Manda Jaganath vs K.S.Rathnam & Ors on 16 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 3600, 2004 AIR SCW 3499, 2004 (5) SRJ 272, 2004 (3) SLT 808, 2004 (2) ALL CJ 2036, (2004) 5 JT 8 (SC), 2004 (4) SCALE 600, 2004 (7) SCC 492, 2004 (4) ACE 628, (2004) 5 ALLMR 527 (SC), (2004) 3 JCR 67 (SC), (2004) 4 ANDHLD 865, (2004) 3 SUPREME 460, (2004) 4 SCALE 600, (2004) 5 ANDH LT 28, (2004) 2 RECCIVR 810, (2004) 18 INDLD 33

Bench: N.Santosh Hegde, B.P.Singh

CASE NO.:
Appeal (civil) 2489 of 2004

PETITIONER:
Manda Jaganath

RESPONDENT:
K.S.Rathnam & Ors.

DATE OF JUDGMENT: 16/04/2004

BENCH:
N.Santosh Hegde & B.P.Singh

JUDGMENT:

J U D G M E N T (Arising out of SLP) No.7457 of 2004) SANTOSH HEGDE,J.

Leave granted.

Heard learned counsel for the parties.

The first respondent herein filed his nomination to contest elections to the Parliament from 28 Nagarkurnool (SC) Constituency. On 2.4.2004 when the said nomination papers were taken up for scrutiny, the Returning Officer found that Form B submitted by the first respondent was blank in columns 2 to 7 and scratch line indicating scoring off the requirement of the said columns was noticed. Following the guidelines found in Handbook of Returning Officers issued by the Election Commission of India, the said Returning Officer rejected Form B filed by the first respondent herein and while accepting the nomination of the first respondent as an independent candidate he did not allot him the symbol reserved for the candidates of Telangana Rashtra Samithi of which party the first respondent claimed to be a candidate.

Being aggrieved by the said order of the Returning Officer the first respondent and the Telangana Rashtra Samithi represented by its President filed a writ petition under Article 226 of the

Constitution of India before the High Court of Judicature; Andhra Pradesh, Hyderabad praying inter alia for issuance of a writ, order or direction in the nature of mandamus declaring the action of the Returning Officer treating the first respondent as an independent candidate and not as a candidate set up by the Telangana Rashtra Samithi vide his order dated 2.4.2004 as illegal and further prayed for a direction to the said Returning Officer to treat the first respondent as a candidate set up by the said Telangana Rashtra Samithi political party and allot the symbol of 'car' to him. When the said writ petition came up for preliminary hearing the High Court, while issuing notice of admission and hearing learned counsel appearing for the parties at the interlocutory stage, came to the conclusion that the reason given by the Returning Officer for refusing to recognise the first respondent as an official candidate of Telangana Rashtra Samithi and consequential refusal to allot the official symbol of that party, was not acceptable even at that interlocutory stage because the errors pointed out by the Returning Officer were due to inadvertence and there was no other candidate set up by the said Telangana Rashtra Samithi in the said Constituency for which the first respondent had filed his nomination. It also took notice of an affidavit filed by the President of the Telangana Rashtra Samithi stating inter alia that the party had authorised him to issue B Form to the candidate set up by that party in the ensuing Assembly and Parliamentary elections and exercising said authority he had issued Form B to the first respondent herein. Based on the above material the High Court came to the conclusion that the irregularity, if any, found in Form B was so technical and trivial that the same did not justify the decision of the Returning Officer to treat the first respondent as an independent candidate and not as a candidate set up by the Telangana Rashtra Samithi, hence, issued the impugned directions setting aside the decision of the Returning Officer. It also came to the conclusion that the issue relating to allotment of symbol by the Returning Officer at the time of scrutiny of nomination papers is not one of the grounds on which an election petition could be filed under the provisions of the Representation of the People Act, 1951 (R.P.Act, 1951). Being aggrieved by the interim order of the High Court, the appellant has filed the above appeal which was listed on 8.4.2004 before us for mentioning for an early date of hearing the SLP. Noticing the urgency of the matter and prima facie case of lack of jurisdiction of the High Court to entertain a writ petition after the election process had started, we took up the matter on board and issued notice to the respondents. We also considered it fit to suspend/stay the operation of the impugned order.

Now, the parties are served with the court notice of this petition and are represented through their respective counsel who have requested us to finally dispose of the matter today because of the urgency involved.

Having heard the learned counsel, we grant leave in this matter and proceed to dispose of this appeal.

Ms. K. Amareshwari, learned senior counsel for the appellant and Mr. S Muralidhar, learned counsel for the Returning Officer assailed the order of the High Court primarily on the ground that the High Court was not justified in entertaining a writ petition after issuance of election notification because of the specific bar found in Article 329(b) of the Constitution of India read with the other provisions of the Representation of the People Act, 1951. They also contended that the High Court could not have directed the Returning Officer to treat the first respondent as a candidate set up by the

Telangana Rashtra Samithi and further direct the Returning Officer to allot the symbol of car which is reserved for the official candidate of the said political party only. They also submitted that in view of glaring defects and omissions found in Form B filed by the first respondent which are in contravention of the Representation of the People Act, the Rules and Orders made thereunder, it was only the Returning Officer who was competent to adjudicate on such issues and the High Court could not have in a petition filed under Article 226 decided that issue. They placed strong reliance on the provisions of Article 329(b) of the Constitution as also the judgments of this Court in :

1. N.P.Ponnuswami vs. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist., and Others (AIR 1952 (39) SC 64);

2. Mohinder Singh Gill & Anr. V. The Chief Election Commissioner, New Delhi & Ors. (1978 1 SCC 405);

3. Election Commission of India v. Shivaji & Ors. (1988 1 SCC 277); and

4.Ram Phal Kundu v. Kamal Sharma (2004 2 SCC 759).

Dr. Rajeev Dhawan, learned senior counsel appearing for the respondents before us who was the writ petitioner before the High Court, however, supported the judgment of the High Court stating that the bar found in Article 329(b) of the Constitution is only in regard to the defects which are not of substantial nature and not a bar to correct errors arising out of irregularities and omissions which have no material bearing on the election or rights of parties. He placed strong reliance on the proviso to Rule 4 of the Conduct of Elections Rules, 1961. He also submitted that the defects pointed out by the Returning Officer were of a very trivial nature and from a complete reading of the nomination papers filed in different forms, it was clear that the first respondent was a candidate proposed by the Telangana Rashtra Samithi and in such circumstances an omission to fill up clauses 2 to 7 in Form B can never be treated as a fatal omission. He also contended that there being no substantial defect and there being no other nomination paper filed on behalf of that political party, the High Court was justified in rectifying that error of the Returning Officer but for which his client would have suffered great hardship and might have had to suffer a prolonged legal battle at a subsequent stage. He also submitted that since the appellant herein was not a candidate claiming either as a nominee of the Telengana Rashtra Samithi or claiming the official symbol of the said party he would not be in any manner prejudiced by the order of the High Court which would only further the interest of justice in facilitating the ongoing election process which is the main object of Article 329 of the Constitution of India.

He also relied on certain passages found in Mohinder Singh Gill's case (supra) as also Ponnuswami's case (supra) to support his contention. Learned counsel also placed strong reliance on section 36 of the Representation of the People Act as also clause 30 of the Election Symbols (Reservation and Allotment) Order, 1968 to show that any error in Form B filed in regard to the allotment of the symbol would not be a defect of substantial nature.

It is an admitted fact that so far as the Elections to Parliament from Constituency No.28 Nagarkurnool (SC) Parliamentary Constituency in Andhra Pradesh is concerned, the process of election had already started not only by issuance of the notification by the President of India but also by issuance of a notification fixing the calendar of events by the Election Commission. It is only pursuant to said notification that the first respondent filed his nomination before the Returning Officer on the last date of filing of nominations. It is an admitted fact that in Form A filed by the appellant, he had asked for the symbol of a car on the ground that he is a candidate proposed by the Telengana Rashtra Samithi. His candidature has also been properly proposed and seconded as a candidate for the election to the House of People from Nagarkurnool (28) Parliamentary Constituency, but in Form B which is also a statutory form required to be filed by the first respondent for claiming a reserved symbol of a particular party at Part III in column (b)(ii) of the said form the candidate is required to give the particulars of the political party represented by him. Though in this column the respondent has stated that he is a candidate set up by the Telangana Rashtra Samithi party which is a registered unrecognised political party, alternate printed words that he is contesting this election as an independent candidate is also retained. This column requires the candidate to strike out what is not applicable therein but the first respondent has failed to strike out the part that he is contesting that election as an independent candidate thus giving room for a doubt whether really he was a candidate representing Telengana Rashtra Samithi political party or he is contesting the election as an independent candidate. The more important and more glaring error that was noticed by the Returning Officer was the lack of particulars in columns 2 to 7 of the said form which is the requisite notice required to be given by the political party setting up the candidate in proof of the fact that the candidate named therein has been set up by and entitled to the reserved symbol of that party. From a reading of the various clauses of Form B it is clear that only that person whose name and other particulars are furnished in columns 2 to 4 in the said form, can be treated as a representative or a candidate proposed by the said political party. As noticed by the Returning Officer we also see that except column 1 which mentions the name of the Constituency no other column which requires name of the approved candidate, name of father/mother/husband of the approved candidate, postal address of the approved candidate has been filled up to indicate that it is the first respondent who is the official candidate of that party and entitled to the symbol. On the contrary these columns are struck off as if this Form B was not given to any one. Clause 2 of the said form requires a declaration to be made by the authorised person as to whom this Form B is being given. Even in this column the name of the first respondent is not mentioned. Clause 3 of the said form also requires a certificate that the candidate whose name is mentioned above is a member of that political party and his name is duly borne on the rolls of that party. None of these information is provided in the said clause of Form B. In our opinion, whether the Returning Officer is justified in rejecting this Form B submitted by the first respondent herein or not, is not a matter for the High Court to decide in the exercise of its writ jurisdiction. This issue should be agitated by an aggrieved party in an election petition only.

It is to be seen that under Article 329(b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. The parliament has by enacting the Representation of People Act, 1951 provided for such a forum for questioning such

elections hence, under Article 329(b) no forum other than such forum constituted under the R.P.Act can entertain a complaint against any election.

The word 'election' has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

In Ponnuswami (supra) this Court held :

> "The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded)" and another after they have been completed by means of an election petition."

The above view of this Court in Ponnuswami's case has been quoted with approval by the subsequent judgment in M.S. Gill (supra) wherein this Court after quoting the passages from said judgment in Ponnuswami's case held that there is a non- obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in Ponnuswami's case. It is while considering the above unexplored situations in Ponnuswami (supra) in M.S. Gill's case (supra) this Court held thus :

> "This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz., Article 324 but is neatly covered by the widely- worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election."

In the very same paragraph this Court, however, demarcated an area which is available for interference by the High Court and the same is explained as follows:

> "But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or

> independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all."

Of course, what is stated by this Court herein above is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers remedy for which lies in an election petition only.

In Election Commission of India v. Shivaji (supra) this Court while considering a challenge to the election notification which included certain Zila Parishads within a notified constituency, held following the judgment in Ponnuswami (supra) that even if there was any ground relating to the non- compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and institute a petition in accordance with Section 81 of the Act calling in question the election of the successful candidate.

Learned counsel for the writ petitioner before the High Court had relied upon a judgment of this Court in S.T. Muthusami v. K. Natarajan & Ors. (1988 1 SCC 572) wherein this Court had held following the judgment in Ponnuswami's case (supra) that entertaining of a writ petition by the High Court under Article 226 of the Constitution cannot be supported and consequently it set aside the judgment of the Division Bench of the High Court and dismissed the writ petition filed in the High Court. In that case the question involved was a dispute between two candidates claiming the official symbol of a political party. This judgment came to be distinguished by the High Court on the basis of facts though the law laid down there was squarely applicable against the maintainability of the writ petition. Learned senior counsel for the respondent candidate contended that case of the first respondent before the High Court came within the exceptions noted by this Court in M.S. Gill's case (supra) which permits filing of a writ petition under Article 226 of the Constitution in certain exceptional cases. He contended that the facts in this case also show that but for the intervention of the High Court the progress in the election would have been stalled. With due respect to learned counsel we do not agree with this argument because by not allotting a symbol claimed by the first respondent the Returning Officer has not stalled or stopped the progress of the election. Said respondent has been treated as an independent candidate and he is permitted to contest with a symbol assigned to him as an independent candidate, and consequently there is no question of stalling the election. His grievance as to such non- allotment of the symbol will have to be agitated in an election petition (if need be) as held in S.T.Muthuswami (supra).

Learned counsel then contended that non-allotment of a symbol which the first respondent was legally entitled to would not be a ground of challenge available to him in the election petition under section 100 of the Representation of the People Act, 1951 therefore the High Court is justified in entertaining the petition. We do not think this argument of learned counsel is correct because as has been held by this Court in M.S. Gill's case (supra) sub-clause 4 of section 100(1)(d) of the Representation of the People Act, 1951 is widely worded residual clause which this Court in the said judgment of M.S. Gill case termed as "catch all clause". It is further stated in the said judgment that the said section has been added to absolve everything left over and the same is exhaustive of all grievances regarding an election, hence, in our opinion this argument of learned counsel for the first respondent should also fail.

The next argument of learned counsel for the respondent is that as per the provisions of section 36 of the R.P. Act, Rule 4 of the Conduct of Elections Rules, 1961 and Clause 30 of the Election Symbols (Reservation and Allotment) Order, 1968, the omissions found by the Returning Officer in Form B filed by the respondent herein are all curable irregularities and are not defects of substantial nature, calling for rejection of the nomination paper. We think these arguments based on the provisions of the statutes, Rules and Orders are all arguments which can be addressed in a properly constituted election petition, if need be, and cannot be a ground for setting aside the order of the Returning Officer which is prima facie just and proper in our opinion.

We are not recording any conclusive opinion in regard to the applicability of the above statute, Rules and Orders because, as stated above, it is a matter to be decided in an election petition. Suffice it to say that the High Court on facts of this case, could not have interfered with the decision of the Returning Officer to reject Form B filed by the first respondent.

For the reasons stated above, this appeal succeeds and the same is allowed, setting aside the impugned order of the High Court.

In view of the above decision of ours, we think nothing survives in the Writ Petition No. 6653/2004 titled K.S.Rathnam & Anr. Vs. The Returning Officer pending before the High Court, hence, we dismiss the same also.