
(2012) 02 GAU CK 0077
In the Gauhati High Court
Case No : Writ Petition (C) No. 95 of 2012

T Nengzakham

APPELLANT

Vs

The State of Manipur and Others

RESPONDENT

Date of Decision : 27-02-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 329
Representation of the People Act, 1951 — Section 58

Citation : (2012) 02 GAU CK 0077

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : Serto T. Kom, for the Appellant; R.S. Reisang, Sr. Government Advocate, Manipur, for the Respondent

Final Decision : Allowed

Judgement

T Vaiphei

1. The sole question which falls for consideration in this writ petition is, whether this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India can direct the Returning Officer/District Election Officer, Churachandpur to dispose of the representation filed by him on 2912012 and 122012 for reference to the Election Commission of India? According to Mr. Serto T. Kom, the learned counsel for the petitioner, the direction prayed for by the petitioner will in no way retard or interrupt or protract or stall the election process, and such direction may be issued by this Court to enable him to contest the election in a meaningful and purposeful manner. The learned counsel contends that the error complained of by the petitioner is an error contemplated by Section 58(b) of the Representation of the People Act, 1950 ("the Act" for short), and the Returning Officer has acted in breach of this provision in not referring the complaint of the petitioner to the Election Commission of India for taking appropriate action u/s 58(2) of the Act. Mr. R.S. Reisang, the learned Senior State Counsel, however, vehemently opposes the prayer and contends that the writ petition, if allowed,

will have the effect of undue interference by this Court in the election process, which is not permissible in terms of the decision of the Apex Court in *C. Subrahmanyam Vs. K. Ramanjaneyullu and Others*, ; *Election Commission of India Vs. Shivaji and Others*, ; *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, and *Sephu Haokip and Others Vs. Speaker, Manipur Legislative Assembly and Others*, . It is his submission that the subject matter of the complaint lodged by the petitioner is a matter which can be agitated by him only by way of an election petition after the declaration of the result of the election.

2. The factual background prompting the petitioner to move this writ petition may now be noticed. The petitioner filed the nomination paper for the ongoing election to the Manipur Legislative Assembly from 56 Thanlon (ST) Assembly Constituency in the name of "T. Nengzakham", which, according to him, is his correct name. He belongs to a Paite tribe of Manipur. However, when the election was held on 28/12/2012, he found to his dismay that his correct name was not displayed in the Electronic Voting Machine (EVM) and was, instead, displayed as "Nengzakham" thereby omitting the prefix "T." there from. According to the petitioner, this deprived him of his valuable right to be properly and correctly identified by the concerned voters as one of the contesting candidates and, therefore, of his chance of winning the election. It is his case that the prefix "T" stands for the name of his clan, namely, "Tombing" and without this prefix, he cannot be identified for the simple reason that there are a number of persons belonging to Paite Tribe in Manipur having the same name; even in the electoral roll for 56/19 Polling Station in respect of Thanlon "B" House No. 74, Sl. No. 296 GCTO 107664, the name of Nengzakham, which is not the name of the petitioner herein, also found a place. Aggrieved by the error in recording his name in the EVM, which is likely to have disastrous consequences for him, he immediately approached the respondent No. 3 on 29/12/2012 and again on 1/2/2013 by filing written representations for displaying his correct name in the EVM and thereafter order repoll for all the polling stations of the 56/Thanlon Assembly Constituency in accordance therewith. The respondent No. 3 did not dispose of his representations. This is how this writ petition has been filed.

3. The scope of interference by this Court in the election process is undoubtedly limited. The following principles have been laid down by the Apex Court in *Election Commission of India Through Secretary Vs. Ashok Kumar and Others*, of the judgment:

32. For convenient sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows there from in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which

questioning may have the effect of interrupting, protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of the proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it sub serves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by the Election Commission are open to judicial review on the well settled parameters which enables judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilize the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

4. It is obvious from the observations extracted above that once the election process has started (which continued till the date of declaration of result), the election cannot be called in question if the questioning has the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy under Article 226 or otherwise is interdicted. However, if the decision sought and rendered do not amount to "calling in question" such as for sub serving the progress of the election and facilitates the completion of the election or anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election. The question now is whether the prayers in the writ petition, if granted, will have the effect of retarding, interrupting, protracting or stalling the ongoing election process? In my opinion, the error pointed out by the petitioner is an error

contemplated u/s 58 of the Representation of People Act, 1951, which deals with fresh poll in the case of destruction, etc. of ballot boxes and which is in the following terms:

58. Fresh poll in the case of destruction, etc., of ballot boxes. -

(1) If at any election,-...omitted as irrelevant....

(a) ... -do

(aa) ...do

(b) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, the returning officer shall forthwith report the matter to the Election Commission.

(2) Thereupon the Election Commission shall, after taking all material circumstances into account; either?

(a)declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the day so appointed and the hours so fixed in such manner as it may deem fit, or

(b)if satisfied that the result of a fresh poll at that polling station or place will not in any way, affect the result of the election or that the mechanical failure of the voting machine or the error or irregularity in procedure is not material, issue such directions to the returning officer as it may deem proper for the further conduct and completion of the election.

(3) ... Omitted as irrelevant ...

5. A cursory look at Section 58(1)(b) of the Act will show that once an error in displaying the name of the petitioner as entered by him in his nomination form was brought to the notice of the respondent No. 3, it was for him to examine the nature of the error complained therein and if he was prima facie satisfied that the error or irregularity in the procedure complained of was such as likely to vitiate the poll, he was statutorily obliged to report the error forthwith to the Election Commission of India, which should then act in accordance with Section 58(2) of the Act. In the instant case, the error in displaying the name of the petitioner in the EVM was reported to the Returning Officer/District Election Officer on 29/12/2012 i.e. a day after the election vide the letter at Annexure A/3. The Returning Officer apparently did not immediately take action upon such complaint. This prompted him to file another representation on 12/2/2012 vide Annexure A/4. No action was apparently taken by the Returning Officer even after this whereupon this writ petition came to be filed by the petitioner. The receipt of those representations by the respondent No. 3 was not denied by the learned State counsel. His only contention, as already noted, is that this Court under Article 226 of the Constitution has no jurisdiction to interfere with the election process and that if the petitioner is aggrieved by the conduct of the election including the error pointed out by him, his remedy lies in an election

petition after the declaration of the result of the election and not before. In my judgment, the entertainment of this writ petition, on the peculiar facts of this case, will not amount to retarding, interrupting, protracting or stalling the election proceedings. This Court is not staying or halting the election process; it merely wants the Returning Officer and the Election Commission to discharge the duty imposed upon them by the statute. The Returning Officer has failed to exercise the jurisdiction vested in him by law. Normally, in the inimitable words of Justice Krishna Iyer, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its marrow, but that is no excuse to ignore or circumvent a statutory duty imposed upon them. By allowing this writ petition, it should not be construed that I have already adjudged the tenability or otherwise of the complaint made by the petitioner. I have not nor do I intend to do so; that will be beyond my jurisdiction and will amount to usurping the functions legitimately belonging to the Returning Officer or the Election Commission. All that I say is that the Returning Officer should have disposed of the representation of the petitioner in accordance with law after observing the principles of natural justice. For example, if he determines that the error complained of does not fall within the four corners of Section 58(1)(b) of the Act, he need not report the same to the Election Commission, but a decision he must take one way or the other. Observance of principles of natural justice does not, however, always or necessarily include personal hearing of the complainant. In the view that I have taken, the proposition of law laid down by the Apex Court that this Court under Article 226 of the Constitution should interfere with the election process until the declaration the result of the election does not, and cannot, mean that it cannot direct the Election Commission or its subordinates to carry out their statutory duties so long as such direction will not have the effect of retarding, interrupting, protracting or stalling the election proceedings. After all, if the error complained of is determined by the Election Commission to be an error contemplated by Section 58(1)(b) of the Act, it may consider declaring the poll in that particular constituency to be void and appoint a day, fix the hours, for taking a fresh poll at that polling station or place, etc. However, if it is satisfied that the error or irregularity in procedure complained of is not material, it may dismiss the complaint. This much exercise is contemplated by the statute even before the completion of the election process in order to correct or smoothen the progress of the election proceedings. Failure to undertake this exercise will attract the jurisdiction of this Court under Article 226 of the Constitution. After all, this is what a writ of mandamus is meant for.

6. For the reasons stated in the foregoing, this writ petition succeeds. The respondent No. 3 shall now take a decision on the representations of the petitioner at Annexures A/3 and A/4 for reporting the error complained of to the Election Commission in accordance with Section 58(b) of the Act.