

PETITIONER:
J.H. PATEL

Vs.

RESPONDENT:
SUBHAN KHAN

DATE OF JUDGMENT: 24/07/1996

BENCH:
AHMADI A.M. (CJ)
BENCH:
AHMADI A.M. (CJ)
ANAND, A.S. (J)
MAJMUDAR S.B. (J)

CITATION:
JT 1996 (6) 633 1996 SCALE (5)434

ACT:

HEADNOTE:

JUDGMENT:

W I T H
CIVIL APPEAL NO.3677 OF 1996

Subhan Khan
V.
J.H. Patel

J U D G M E N T

Ahmadi, CJI.

By an order dated March 20, 1996, Civil Appeal No.1795/96 was allowed and the impugned order of the High Court dated January 3, 1996, was set aside. The Civil Appeal No.3677/96 which was actually cross objections filed by the respondent in Civil Appeal No.1795/96 was dismissed. The election petition from which the present appeals arose was consequently dismissed. The present judgment is to provide reasons for the above order.

First, the facts in brief. Shri Subhan Khan, the respondent in Civil Appeal No.1795/96, (hereinafter referred to as the respondent), filed the election petition challenging the election of Shri J.H. Patel, the appellant in C.A.No.1795/96, from 158 Channagiri Legislative Assembly Constituency on the ground that his (respondent's) nomination paper was improperly rejected by the Returning Officer. One Sri E. Shekharappa, a voter from the same constituency, filed a nomination paper proposing the respondent's name on October 29, 1994. The Returning Officer issued a notice to the respondent to make and subscribe the oath or affirmation before the date appointed for scrutiny of the nomination paper, that is, November 3, 1994. The preceding two days i.e., November 1, 1994 & November 2, 1994, were public holidays. The respondent came to the office of the Returning Officer on November 3, 1994 at 9.00 a.m. and took oath under Article 173 of the Constitution of India at 10.55 a.m. before the Tehsildar, Channagiri Taluk. The scrutiny was to commence at 11.00 a.m. when the respondent produced the certificate of having taken oath.

The Returning Officer rejected the nomination of the respondent. Elections were held on November 26, 1994 and on December 9, 1994, the appellant was declared elected. The respondent challenged the election as void on the ground that the rejection of his nomination was improper. The election petition was contested by the appellant. The High Court held that the oath taken on November 3, 1994, at 10.55 a.m. was not sufficient but that the oath taken on October 27, 1994 at Davanagere Constituency, as required by Article 173 of the Constitution of India as evidenced by Ex. P.1, although not brought to the notice of the Returning Officer at the time of scrutiny, would qualify him to contest the election from the concerned constituency. The High court further held that the respondent was entitled to raise any fresh ground or produce any fresh material to prove the fact that his nomination paper was improperly rejected and that the fact that the respondent did not bring this fact to the notice of the Returning Officer would not disentitle him to rely on the fact before the High Court. The High Court accordingly concluded that the rejection of the nomination paper of the respondent was improper and hence set aside the election.

The impugned judgment is challenged on the ground that the decision of the High Court in accepting fresh material produced for the first time before it was based on an erroneous understanding of the judgments of this Court in *N.T. Veluswami Thevar V.G. Raja Nainar and Others* (AIR 1959 SC 422) and *Birad Mai Singhvi V. Anand Purohit* (AIR 1988 SC 1796); that the reasoning of the High Court if accepted would lead to absurd results as mischievous elements could then file nomination at one place and take oath at another and later challenge the rejection of the nomination; that the Returning Officer was right in rejecting the nomination paper on the basis of material placed before him and that the plea of the respondent in the face of his unfair and improper conduct would amount to misuse of the electoral process.

In the cross-objections filed by the respondent, he reiterates that the oath taken at 10.55 a.m. on November 3, 1994 was valid and that the finding of the High Court to the effect that he had not brought to the notice of the Returning Officer about the affirmation at Davanagere is incorrect.

From the above narration, one question of fact comes up for consideration, namely, whether the respondent had informed the Returning Officer that he had subscribed an oath or affirmation in the prescribed form in the Davanagere constituency on October 27, 1994. The questions of law that arise for consideration are : (a) whether the oath taken at 10.55. a.m. on November 3, 1994 would suffice for the scrutiny held at 11.00 a.m. on that very day; (b) whether the oath taken on October 27, 1994 at Davanagere could be taken into consideration for scrutiny of the nomination for the concerned constituency; and (c) whether the election could be set aside on the basis of oath of October 27, 1994 even if the question of fact raised by the respondent is decided in the negative.

So far as the fact in issue is concerned, we have to begin from the initial flaw in the pleadings of the respondent. As pointed out by the High Court, the respondent pleaded that he had brought to the notice of the Returning Officer that he had taken oath at Davanagere but did not plead that he had shown the certificate Ex. P.1 evidencing the taking of the oath. In fact, the best way to satisfy the Returning Officer about the oath was to present the

certificate. His witnesses say that the certificate was shown. The Assistant Returning Officer and the Returning Officer of the concerned constituency depose to the contrary. The order of the Returning Officer Ex.P.4 does not make any mention of any such certificate or any information being given by the respondent about the previous oath. No allegation of bias has been made against the Returning Officer. We are of the opinion that evaluation of evidence on this aspect by the High Court does not call for any interference and we agree with the finding that the respondent had not informed the Returning Officer that he had already taken oath as required by Article 173 of the Constitution on October 27, 1994 at Davanagere.

There is hardly any scope for controversy about the validity of the oath taken at 10.55 a.m. on November 3, 1994 which was the date of scrutiny. This Court in its earlier judgments in the case of Pashupati Nath Singh v. Harihar Prasad Singh, 1968(2) SCR 812 and in the case of Khaje Khanavar Khaderkhan Hussain Khan and Others v. Siddavanballi Nijalingappa & Another. 1969(3) SCR 524 has categorically held that the oath required by Article 173 of the Constitution of India has to be taken prior to the date of scrutiny of the nomination paper and not on the same day, minutes before the scrutiny. This Court took note of the provisions of Section 36(2) of the Representation of People's Act, 1951 and made the following observation :

"It seems to us that the expression "on the date fixed for scrutiny" in s.36(2)(a) means "on the whole of the day on which the scrutiny of nomination has to take place". In other words, the qualification must exist from the earliest moment of the day of scrutiny. It will be noticed that on this date the Returning Officer has to decide the objections and the objections have to be made by the other candidates after examining the nomination papers and in the light of s. 36(2) of the Act and other provisions. On the date of the scrutiny the other candidate. Should be in a position to raise all possible objections before the scrutiny of a particular nomination paper starts."

We subscribe to the same view.

However, before we proceed to the next point, we must refer to the decision of this Court in the case of Ram Swarup v. Hari Ram and Others (1983) 3 SCC 373 wherein this Court held that it was enough if the candidate could satisfy that on the date of scrutiny he was not qualified or disqualified for being chosen to fill the seat under Article 191 of the Constitution. The High Court did not apply the ratio of this decision to the facts of the present case as it turned on the language of Article 191 and not Article 173 with which we are presently concerned. That is perhaps the reason why the Court did not refer to the two decisions relied on while deciding the case of Ram Swarup. The two-Judge Bench in Ram Swarup's case could not have taken a view different from the view taken by the three-Judge Benches in the earlier two cases. We are, therefore, of the view that on this point the High Court's decision cannot be faulted.

There was not much controversy at the Bar that the oath

to be taken under Article 173 of the Constitution of India once taken for any constituency would be valid for the election to the concerned assembly. The earlier judgments of this Court on this point, as pointed out by the High Court, are also to the same effect. The central controversy in the case is the effect of non-disclosure of the fact of having subscribed an oath on an earlier date prior to scrutiny. The earlier oath, if any, has to be subjected to scrutiny on the date and place fixed for the purpose. The subject matter of scrutiny is provided for in Section 36(2) of the Representation of the People Act, 1951:

"(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 (20 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."

It can be seen that the eligibility of the candidate as per the requirements of Article 173 of the Constitution is squarely a matter for scrutiny. The oath subscribed by the candidate would itself be subject to scrutiny. The mere information that an oath has been subscribed could not have fulfilled the requirement of scrutiny. Even Ex. P.1 would fall short of the requirement. Ex.P.1 is quoted below for facility of its examination:

Ex.P.1
ANNEXURE - B

(Certificate for receipt of form of Oath). (To be handed over to the candidate by the authorised person)

Certified that Shri Subhan Khan (name) a candidate for election to the 41-Davanagere Legislative Assembly Constituency has made and subscribed the oath/affirmation as required by the Constitution of India, before me at my office at 12-45 (hours) on 27-10-1994 (date).

Date: 27-10-1994

Sd/
7-10-1994
Electoral Officer
No.41, Davanagere Assembly Constituency

I, the Petitioner, verify that the contents of this document Annexure-B are true to the best of my knowledge.

Sd/
Suhhan Khan

Petitioner

The certificate does not reproduce the oath subscribed. The candidate contesting the election could not, therefore, have scrutinized the validity of the oath and could not have raised any objection to it.

It was contended on behalf of the respondent that he had brought to the notice of the Returning Officer that he had taken oath in the Davanagere constituency and had shown Ex.P.1 to him. The High Court has on an evaluation of the evidence of PWS 1 to 4, 8 and 9 on the one hand, and PWS 5 and 6 on the other, come to the conclusion that this part of the version is unacceptable. The High Court notices that there was no averment in the petition that Ex.P.1 was shown, nor is there any mention about it in the order Ex.P.4 rejecting the nomination. We, too, have carefully scrutinized the evidence and see no reason to depart from the conclusion reached by the High Court. Therefore, this finding of the High Court assailed in cross-appeal must be upheld.

In this situation, could the respondent be allowed to prove the factum and validity of the oath taken by him at Davanagere on October 27, 1994 by an altogether fresh plea raised before the High Court? Relying on two decisions of this Court, viz., (i) N.T. Veluswami Thevar and (ii) Birad Mal Singhvi (supra), the High Court allowed fresh plea to be raised and concluded that the nomination was wrongly rejected which resulted in the election of the appellant being vitiated. The question is whether the High Court was right in doing so.

In the first mentioned case, the facts were that the election of the successful candidate was challenged by one of the voters of the constituency for the reason that the nomination paper of the 4th respondent had been wrongly rejected by the Returning Officer on the ground that he was holding an office of profit, in that, he was the Headmaster of a Government-aided school at the relevant point of time. The contention was that the ground on which the nomination paper was rejected was improper as the 4th respondent had ceased to be a Headmaster at the time of his nomination and further that he was employed in a private institution. The appellant, the successful candidate, who was the second respondent in the petition, contended that even if the ground on which the nomination was rejected was improper, the decision of the Returning Officer could still be supported as the 4th respondent was interested in Government contracts and had agreed to serve as a teacher under the District Board. The question which arose for consideration was whether in an election petition challenging the correctness of the rejection of a nomination paper under Section 100(1)(c) of the Representation of the People Act, 1951, it was open to the parties to raise grounds of disqualification other than those put forward before the Returning Officer. This Court held that an election petition is in the nature of original proceedings and not appellate proceedings against the order of the Returning Officer and hence the jurisdiction need not be confined to one exercised by an appellate authority. The Court, therefore, held that it was open to the successful candidate to support the decision of the Returning Officer on a ground different from the one on which the nomination came to be rejected.

In the second mentioned case, the appellant's, i.e., the successful candidate's, election was challenged by the respondent, an elector, on the ground that the result of the election was materially affected by the improper rejection of the nomination papers of three candidates, Umrao Ben,

Hukmichand and Suraj Prakash Joshi. It was contended that Smt. Umrao Ben was an elector in Sardarpura Constituency and the Returning Officer wrongly rejected her nomination paper without affording her an opportunity to produce a copy of the electoral roll; Hukmichand and Suraj Prakash Joshi were both more than 25 years of age on the date of their nomination and yet the Returning Officer had rejected their nomination papers holding them to be below 25 years of age. The successful candidate contended that Umrao Ben had failed to file a certified copy of the relevant entry in the electoral roll of Sardarpura Constituency along with her nomination and had further failed to produce the same for scrutiny and therefore, the Returning Officer was justified in rejecting her nomination paper. As regards the other two, Hukmichand and Suraj Prakash Joshi, he contended that neither of them was present before the Returning Officer at the time of scrutiny and since the entries contained in the electoral roll indicated that they were below 25 years of age, the Returning Officer rightly rejected their nomination papers. The High Court held that the nomination of the first mentioned candidate was rightly rejected as she had failed to comply with the statutory requirement, but in regard to the other two, it held that the rejection was improper as both the candidates were above the age of 25 years. The High Court set aside the election of the successful candidate. When the matter was heard in appeal by this Court, the rejection of Umrao Ben's nomination was upheld. Insofar as the nomination papers of the other two candidates were concerned, this Court, on an examination of the material placed on record, came to the conclusion that the High Court's approach in evaluating the evidence concerning the dates of birth was wholly wrong and hence it had committed a serious error in accepting that evidence and holding the appellant's election to be void. It would thus be seen that even on the fresh material before the High Court, oral as well as documentary, the decision of the Returning Officer could not be assailed. On the question whether the decision of the Returning Officer can be assailed when the candidate or his agent did not remain present at the time of scrutiny and more particularly when his decision on the material then available is found to be proper this Court held that since the enquiry at the stage of scrutiny is of a summary nature and since the proceedings in the High Court are original and not appellate, it is open to place fresh material before the High Court to show that the rejection of the nomination paper was erroneous. The limited purpose for placing this decision was to show that the decision of the Returning Officer could be challenged on grounds other than the one accepted by him, by adducing fresh evidence.

We may mention that in Hussain Khan's case (supra), the election of the first respondent from Shiggaon constituency was challenged on the ground that he had made the affirmation before the Returning Officer of the Shiggaon constituency on the date of scrutiny and not prior thereto as required by the decision in Pashupati Nath's case (supra). The first respondent sought to support the decision of the Returning Officer by pointing out that he had filed his nomination at two other places, Bagalkot and Hospet, and had validly made affirmations at those places prior to the date of scrutiny i.e., January 21, 1967. This attempt was questioned on two grounds, namely (i) that this was a new case being set up on behalf of the first respondent for the first time and (ii) that the affirmation in Bagalkot and Hospet could not ensure to the benefit of the first respondent for holding him qualified to stand for election

from Shiggaon constituency. On the first point, this Court held that since the challenge was based on Pashupati Nath's case which itself was a new ground permitted to the appellants, there was no justification for debarring the first respondent from putting forward the alternative case on the basis of the affirmations made at Bagalkot and Hospet. On the second point, the court referred to the evidence and came to the conclusion that the affirmations made at the said two places could be used to support the decision of the Returning Officer in regard to the acceptance of the nomination paper of the first respondent. It will, thus, be seen that in this case also, the successful candidate was allowed to defend the decision of the Returning Officer on a ground other than the one which weighed with the Returning Officer.

From the case law discussed above, it seems clear to us that an election petition, being original proceedings and not appellate proceedings, the High Court's jurisdiction cannot be confined to the grounds on which the Returning Officer rejected the nomination. We agree with the High Court that it was not precluded from considering any other ground or fresh material bearing on the question of the rejection of the nomination paper. It is pertinent to note that in Veluswami's case as well as in Hussain's case, the successful candidate sought to support the Returning Officer's decision of rejection of the nomination paper on other grounds when it was realised that the ground on which the rejection was based was unsustainable; in other words, the fresh grounds were set up by way of a shield and not a sword. However, in Birad Mal's case the fresh ground was invoked to unsettle the election of the successful candidate but the attempt did not succeed. In the present case, the situation is just the reverse, in that, it has resulted in upsetting the election of the successful candidate.

Mr. Soli J. Sorabjee, the learned Senior Counsel for the appellant, contended that even if it is assumed that the candidate whose nomination is rejected can be permitted to question the correctness of the rejection on a ground other than the one on which the rejection was founded, the Court should be extremely circumspect about the same because of the possibility of mischief that can be played to defeat the election if the desired result is not achieved. He contended that as an election strategy nomination papers can be filed in the name of a dummy candidate at two or more places and the oath or affirmation as required by Article 173 can be subscribed at one place and not at other places, thus permitting the nominations to be rejected. If at the other places the candidate of choice wins, the dummy candidate would keep quiet but if the rival succeeds, his election would be challenged through the dummy candidate by raising the plea that he had taken oath at another constituency and therefore his nomination was wrongly rejected. If such a plea is allowed to be raised even though he had not brought this fact to the notice of the Returning Officer, the successful candidate who won the election after considerable effort and expense and even personal discomfiture would find all that wasted for no fault of his own. In fact, the wrong doer, that is the person who deliberately suppressed the information, would succeed. He, therefore, submitted that the court should permit a new ground to be raised only as a defence as in the cases of Veluswami and Hussain Khan (supra). He lastly submitted that even if the court does not restrict the scope of its jurisdiction in this behalf, it should permit it sparingly, keeping in view the possibility of mischief. He urged that in such cases the Court should

test the bona fides of the candidate who challenges the election of the successful candidate and ascertain if he was put up as a dummy to be used, if need be.

Mr. Raju Ramachandran, learned counsel for the respondent, submitted that election law being a technical law, there was no room for equity. He submitted that the application of Pashupati Nath's case should be confined to its own facts and Hussain Khan's case does not lay down any law since it merely follows the earlier decision without any discussion whatsoever. He lastly contended that the respondent had gone to Bombay on October 29, 1994 and as soon as his father who received the notice informed him of the same, he returned on October 31, 1994 and took oath at the earliest opportunity on November 3, 1994 since November 1, 1994 and November 2, 1994 were admittedly public holidays. He, therefore, submitted that there was no delay on the part of the respondent.

Now let us carefully examine the facts of this case. The calendar of events for the General Elections to the 10th Karnataka Legislative Assembly was published on October 24, 1994. According to the said calendar the last date for filing nomination papers was fixed as October 31, 1994, and the date for scrutiny of the nominations was fixed as November 3, 1994. According to the respondent, he filed his nomination paper for contesting the election from 41, Davanagere Legislative Assembly Constituency on October 27, 1994 and on the same day he took oath as required by Article 173 of the Constitution of India. Two days later on October 29, 1994, the respondent's name was proposed for candidature from 158, Channagiri Legislative Assembly Constituency by an elector. Since the respondent had not subscribed an oath or affirmation as required by Article 173, the Returning Officer gave notice on the same day reminding him to do so before the date of scrutiny. Indisputably, the respondent took oath before the Assistant Returning Officer at 10.55 a.m. on November 3, 1994, the date fixed for scrutiny of nomination papers. In view of this court's ruling in Pashupati Nath's case, the oath taken minutes before the scrutiny was to commence was of no avail to the respondent. The respondent's contention that he had informed the Returning Officer that he had taken oath on October 27, 1994 when he filed his nomination for the Davanagere constituency (two days before his proposer filed the nomination for the Channagiri constituency) and that he had produced the certificate Ex.P.1 in that behalf before the Returning Officer has not been accepted as proved by the High Court and we have subscribed to that view.

Since we have already dealt with the case law in the earlier part of this judgment, we do not consider it necessary to restate the same except to say that the potential for mischief as pointed out by Mr. Sorabjee is real and not imaginary. The Court must, therefore, hear in mind this fact while deciding whether or not to entertain a fresh plea which was not put forward before the Returning Officer at the time of scrutiny of the nomination paper and the rejection thereof. The evidence on record in the present case shows that both the respondent and his father were experienced persons since they had contested assembly elections on more occasions than one. The respondent had personally filed the nomination papers for the Davanagere constituency on October 27, 1994 and had also subscribed to the oath under Article 173 of the Constitution. Of course, he withdrew his candidature later but does not disclose whether he withdrew before the date of scrutiny or thereafter. He did not file his nomination for the

Channagiri constituency. According to him, he had left for Bombay by the afternoon of October 29, 1994 which shows that he had no intention to contest from that constituency. A voter from the Channagiri constituency known to him had proposed his name and filed the nomination papers for election from that constituency on October 29, 1994. He must have informed the respondent or his father about the same, even if we assume the respondent was not aware of the same before the papers were filed. The Returning Officer sent a reminder to the respondent on that very day, i.e., October 29, 1994, informing him that he had failed to subscribe an oath or affirmation in respect of his nomination for the said constituency and should do so before the date of scrutiny. This letter was admittedly received by the father of the respondent who must have informed him about the same, If the father of the respondent had informed him on telephone, he could have told his father that he had already subscribed an oath on October 27, 1994 at Davanagere constituency and could have instructed him to produce the certificate in that behalf before the Returning Officer. He claims that he returned from Bombay on October 31, 1994 and as the 1st and 2nd of November 1994 were public holidays, he could take the oath earliest on November 3, 1994 as soon as the office of the Returning Officer opened for the day. As stated earlier that oath is of no avail. Now, as found on facts he did not inform the Returning Officer that he had subscribed an oath on October 27, 1994 nor did he produce Ex. P.1 before the Returning Officer. That is the finding of fact recorded by the High Court to which we have subscribed. There was no reason for the Returning Officer not to accept the certificate Ex.P.1 if it was tendered to him when he himself had written to the respondent on October 29, 1994 to complete that requirement. If that be so, it becomes obvious that he deliberately allowed the rejection of his nomination paper because he knew fully well that if he did not subscribe the oath before the date of actual scrutiny his nomination would be rejected. He was not a serious contender for the seat of the Channagiri constituency otherwise he would himself have filed the nomination papers as he did in the case of Davanagere constituency. It is, therefore, obvious that the voter had been responsible for his nomination in the Channagiri constituency. From these facts it emerges that he did not inform the Returning Officer of his having taken an oath before the Returning Officer of Davanagere constituency on October 27, 1994 nor did he produce Ex. P.1 before the Returning Officer of Channagiri constituency. He did not seek time for its production either. This backdrop is sufficient to create a doubt regarding the bona fides of the respondent. It leaves one with the impression that the rejection of the nomination paper was a planned action. In any case, the respondent was himself to blame for the rejection of his nomination papers relating to the Channagiri constituency. Should then his omission to produce the material evidence regarding his having taken oath at the Davanagere constituency on October 27, 1994, before the Channagiri Returning Officer result in unseating the appellant, the successful candidate? It is not merely a question of equity but a question of principle that a person who deliberately and designedly fails to disclose information within his special knowledge and fails to produce material in that behalf thereby virtually engineering the rejection of his nomination cannot be permitted to raise a fresh ground which would adversely affect the opposite party. A party which does not come to court with clean hands cannot seek such an indulgence. In

the circumstances of this case, a serious doubt arises as to the bona fides of the respondent in omitting to produce the material evidence before the Returning Officer. We feel reasonably sure that the respondent had planned the rejection of his nomination. We are, therefore, of the opinion that the High Court was wrong in setting aside the election of the appellant on that ground.

Secondly, the mere production of the certificate Ex. P.1 on the record of the present proceedings cannot satisfy the requirement of Article 173 of the Constitution. That certificate merely states that he had taken an oath as required by Article 173 but what is important is the text of that document i.e., whether it was in the prescribed form or not. The Returning Officer at Channagiri would have to satisfy himself that the oath taken at Davanagere was in the form prescribed under Article 173 of the Constitution and a mere certificate to the effect that he had taken oath would not suffice. We are, therefore, of the opinion that even the production of Ex.P.1 would not have been sufficient to invalidate the election of the appellant.

These are our reasons in support of the order which we made on March 20, 1996. As mentioned in the said order, there shall be no order as to costs.