Abdulla v. Kerala State Election Commission (supra) , this Court is not inclined to interfere with the election process at the instance of the petitioners, at this stage.

30. The Election Commission of India exercises plenary powers under Article 324 of the Constitution and any error or deficiencies in the electoral process can be

corrected by the Election Commission of India itself. As regards the allegations made in W.P.(C) Nos.7358, 7359 and 7372 of 2021, it will be open to the Election Commission of India to look into these aspects and take remedial measures, as are found necessary.

31. Having held so, this Court notes with the concern that Returning Officers in different constituencies are resorting different parameters in the matter of acceptance of nominations, scrutiny of nominations and acceptance of various forms. When some candidates get the benefits of liberal approach of the Returning Officers, some others are put to disadvantageous position affecting their statutory right under the Representation of the People Act to contest in the elections. This Court is of the opinion that taking note of the factual situations disclosed in these writ petitions, the Election Commission of India shall take necessary steps so that such differential treatment is excluded and the purity of the election process is preserved.

The writ petitions are dismissed with the above observations. As this Court is not considering the issues raised by the petitioners on their merits, all contentions raised by the petitioners are left open.