

(1998) 06 KL CK 0020
In the High Court Of Kerala
Case No : O.P. No. 9329/98 I

Rajalakshmi, T.D.

APPELLANT

Vs

The District Election Officer and Others

RESPONDENT

Date of Decision : 17-06-1998

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 64
Constitution of India, 1950 — Article 226, 227, 327, 329
Representation of the People Act, 1951 — Section 100(1), 100(2), 14, 2(1), 36

Citation : (1998) 06 KL CK 0020

Hon'ble Judges : P.A. Mohammed, J;G. Sivarajan, J

Bench : Division Bench

Advocate : K. Ramakumar, Ramprasad Unni and Rajkumar, for the Appellant;
T.M. Mohammed Yusuf, A.A.G. and C.N. Radhakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

P.A. Mohammed, J.—This writ petition has been filed by a candidate who contested the by-election to No. 72 Ernakulam Assembly Constituency to the Kerala Legislative Assembly. She was supported by a national political party called "Bharatheeya Janatha Party". She challenges the withdrawal of symbol "conch" allotted to her initially by the Returning Officer.

2. The case put forth by the Petitioner in the writ petition is condensed thus: The nomination paper submitted by the Petitioner was found valid by the second Respondent Returning Officer. Subsequently, Ext. P-1 notice was issued to her stating that symbol to the contesting candidates would be allotted at 3 p.m. on 20th May 1998 and she was also requested to be present on the said occasion. Pursuant to the said notice she attended the meeting at the relevant time along with other candidates. A list of free symbols as contemplated under Sub-clause (2) of Clause 12 of the Election Symbol Reservation and Allotment Order, 1968 was made available at the meeting and she selected the symbol "conch". As there was no other claimants for the symbol "conch" it was allotted to the

Petitioner. However, she was surprised to hear from the newspapers that the symbol "conch" allotted to her had been withdrawn and instead symbol "aeroplane" given. This was done when the Petitioner had already started her election campaign exhibiting her election symbol as "conch". However, the Ext. P-2 notice specifying the symbols allotted to the candidates was affixed at the premise of the residence of the Petitioner. From Ext. P-2 it was found that the symbol allotted to her is "aeroplane". The Respondents effected this change of symbol without issuing any prior notice and she was not heard before doing so. With these allegations the Petitioner prayed for a declaration that the withdrawal of symbol "conch" was patently illegal.

3. When this writ petition came up for admission before a learned Single Judge on 25th May 1998 it was referred to a Division Bench since according to the learned Judge an important question arises for consideration. Accordingly this writ petition came up before the Division Bench which declined to grant any interim relief though it was admitted. The petition, C.M.P. No. 15852 of 1998 seeking direction to the Election Commission to consider the postponement of polling date to some other date in view of the alleged violation of the provisions of the law by Respondents 1 and 2 was withdrawn by the Petitioner. However, the counsel for the Petitioner prayed for an early disposal of the writ petition.

4. In the counter-affidavit filed by the first Respondent on 1st June 1998 it was averred that the allotment of symbol was made by the second Respondent Returning Officer and first Respondent had nothing to do with the process of allotment of symbol. He further stated that he had not interfered with the allotment of symbol to the candidates directly or indirectly. The second Respondent has also filed a counter-affidavit. His case is that the Election Commission of India over phone informed him on 21st May 1998 that a notification had been issued on 13th May 1998 as per which the symbols such as "conch", "coconut tree bearing fruits" etc., had been deleted from the list of free symbols allotted to the Kerala State. He further stated that the said notification (Ext. R-2 (a)) was received by the first Respondent only at 9.21 a.m. on 22nd May 1998. In view of this situation all efforts were made to contact the Petitioner in order to inform this change of symbol, but in vain. In the aforesaid background he further added that he had allotted Anr. free symbol "aeroplane" to the Petitioner. The second Respondent also raised a contention that in view of Article 329(b) of the Constitution of India there is a total bar of jurisdiction of the High Court to interfere with the proceedings of the election except by a regular Election Petition. This being an important question it is essential to decide this as a preliminary point.

5. While examining the above preliminary point it must be recalled that the existence of power is different from exercise of power. Once it is conceded that the power exists, it cannot be said that there is total prohibition in dealing with the matter. After examining the issue the court may refuse to exercise the power because the grant of relief is statutorily prohibited. That means this Court while

functioning under Articles 226 and 227 has power to entertain the writ petition so as to ascertain the possibility of granting any relief sought for. When it is found that statutory bar operates effectively against the grant of relief the court can reject the petition. In this premise we will deal with the above primary point raised by the second Respondent.

6. Article 329 of the Constitution in so far as it is relevant in the present context is as follows:

329. Bar to interference by courts in electoral matters. - Notwithstanding anything in this Constitution-

(a) * * * (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an Election Petition presented to such authority and in Such manner as may be provided for by or under any law made by the appropriate Legislature.

The above provision mandates that the election to a legislative assembly shall not be called in question except by an Election Petition presented to the prescribed authority. In other words, Article 329 bars the jurisdiction of the High Court to issue writ under Article 226 in respect of election to either House of Parliament or to either House of a Legislature of a State. Likewise Section 80 of the Representation of People Act, 1951 (hereinafter referred to as R.P. Act) mandates that no election shall be called in question except by an Election. Petition presented in accordance with the provisions of Part VI of the Act. In order to decide what constitutes "election" as contemplated by the abovesaid statutes it is essential for us to examine the definition of the said term. The Constitution has not defined the term "election". However, the R.P. Act defines it in Section 2(1)(d) as thus:

"Election" means an election to fill a seat or seats in either House of Parliament or in the House or either House of Legislature of a State other than State of Jammu and Kashmir.

This definition would not in any way serve us in solving the present issue inasmuch as it does not indicate when does the process of election commence and when does it end. The question required to be determined in the present case is whether withdrawal of a symbol allotted to a candidate and the allotment of a fresh symbol would come within the term of "election". If such a process comes within the definition of "election" then only the bar provided under Article 329(b) of the Constitution and Section 80 of the R.P. Act would be operative. On behalf of the Election Commission, it was pointed out that the by-election to Ernakulam Constituency was declared as per the notification dated 9th Alay 1998 and all steps for such election from the date of publication of the notification till the date of publication of results would come under the election process. It is further pointed out that even if there is any irregularity or illegality in such process of election, it cannot be challenged before this Court invoking the power under Articles 226 or 227 of the Constitution of India.

7. The preamble to our Constitution unequivocally declares India to be a sovereign democratic republic. The term "democratic republic" has not been defined anywhere in the Constitution. Prof. Finer in "Comparative Government (1970)" pointed out:

...no political terms have been so subjected to contradictory definitions as "democracy" and "democratic" since it has become fashionable and profitable for every and any State to style itself in this way. The Soviet Union and communist States of Eastern Europe, the Chinese People's Republic, North Korea and North Vietnam all call themselves democracies. So does Nasser's Egypt; so does General Stroessner's Paraguay; so did Sukarno's Indonesia. Yet, if anything is clear, it is that these States do not all meet the same definition of democracy.

The preamble of our Constitution does not tell us what kind of democratic republic is established in India. However the enacting provisions of the Constitution evince that we have a federal Constitution with a parliamentary democracy of the type prevailing in the United Kingdom which was also adopted in the Federal Constitution of Canada and Australia. The preamble of the Constitution as reflected in Part III relating to Fundamental Rights shows that democracy prevalent in this country is that of a free and open society as opposed to an unfree and closed society. Free and fair elections are basic requirements of free democratic society and under the Constitution elections are held on the basis of adult universal suffrage for every citizen who is not disqualified.

8. The whole scheme of Part XV of the Constitution was considered by the Supreme Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, There the Appellant whose nomination paper had been rejected by the Returning Officer applied under Article 226 of the Constitution for a writ of certiorari to quash the order of the Returning Officer and to direct him to include his name in the list of valid nominations. An argument was advanced before the Supreme Court that the action of the Returning Officer in rejecting a nomination paper can be questioned before the High Court under Article 226 of the Constitution. In this context it was pointed out that the scrutiny of nomination papers and their rejection are provided for in Section 36 of the R.P. Act and that the Parliament has made this provision in exercise of the powers conferred on it by Article 327 by the Constitution which is "subject to the provisions of the Constitution". These arguments were answered by the Constitution Bench of the Supreme Court as below:

As we have seen, the most important question for determination is the meaning to be given to the word "election" in Article 329(b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared

elected.

(emphasis supplied)

In *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, the Constitution Bench after following the decision in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, observed that the word "election" in Article 329(b) is used in a comprehensive sense as holding the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate. It further held that an application under Article 226 challenging the validity of any of the acts forming part of that process will be barred.

9. Again the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, observed:

We have held that Article 329(b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding election disputes. We have further held that Article 226 also suffers such eclipse. Before the notification u/s 14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961, are not forbidden ground. In between is, provided, the step challenged is taken in furtherance of, not to halt or hamper the progress of the election.

We also refer to the decision of the Supreme Court in *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman* AIR 1985 S.C. 1233 on this point. Thus it is crystalline that the election contemplated in Article 329(b) and Section 80 of the R.P. Act covers the entire process from the issue of the notification u/s 14 to the declaration of results u/s 66 of the Act. Whatever may be the nature of these processes at different stages during the said period the High Court cannot exercise the power under Article 226 or 227 in view of the statutory prohibition contained in Article 329(b) of the Constitution and Section 80 of the R.P. Act.

10. The learned Counsel for the Petitioner has brought to our notice the ambit and width of the judicial review available under Article 226 placing reliance on the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* 1969 (1) All. E.R. 208 and also the decisions of the Supreme Court in *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, and *L. Chandra Kumar Vs. Union of India and others*, We find it difficult to apply the principle enunciated in those Judgments in so far as it relates to judicial review in view of the express constitutional bar contained in Article 329(b) of the Constitution.

11. The only question remains to be considered is the remedy available to the aggrieved parties for the violation during the forbidden period, that is to say, from the issue of notification u/s 14 and to the declaration of results u/s 66 of the R.P. Act. Section 100(1)(d)(iv) of the R.P. Act is very apposite in this context. It runs thus:

100. Grounds for declaring election to be void.-(1) Subject to the provisions of

Sub-section (2) if the High Court is of opinion-

(a) * * * * (b) * * * * (c) * * * * (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected- (i) * * * * (ii) * * * * (iii) * * * * (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act.

The above provision sufficiently safeguard the interest of the aggrieved parties who allege there is non-compliance with the provisions of the Constitution or the Act or rules or orders made under the Act. When the above non-compliance is established the High Court has power to declare the election of the returned candidate to be void. This remedy can be resorted to by filing an election petition as contemplated u/s 80 of the R.P. Act. This is an effective remedy available to a person who alleges the contravention of the provisions of the Constitution and the Act and Rules. Accordingly the preliminary objection of the second Respondent is upheld.

In view of what is said above, we decline to exercise the power under Article 226 of the Constitution. In the result, the writ petition is dismissed. No order as to costs.