

CASE NO.:
Appeal (civil) 4023 of 2001

PETITIONER:
Shaligram Shrivastava

RESPONDENT:
Naresh Singh Patel

DATE OF JUDGMENT: 19/12/2002

BENCH:
R.C. Lahoti, Brijesh Kumar & H.K. Sema.

JUDGMENT:
JUDGMENT

BRIJESH KUMAR, J.

The defeated candidate in the bye-election held in February, 2000 to the legislative assembly, Madhya Pradesh from Bhojpur assembly constituency, filed an election petition in the High Court of Madhya Pradesh challenging the declaration of the respondent as elected from the aforesaid assembly constituency. The election petition has been dismissed, hence this appeal.

Briefly, the facts are that nomination paper of one Bhagwan Singh was rejected at the time of scrutiny on the ground that he had not filled up the proforma prescribed by the Election Commission vide letter dated 28.8.97. The said proforma was required to be filled up to ascertain as to whether the candidate had been convicted or not for any offence mentioned in Section 8 of the Representation of People Act, 1951 (for short the 'Act'). Interestingly, the candidate, namely, Bhagwan Singh had filed an affidavit that information given in the proforma was correct but the proforma itself was left blank. He had though filled the nomination paper on Form 2-B as prescribed under Rule 4 of the Conduct of Elections Rules, 1961 declaring that the candidate was qualified and also not disqualified for being chosen to fill the seat. According to the Election petitioner the nomination paper of Bhagwan Singh could not be rejected on the ground that he had not filled up the proforma prescribed under the letter dated 28.8.97, since no such proforma was statutorily provided under the provisions of the Act nor under the rules framed thereunder. It is contended that the commission could not legislate to prescribe a proforma; at best it can only be an executive instruction of the Election Commission whereas the petitioner had filled the form prescribed under the Rules which did not suffer from any defect. Yet another ground taken up by the petitioner was that failure to comply with executive direction of the Election Commission would not entail the consequence of rejection of the nomination paper much less where it is not provided that failure to fill up the proforma would result in rejection of the nomination paper.

The High Court considering the points raised by the petitioner came to the conclusion that non-submission of the declaration as required under the instruction dated 28.8.97 is a defect of substantial character. Hence the nomination paper was rightly rejected by the Returning Officer. At this juncture it may also be mentioned that a question seems to have been raised,

as to whether election petition could be entertained, in view of the fact that Bhagwan Singh, whose nomination paper was rejected neither approached the court nor he ever raised any objection to the rejection of his nomination paper, but this point does not seem to have been pursued before the High Court nor this court was addressed on the said point. We therefore, need not digress on that question and proceed to consider the matter on merit of the appeal on the grounds canvassed before us.

Before entering into the merits of the other points it would be appropriate to deal with one question raised by the appellant to the effect that the instructions dated 28.8.97 contained in letter P-1 and the letter dated 6.1.98 have not been issued by the Election Commission. On the other hand it is submitted that these letters have been issued by the officers of the Commission, hence Article 324 of the Constitution will not be attracted. This point though argued at length, holds no water and it is destined to be rejected. Referring to letter dated 28.8.97 it is submitted that it has been issued only by the Director (Law) of the Election Commission. It is further pointed out that the said letter has been issued only to operationalise the directive of the Commission. The Commission had desired that at the time a nomination paper is filed, the candidate should also fill up the proforma annexed therewith seeking information with a view to ascertain, at the time of scrutiny, as to whether his candidature is valid in the light of the provision of Section 8 of the Act or not. The instructions of the Commission alongwith copy of the letter of the Commission dated 28.8.97 were furnished to all Returning Officers and Assistant Returning Officers for their information, guidance and strict compliance. It may be pointed out that the letter written by the Director (Law) itself refers to the instructions issued by the Commission dated 28.8.97 under Article 324 of the Constitution. It has not been anybody's case that letter dated 28.8.97 issued by the Director (Law) is the instruction issued by the Election Commission under Article 324 of the Constitution. The letter of the Director (Law) only indicates the gist of the instructions of the Commission issued on the same date. The appellant has chosen not to file the instructions issued by the Election Commission dated 28.8.97 under Article 324 of the Constitution. It may further be indicated that the main document is the proforma which is required to be filled up by the candidate as per instructions of the Election Commission, seeking information which was considered necessary at the time of scrutiny of the nomination paper. The letter dated January 6, 1998 issued by the Secretary of the Election Commission clearly indicates in para 2 that revised proforma was issued along with letter of the Commission dated 28.8.97. Therefore there is no substance whatsoever in the submission made on behalf of the appellant, with some vehemence too, that the proforma as well as the instructions were issued by the officers of the Election Commission and not by the Commission itself. Apart from what has been indicated above it may also be noticed that such a ground was never canvassed before the High Court nor it has been taken in the special leave petition; rather it has been mentioned at all the places that the instructions and proforma were issued by the Election commission. It is only on the basis of oral submission that such a point was tried to be made out. For the above reasons we repel this contention of the appellant.

We thus feel that mainly two aspects of the matter require our consideration, the first being the status of the instruction issued by the Election Commission and its binding nature by virtue of Article 324 of the Constitution and the next point as to the nature and scope of inquiry as well as the power of the Returning Officer under Section 36 (2) of the Act at the time of

scrutiny. That is to say suppose it is held that the instructions and the proforma issued by the Commission does not have the force of instructions issued under Article 324 of the Constitution on the ground that the field is already covered by legislation as canvassed or on any other ground whatsoever, could the Returning Officer still in exercise of its power under Section 36(2) of the Act, seek necessary information and reject the nomination paper or not. We propose to deal with the second point first. It will be appropriate to peruse the relevant provisions contained under Sections 30, 33, 34 and 36 of the Act. They read as follows:-

"30. Appointment of dates for nominations, etc.- As soon as the notification calling upon a constituency to elect a member or members is issued, the Election Commission shall, by notification in the Official Gazette, appoint -

(a) the last date for making nominations, which shall be the [seventh day] after the date of publication of the first mentioned notification or, if that day is a public holiday, the next succeeding day which is not a public holiday;

(b) the date for the scrutiny of nominations, which shall be [the day immediately following] the last date for making nominations or, if that day is public holiday, the next succeeding day which is not a public holiday;

(c) the last date for the withdrawal of candidatures, which shall be [the second day] after the date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;

(d) the date or dates on which a poll shall, if necessary, be taken which or the first of which shall be a date not earlier than the [fourteenth day] after the last date for the withdrawal of candidatures; and

(e) the date before which the election shall be completed.

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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 recognised 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.

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday.

Provided also that in the case a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to "an elector of the constituency as proposer" shall be construed as a reference to ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers.]

(1A)

(2)

(3)

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

[Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.]

(5)

(6).

[(7).

34. Deposits: [(1)A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited, -

(a)

(b)

(2)

Xxx

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36. Scrutiny of nominations.- (1)On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one

proposer of each candidate, and one other person duly authorised in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, [reject] any nomination on any of the following grounds :-

[(a) [that on the date fixed for the scrutiny of nominations the candidate] either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely :-

Articles 84, 102, 173 and 191,

[Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (2) of 1963)]; or

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.]

(3) Nothing contained in [clause (b) or clause (c) of sub-section (2) shall be deemed to authorise the [rejection] of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularities has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that if a case [an objection is raised by the returning officer or is made by any other person] the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected,

shall record in writing a brief statement of his reasons for such rejection.

[(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.]

To summarise the legal position as emerging from the above provisions we find that Section 30 of the Act provides for fixing of dates for filing of nomination paper for election of a member from a Constituency. Section 32 provides that a person may be nominated as candidate for election to fill a seat who is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act. Section 33 relates to presentation of nomination paper and requirements for a valid nomination. The nomination is to be in the prescribed form signed by the candidate and by an elector of the Constituency as proposer. Other clauses of Section 33 indicate a number of requirements of a valid nomination. A notice of scrutiny of the nomination paper indicating the date and time for the purpose is to be issued and affixed in some conspicuous place as provided under section 35 of the Act. Under Section 36 of the Act, a nomination paper is scrutinized by the Returning Officer. Sub-section (2) of Section 36 provides that the Returning Officer on the objections filed to any nomination, or on his motion may hold a summary enquiry in connection thereof. A nomination can be rejected on the grounds: (i) the candidate is not qualified or is disqualified for being chosen to fill the seat under any of the provisions namely, Articles 84, 102, 173 and 191 of the Constitution or under Part II of the Act (Section 8 of the Act falls in Part II); (ii) the nomination paper can also be rejected on failure to comply with provisions of Section 33 or Section 34 of the Act or; (iii) The signature of the candidate or the proposer on the nomination paper is not genuine. Sub-section (4) of Section 36 provides that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of substantial character. The prescribed form B-2 for filing the nomination contains a declaration that the candidate is qualified and not disqualified. No further facts, details or information is contained in the prescribed form in relation to his qualification or disqualification. Section 8 of the Act which falls in Part II, provides for disqualification which a person may incur on being convicted. It may be noted that every conviction may not result in disqualification. It depends upon the nature of the offence and provisions under which the offence is committed, as also the period of sentence awarded.

At the time of scrutiny the Returning Officer is entitled to satisfy himself that a candidate is qualified and not disqualified. Sub-section (2) of Section 36 authorises him to hold an enquiry on his own motions, though summary in nature. The Returning Officer furnished a proforma to the candidates to be filled on

affidavit and filed on or before the date and time fixed for scrutiny of the nomination paper. Therefore providing a proforma, eliciting necessary and relevant information in the light of Section 8 of the Act to enquire as to whether the person is qualified and not disqualified, is an act or function fully covered under sub-section(2) of Section 36 of the Act. The Returning Officer is authorized to seek such information to be furnished at the time or before scrutiny. If the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, is obviously avoiding a statutory enquiry being conducted by the Returning Officer under Sub-section (2) of Section 36 of the Act relating to his being not qualified or disqualified in the light of Section 8 of the Act. It is bound to result in defect of a substantial character in the nomination.

The letter dated 28.8.97 issued by Director (Law) was addressed to the Chief Electoral Officer of all the States and Union Territories and it drew attention to the instructions issued by the Election Commission under Article 324 of the Constitution saying that in view of decisions of some High Courts, the disqualification of a candidate for election under Section 8 of the Act would commence from the date of conviction, regardless of the fact whether he is intending to be a candidate, is on bail or not except where the conviction is covered under Sub-section 4 of Section 8 of the Act.

To elicit the relevant information in regard to Section 8, the Commission had indicated a proforma which was to be handed over to the candidates who were supposed to fill the same on affidavit. In this context we may peruse Section 8 of the Act which reads as under:-

Disqualification on conviction for certain offences - (1) A person convicted of an offence punishable under -

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171 E (offence of bribery) or section 171 F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or section 376A or Section 376B or Section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) or the Indian Penal Code (45 of 1860), or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

section 11 (offence of importing or exporting prohibited goods) or the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of

an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) The Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of Section 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (a) of sub section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act;

(j) section 6 (offence of conversion of a place or worship) of the Places of Worship (special Provisions) Act 1991

(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence or preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971) shall be disqualified for a period of six years from the date of such conviction.

(2) A person convicted for the contravention of -

- (a) any law providing for the prevention of hoarding or profiteering; or
- (b) any law relating to the adulteration of food or drugs; or
- (c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); or
- (d) any provisions of the Commission of Sati (Prevention) Act, 1987 (3 of 1988),

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release]

(4) Notwithstanding anything (in sub section (1) sub section 2 and sub section (3) a disqualification under

either sub section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation - In this section -

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for -

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(a) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955)

(b) "food" has the meaning assigned to it in the Prevention Food Adulteration Act, 1954 (37 of 1954).

According to the petitioner information furnished in the form 2-B prescribed under Rule 4 for the nomination is sufficient, as it contains the declaration of the candidate that he is qualified and not disqualified to be a candidate for being chosen from the constituency. In our view the bald declaration that the candidate is qualified and not disqualified is not at all sufficient to scrutinize the nomination paper from the angle of Section 8 of the Act. Clause (a) of sub-section 2 of Section 36 provides for scrutiny of the nomination paper to see whether he is disqualified for being chosen to fill the seat or not, amongst others in the light of part II of the Act; as indicated earlier, Section 8 falls in part II of the Act. Therefore, the declaration in the nomination paper that the candidate is qualified and not disqualified may only be a mere basic statement necessary to fill up the nomination paper but it contains no information or facts relevant for the purposes of scrutinising the nomination paper in the light of Section 8 of the Act which falls in Part II of the Act. For the purpose of scrutiny further information is necessary. The scrutiny may call for even suo motu inquiry by the Returning Officer though summary in nature. It is one of the statutory duties of the Returning Officer to scrutinize the nomination paper in the light of section 8 of the Act and he is statutorily authorised to hold a summary inquiry about the qualification and disqualification of a candidate (See Birad Mal Singhvi vs. Anand Purohit, AIR 1988 SC 1796). Such a power

which vests in the Returning Officer is not dependent upon any instructions issued by the Election Commission, therefore, it is not necessary to enter into the controversy which is sought to be raised as to whether the instructions issued by the Election Commission are in exercise of its power under Article 324 or not. The returning Officer is supposed to have the necessary information at the time of scrutiny of the nomination paper and for that purpose he can very well require a candidate to furnish information relevant for the purpose of section 8 of the Act before or on the date of scrutiny. At best it can be said that the Election Commission by its letter dated 28.8.1997 had brought to the notice of the Returning Officers certain decisions of different High Courts in regard to disqualification under Section 8 of the Act. It was further desired that such a scrutiny be made by the Returning Officers looking to the menace of criminalisation of the politics. Barring the fact that the instructions apprised the Returning officers of the position under law in the light of the judgments of the High Courts, nothing else was provided thereunder which was already not within the power of the Returning Officer under the statutory provisions rather it was a part of their duty to scrutinize the nomination papers in the light of Section 8 of the Act which implies that he is authorised to seek necessary information for the purpose. It can be suo motu as well.

Since such information is necessary and relevant for the purpose of scrutiny of the nomination paper under Section 36(2), in the light of Section 8 of the Act, it can well be furnished on a format provided to the candidate by the Returning Officer and it becomes his duty to furnish such information so that a Returning Officer may discharge its statutory duty to scrutinize the nomination paper effectively, properly and in consonance with the provisions of law.

Here we would like to point out that the directive of the Commission states "when a candidate files his nomination paper the Returning Officer or, as the case may be, the Returning Officer receiving the nomination paper shall hand over to him the enclosed letter, together with the proforma of affidavit annexed thereto to ascertain at the time of scrutiny of nomination as to whether the candidature is valid from the angle of Section 8 of RP Act, 1959", it would be better that for future the directive may find it feasible to require the Returning Officer to hand over the proforma of affidavit while issuing the nomination paper itself.

In the case in hand the candidate had failed to furnish such information as sought on the proforma given to him and had also failed to be present personally or through his representative at the time of scrutiny. The statutory duty/power of Returning Officer for holding proper scrutiny of nomination paper was rendered nugatory. No scrutiny of the nomination paper could be made under Section 36(2) of the Act in the light of Section 8 of the Act. It certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same.

The appeal therefore, lacks merit and it is dismissed with costs.