
(2010) 09 AHC CK 0269
In the Allahabad High Court
Case No : Election Petition No. 1 of 2008

S.N.Tripathi (Major)

APPELLANT

Vs

Election Commission of India

RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Representation of the People Act, 1951 — Section 33, 87

Citation : (2010) 09 AHC CK 0269

Hon'ble Judges : Satish Chandra, J

Final Decision : Dismissed

Judgement

1. Heard Major S. N. Tripathi, the petitioner who appeared in person and Sri I. B. Singh, Senior Advocate, assisted by Sri Amit Jaiswal, learned counsel for the opposite parties.

The petitioner preferred this Election Petition under Section 81 of the Representation of the People Act, 1951 (hereinafter known as R.P. Act) challenging the validity of the election of the opposite party No. 3/returned candidate. The petitioner has prayed that the election of the elected candidate i.e. opposite party No. 3 be declared as void under the provisions of Section 98 (b) of the R.P. Act. Feeling aggrieved, the petitioner preferred the present election petition mainly on the following grounds:

i. This election was not conducted in accordance with the provisions of this R.P. Act and hence it is void under Section 100 (1) (d) (iv) of this R.P. Act.

Ii. The opposite party No. 3 has been elected as a delegate/agent of an association or a body of persons and such a person is not qualified to be chosen to fill the seat under Article 173 of the Constitution and Section 5 (c) of this R.P. Act. Hence, his election is void under Section 100 (1)(a) of this R.P. Act.

Iii. An agent/delegate of an association or a body of person is not entitled to be nominated as Candidate for election to fill this seat under Sections 32 and 33 (1) of the R.P. Act. Hence, the acceptance of his nomination being improper, his

election is void under section 100 (1) (d) (i) and (iv) of the R.P. Act.

Iv. The rejection of the nomination of the petitioner being contrary to the provisions of Section 36 (2)(b) of this R.P. Act, the election of opposite party No. 3 is void under Section 100 (1)(c) there under;

v. The expression "Candidate" being statutorily defined is a class under Article 14 and is not open for classification into "Independent Candidate" and the "Party Candidate" under pretext of the recognized political party; similarly, the expression "Political Party" being statutorily defined is a class under Article 14 and is not open for classification into recognized unrecognized party, but both the said defined words has been classified in which, the opposite party No.3 is called "Party Candidate" and is accorded favoured treatment in violation of Article 14. hence his election is void under Section 100 (1) (d) (iv) of this R.P. Act.

Vi. The citizens associations formed and governed under Article 19 (1) (c) and registered under Section 29A (7) of this R.P. Act and defined under its 2(1)(f) as Political Party has unreasonably been restricted by changing their structure into (i) the recognized National Party; (ii) recognized State Party and (iii) registered unrecognized party, which violate clause (4) of Article 19 and such classified parties without having the right to freedom of expression under Article 19(1) (a), have been permitted to exercise civic right by way of setting up for the election to its own delegates by means of the Nomination FORM 2B, Annexure 5 giving undue electoral advantage to opposite party No. 3 to get elected by breach of Article 19(1) (a) inter alia. Hence, his election is void under Section 100 (1) (d) (iv) of the R.P. Act.

2. The petitioner submits that the election petition is presented under Section 81 of the R.P. Act, 1951 on the grounds specified under Section 100 (1) (a), (c), (d) (i) and (iv) there under, questioning the validity of the election of opposite party No. 3, who has got himself illegally elected by blatant breach of the limitations in Article 173 of the Constitution and of the provisions of Sections 5 (c), 32, 33(1), 36(2)(a) and (b), 29A(7) and 169 (1) of the R.P. Act as well as by flagrant breach of the definition clause of the R.P. Act defining the words and expressions (i) Political Party (ii) Candidate (iii) Electoral Right. He submits that, it is in violation of the fundamental rights of the petitioner guaranteed under Chapter 3 off the Constitution specially Articles 13(2), 14, 19(1)(a), 19(1) (c), 19(4) and 21 of the Constitution. According to him, the petitioner being an elector in U.P. as defined under section 2 (1) (e) of the R. P. Act, is qualified for membership of the U.P. Legislative Assembly under Section 5 (c) there under and, he possessed the electoral right as defined under Section 79(d) there under, which inter alia, includes the right to stand for being a candidate. He read out the definition of persons mentioned in section 2 (g) of R. P. Act, 1950 which prescribed "person does not include the body of person" which is applicable to R.P. Act, 1951 vide its section 2(1) (a).

3. He further submits that the petitioner's cause of action is legally flowing from

the noncompliance of the Constitutional Provisions of Articles 173, 170, 324 (1) and 327 including the fundamental right mentioned above. He read out the paragraph No. 27 of the petition where it was mentioned that the FORM 2 B in Rule 4 of Rules, 1961, used by them treated them differently by calling them with different names such as independent candidates and party candidates, is contrary to the definition of the candidate mentioned under Section 79 (b) of the R.P. Act where the independent candidates having not been set up by a recognized political party, must have ten proposers as nominators while the political party candidates having been set up by a recognized political party will have only one proposer as nominator, which is apparent on the face of their respective nomination forms. He expressly challenged this discrimination.

4. The petitioner further submits that the opposite party No. 3, in spite of being not qualified for being chosen to fill this seat, has been chosen, while the petitioner, in spite of being fully qualified for being chosen to fill the seat both, under the Constitution as well as the R.P. Act, has been improperly stopped from contesting this election by improper rejection of his nomination. To support his argument, he read out the ratio laid down in the following cases:

- i. Smt. Indira Gandhi v. Raj Narain; (1975) Supp. SCC 1 : (AIR 1975 SC 2299);
- ii. Hari Shanker Jain v. Sonia Gandhi; 2001 (8) SCC 233 : (AIR 2001 SC 3689);
- iii. Jyoti Basu and others v. Debi Ghosh; 1982 (1) SCC 691 : (AIR 1982 SC 983); and
- iv. D. Ramchandran v. R. V. Janki Raman; 2004 (7) SCC 181.

5. At the cost of repetition, he also submits that the election in question has been conducted in gross violation of the definition clause of R.P. Act i.e. Sections 2(1) (a), 79 (b) and (d) of the R.P. Act, defining the word "political party", candidates and electoral right and Section 2(g) of R.P. Act, 1950 defining the word "Person" applicable to the R.P. Act vide its Section 2(1) (a) and the provisions of Sections 29A (7), 5 (c), 32, 33 (1) and 7 (b), 36 (2) (a) and (b) and (7) and Section 169 (1); and of Rule 4 of Rules, 1961 and in that, it has violated the provisions of Articles 173, 324 (1) and 327 and also, it has violated the fundamental rights under Articles 13 (2), 14, 19 (1) (a), 19 (1) (c), 19 (4) and 21 of the Constitution.

6. He also submits that the petitioner's Constitutional right under Article 173 qualifying him for being chosen to fill a seat in the State Legislative Assembly (read with Section 5 of the R.P. Act describing other qualification) and he has statutory right under section 32 of the R.P. Act entitling him to be nominated as a candidate for election to fill a seat [(read with his electoral rights under section 79 (d)] thereunder giving him the right, inter alia, to stand for being a candidate including his fundamental rights under Articles 13 (2), 14, 19(1) (a), 19(1)(c), 19 (4) and 21 have been taken away or abridged by the Nomination FORM 2P in Rule 4 of the Rules 1961, which has been made in violation of the express

limitation under section 169 (1) of the R.P. Act, and moreso, when Section 29A(7) thereunder also, has laid down a limitation that registration of the political party shall be only for the purpose of its PART IV A and not for the other PARTS of the R.P. Act. Further, Section 2 (1) (f) thereunder defines the word "Political Party" which applies to all the provisions as decided in the landmark election case of Smt. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299 (para 218). Hence, the words "Political Party" and "Candidate" are not open to opposite party No. 1 for RuleMaking for the purpose of the R.P. Act.

7. He further argued by mentioning that the election in question was not conducted in accordance with the provisions of the R.P. Act and hence, it is void under Section 100 (1) (d) (iv) of the R.P. Act. The opposite party No. 3 was wrongly elected as a delegate/agent of an association or a body of persons and such a person is not qualified to be chosen to fill the seat under Article 173 of the Constitution, and Section 5 (c) of the R.P. Act. According to him, an agent/ delegate of an association or a body of person is not entitled to be nominated as Candidate for election to fill this seat under Sections 32 and 33 (1) of the R.P. Act. Hence, the acceptance of his nomination being improper, his election is void under section 100 (1) (d) (i) and (iv) of the R.P. Act. He further submits that the citizens associations formed and governed under Article 19 (1) (c) and registered under Section 29A (7) of the R.P. Act and defined under its Section 2 (1)(f) as Political Party has unreasonably been restricted by changing their structure into (I) the recognized National Party; (ii) recognized State Party; and (iii) registered unrecognized party, which violate clause (4) of Article 19 and such classified parties without having the right to freedom of expression under Article 19 (1) (a), have been permitted to exercise civic right by way of setting up for the election to its own delegates by means of the Nomination i.e. FORM 2B, Annexure 5 giving undue electoral advantage to opposite party No. 3 to get elected by breach of Article 19 (1) (a) inter alia. Hence, the election of the returned candidate is void under Section 100 (1) (d) (iv) of the R.P. Act. He relied on the ratio laid down by the Hon"ble Supreme Court in the case of Ram Sukh v. Dinesh Aggarwal in Civil Appeal No.6128 of 2008 decided on 18.09.2009 (Reported in: AIR 2010 SC 1227: 2010 (2) ALJ 464). Lastly, he made a request that the election of the returned candidate, the opposite party No. 3, be declared to be void under Section 98 (b) of the R.P. Act.

8. On the other hand, Sri I. B. Singh, learned Senior Counsel assisted by Sri Amit Jaiswal appearing for the opposite party No. 3 submits that the present election petition is frivolous and misconceived. He submits that it has been held by the Hon"ble Apex Court in the case of Jagan Nath v. Jaswant Singh and others; 1954 SCR 892 : (AIR 1954 SC 210) that the election contest is not an action of law or suit in equity, but purely statutory proceeding and election should not be lightly interfered with and in any petition seeking such interference must strictly conform to the requirements of law. He read out from the affidavit dated 15.10.2009 wherein it was mentioned that the petitioner is taking the matter very casually and not following the practice and procedures of law and had filed

this election petition with ulterior motives and mala fide intention to cause harassment and prejudice to the returned candidate, who is a person of high repute. He further submits that the respondent No. 3, on being served with the notice instead of filing a written statement, filed an application under Order VI, Rule 16 read with Order VII, Rule 11, and Section 151 of Code of Civil Procedure, 1908 read with Section 86 of the R.P. Act raising a preliminary objection to the maintainability of the petition, inter alia, on the ground that the petition was lacking in material facts relating to the election impugned and was also defective for want of requisite verification in accordance with Order VI, Rule 15 of the Code of Civil Procedure and no affidavit was filed in support of the election petition as required under Order VI, Rule 15 (4) of the Code of Civil Procedure. It was further submitted that whatsoever incomplete affidavit has been filed by the petitioner that is not permissible under the law and verification of the paragraphs are also incomplete. Further, it was stated that the petitioner is required to verify all the Annexures/schedule in the same manner in which the plaint is verified but the petitioner has not verified all the Annexures/schedule in the same manner. So, the petition is liable to be dismissed.

9. He also submits that the petitioner had earlier filed an Election Petition No. 02 of 2007 (Major S.N. Tripathi v. Election Commission of India and others), being an elector of 84 Mahona Assembly Constituency, challenging the elections held under section 15(2) of the Act, on 21st February, 2007, in all the 403 Assembly Constituencies in Uttar Pradesh. The same was dismissed on 10.02.2008. The petitioner has also filed another writ petition No. 9575 of 2009 (PIL) i.e. Major S. N. Tripathi v. Union of India and others, which too was dismissed on 11.11.2009 by this Hon"ble Court.

In both the Election Petitions, the petitioner had raised almost the same plea along with certain other pleas which have been considered by the Court and have been rejected. The present petition is nothing but an attempt to get publicity and the same is liable to be dismissed.

10. On merit, learned counsel for the opposite party No. 3 submits that the petitioner has challenged the vires and constitutional validity of Section 33 of the R.P. Act as well as the proviso appended to it. The vires cannot be challenged in the election petition. Contesting the election is a legal right. The opposite party No. 3 elected on Bahujan Samajwadi Party Ticket. The proviso of Section 33 of the R.P. Act creates two classes namely one is the candidates of the recognized political party; and another independent candidates. In the case of political party, nomination paper signed by the candidates and by one electoral of the constituency as proposer is sufficient. But in the case of independent candidate, nomination paper is to be subscribed by ten proposers being electoral of the constituency.

11. He continues to argue by mentioning that the petitioner was an independent candidate and ten proposers were required in his case but ten proposers were not available to him. So, the concerning Returning Officer has rightly rejected his

nomination. Lastly, he submits that the petition may be dismissed with costs.

12. After hearing the parties at length and on perusal of material available on record, it appears that the petitioner has challenged the election of returned candidate (opposite party No. 3) under Section 81 of R.P. Act, which reads as under:

81. Presentation of petitions. (1) An election petition calling in question any election may be presented on one or more of the grounds specified in [subsection (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector within fortyfive days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation. In this subsection, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

1 (??)

2[(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.]

Section 86 of the Representation of the People Act defines the Trial of Election Petitions, which reads as under:

86. Trial of Election Petitions. (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation. An order of the High Court dismissing an election petition under this subsection shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the Trial of Elections under subsection (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation. For the purposes of this subsection and of section 97, the trial of a

petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

Section 87 of Representation of the People Act defined the procedure before the High Court, which runs as under:

Section 87. Procedure before the High Court. (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings,

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1872), shall subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

13. From the above quoted provisions, it would appear that Section 86 of R.P. Act mandates that where the election petition does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, the High Court should dismiss the election petition. Section 87 which lays down the procedure required to be followed by the High Court while trying an election petition, it provides that every election petition shall be tried, as nearly as may be, in accordance with the procedure applicable under the Code to the trial of the suits, subject of course to the provisions of the Act and of any requirement made thereunder.

14. During the course of argument, the petitioner also took a plea that this court cannot exercise its power either under Order VI, Rule 16 or Order VII, Rule 11 of

the Code to reject the election petition at the threshold. The argument is twofold viz. (i) that even if the election petition was liable to be dismissed ultimately, it could be dismissed only after affording an opportunity to the election petitioner to adduce evidence in support of his allegation in the petition; and (ii) since Section 83 does not find a place in Section 86 of the Act, rejection of petition at the threshold would amount to reading an additional ground into subsection (1) of Section 86 of the R.P. Act.

Both the contentions raised by the petitioner are misconceived, and untenable. Undoubtedly, by virtue of Section 87 of the Act the provisions of the Code of Civil Procedure, 1908 are applicable to the trial of an election petition and. Therefore, in the absence of anything to the contrary in the R.P. Act, the Court trying an election petition can act in exercise of its power under the Code, including Order VI, Rule 16; and Order VII, Rule 11 of the Code of Civil Procedure, 1908. The object of both the above said provisions is to ensure that meaningless, frivolous and fleshiness litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the valuable time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election petition is likely to inhibit the returned candidates of the people in the discharge of his public duty ft which the Electorate have reposed confidence in returned candidate.

15. It may be mentioned that the Hon"ble Supreme Court in the case of Hardwari Lal vJ Kanwal Singh; 1972 (1) SCC 214: (AIR 1972] SC 515) observed that:

"Counsel on behalf of the respondent submitted that an election petition could not be dismissed by reason of want of material facts because Section 86 of the Act conferred power on the High Court to dismiss the election petition which did not comply with the provisions of Section 81, or Section 82 or Section 117 of the Act. It was emphasized that Section 83 did not find place in Section 86. Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. A suit which does not furnish cause of action can be dismissed."

16. This view was again reiterated by the Hon"ble Supreme Court in the case of Azhar Hussain v. Rajiv Gandhi; (1986)Supp. SCC 315 : (1986 All LJ 625). Referring to earlier pronouncements in the case of Samat N. Balkrishna and Udhav Singh v. Madhav Rao Scindia; (1977) 1 SCC 511 : (AIR 1976 SC 744), it was observed that the omission of a single material fact would lead to incomplete cause of action and that an election petition without the material facts is not an election petition at all. The Hon"ble Supreme Court held that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and omission of even a single material fact would amount to disobedience of the mandate of Section 83 (1) (a) of the Act and an election petition can be and must be dismissed if it suffers from any such vice.

In view of above, this plea taken by the petitioner has no merit and the same is liable to be dismissed.

17. Further, the petitioner took another plea which is mentioned as main ground in the election petition i.e. rejection of the petitioner's nomination by the returning officer on the ground that the petitioner's nomination was not proposed by the required number of proposers. So, he has challenged the vires of this provision by mentioning that first proviso to Section 33 of the Act provides that a candidate who has not been set up by a recognized political party shall be required to be proposed by ten proposers being electors of the constituency. Vehemently arguing the petitioner submitted that recognized political party has not been defined in the Act and same is discriminatory in terms of democratic constitutional rights of the citizens. The petitioner submits that his nomination paper has been improperly rejected. For this purpose, the petitioner has drawn attention to the annexure No. 4 to the election petition, which is FORM 2B prescribed under Rule 4 of Conduct of Election Rules of 1961. From the perusal of the nomination papers, it is evident that same bears only one name of proposer with his required details. Part V Chapter I of R.P. Act provides the procedure and requirements of valid nominations.

Replying to the aforesaid arguments learned Senior Counsel on behalf of the opposite party No. 3, draw the attention to the explanation appended with the Section 78B of the Act and argued that recognized political party have been defined provisions of order 2 (1) (h) and order 6 of the Election Symbols (Reservation and Allotment Order, 1968 issued vide notification No. S.O. 2959 dated 1st August, 1968) by the Election Commission of India in exercise of powers conferred by Article 324 of the Constitution of India read with Section 29A of the Act.

18. By considering the rival submissions, it appears that nomination is part of the process of selecting a candidate for either election to an office. In the context of elections for public office, a candidate who has been selected by a political party is normally said to be the nominee of that party. The party's selection (that is, the nomination) is typically accomplished either based on one or more primary elections or by means of a political party convention or caucus, according to the rules of the party and any applicable election laws. In some jurisdictions the nominee of a recognized political party is entitled to appear on the general election ballot paper. Candidates who are unaffiliated with any political party are typically required to submit a nominating petition in order to gain ballot access. In others all candidates have to meet nomination rules criteria to stand. Candidates comes from the Latin word "candida" (white). In Ancient Rome, people running for political office would often wear togas chalked and bleached to be bright white. Such garments would be worn by candidates at speeches debates, conventions and other public functions. In parliamentary procedure, there are a number of motions relating to nominations. However, it is evident that in the instant case, the petitioner has challenged the vires of Section 33 of

the R.P. Act. The said provisions reads as under:

33. Presentation of nomination paper and requirements for a valid nomination.
(1). On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer.

Provided that a candidate not set up by a recognized political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

19. Needless to mention that a Constitution Bench of the Hon''ble Supreme Court in the case of Jagan Nath v. Jaswant Singh and others; 1954 S.R.C. 892 : (AIR 1954 SC 210) observed that the statutory requirement of election law must be strictly observed that the election contest is not an action at law or a suit in equity, but is purely statutory proceeding unknown to the common law and that court possessed no common law power. It is also well settled that the election of a candidate who has won should not be lightly interfered with any petition seeking such interference must strictly conform to the requirement of law.

Moreover, it was stated that the vires of the provisions of the Representation of the People Act cannot be challenged in an election petition, as held by Hon''ble Supreme Court in the case of Hari Shanker Jain v. Sonia Gandhi; 2001 (8) SCC 233 : (AIR 2001 SC 3689).''Further, in order to challenge the vires of the Act, it is necessary that Union of India be impleaded as respondent and the notice has to be sent to the Attorney General of India, but the Union of India was not made the party in the present election petition. So, vires to challenge the validity of R.P. Act cannot be examined.

20. Therefore, I find no force in the arguments advanced by the petitioner that first proviso to Section 33 of the Act is ambiguous on the basis of absence of the definition of the recognized political party. As far as second point of argument raised by the petitioner that first proviso to Section 33 of the Act is discriminatory is also not sustainable because of the fact that the aforesaid proviso was inserted in the Act by the amending Act No. 21 of 1996 appears to be with an object to check the nonserious candidates and dummy candidates not to hamper the solemn process of election, essential for the democratic nation like India. It also appears that the same was inserted with a view to check antisocial elements, horse trading activities and to lower the cost of the election process which is becoming an incumbersome burden to the State exchequer.

21. In view of above discussion, I hold that the present election petition is wholly misconceived and is based on absolutely misinterpretation and misunderstanding of the legal provision enshrined in the Constitution as well as in R.P. Act.

Therefore, the election petition being devoid of merit is hereby dismissed.