

Pashupati Nath Singh

Vs

Harihar Prasad Singh

Civil Appeal No. 1692 of 1967

(M. Hidayatullah, K. S. Hegde, S. M. Sikri JJ)

22.01.1968

JUDGMENT

SIKRI, J. –

This is an appeal under s. 116A of the Representation of the People Act, 1951 - hereinafter referred to as the Act - from the judgment of the High Court of Judicature at Patna dismissing Election Petition No. 8 of 1967 filed by the appellant Pashupati Nath Singh hereinafter referred to as the petitioner. In order to appreciate the point arising before us it is necessary to state the relevant facts.

The petitioner stood as a candidate for election to the Bihar Legislative Assembly. The election to that Assembly from the Dumraon Assembly Constituency was held during the last general elections as per the following schedule :

- "(a) Date of filing nomination papers - 13-1-1967 to 20-1-1967.
- (b) Date of scrutiny of nomination papers - 21-1-1967.
- (c) Last date of withdrawal of candidatures - 23-1-1967.
- (d) Date of poll - 17-2-1967.
- (e) Date of counting of votes - 23-2-1967.
- (f) Date of declaration of result of the election - 23-2-1967".

The petitioner filed his nomination paper before the Returning Officer at Buxar on January 16, 1967. Eight other candidates, including the respondent Harihar Prasad Singh, filed their nomination papers before the Returning Officer on different dates between January 13, 1967, and January 20, 1967. On January 21, 1967, the nomination papers were taken up for scrutiny, when the Returning Officer rejected the nomination paper of the petitioner and accepted the nomination papers of the remaining eight candidates. On February 17, 1967, the poll was held and the respondent, Shri Harihar Prasad Singh, secured the largest number of votes, namely, 14,539, and was accordingly declared elected. Thereupon the petitioner presented election petition in the Patna High Court for a declaration that the election of the respondent is void on the ground that the nomination paper of the petitioner was improperly rejected by the Returning Officer.

The High Court held that the nomination of the petitioner was rightly rejected by the Returning Officer on the ground that he was not qualified to be chosen to fill a seat in the State Legislature

since he had not made and subscribed the requisite oath or affirmation as enjoined by cl. (a) of Art. 173 of the Constitution, either before the scrutiny of nominations or even subsequently on the date of scrutiny.

The short question which arises in this appeal is whether it is necessary for a candidate to make and subscribe the requisite oath or affirmation as enjoined by cl. (a) of Art. 173 of the Constitution before the date fixed for scrutiny of nomination paper. In other words, is a candidate entitled to make and subscribe the requisite oath when objection is taken before the Returning Officer or must he have made and subscribed the requisite oath or affirmation before the scrutiny of nomination commenced? The answer to this question mainly depends on the interpretation of s. 36(2) of the Act. It will, however, be necessary to refer to some other sections of the Act in order to fully appreciate the effect of the words used in that section. Section 32 of the Act provides for nomination of candidates for election thus :

"Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963, as the case may be."

It was suggested by the learned counsel for the respondent, Mr. Gupte, that this section means that a candidate must also be qualified to be chosen on the last date for filing nominations. We need not consider this question because we have come to the conclusion that the petitioner was not qualified for being chosen to fill the seat on the date fixed for scrutiny of nominations within the meaning of s. 36(2)(a).

Section 33 provides for presentation of nomination paper and certain requirements for a valid nomination. Sub-s. (2), for instance, provides that in the case of a constituency where any seat is reserved, the nomination paper must contain a declaration by the candidate specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State. Sub-s. (3) provides that where a candidate is a person who, having held any office referred to in cl. (f) of s. 7, has been dismissed and a period of five years has not elapsed since the dismissal, he must with the nomination paper give a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

Section 35 deals with the notice of nominations and the time and place for their scrutiny. The Returning Officer has to inform the person or persons delivering the nomination paper of the date, time and place fixed for the scrutiny of nominations. He is also required to sign a certificate stating the date on which and the hour at which the nomination paper has been delivered to him, and also to cause to be fixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper, both of the candidate and of the proposer.

Then comes s. 36, relevant portion of which reads as follows :

"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 authorized 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 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 will be noticed that under s. 36(2) of the Act, one of the grounds on which a nomination can be rejected is that on the date fixed for the scrutiny of nominations the candidate is not qualified for being chosen to fill the seat under Art. 173 of the Constitution. The relevant part of Art. 173 provides :

"173. A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he -

(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule."

The form referred to reads as under :

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State :-

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India"".

The words "having been nominated" in this form clearly show that the oath or affirmation cannot be taken or made by a candidate before he has been nominated as a candidate. Further, it is clear that none of the Sections from s. 30 to s. 36 require that this oath should accompany the nomination paper. No reference has been made to the form of oath in s. 33 or s. 35, although in s. 33 it is provided that in certain cases the nomination paper should be accompanied by a declaration or by a

certificate issued by the Election Commission. In this case it is common ground that no oath or affirmation was attached to the nomination paper or was filed before the date fixed for the scrutiny.

Mr. Gokhale, who appears for the petitioner, contends that on objection being taken under s. 36(2) that the petitioner had not made and subscribed an oath or affirmation according to the form set out above, he was entitled to make and subscribe the oath or affirmation immediately before the objection was considered by the Returning Officer. He says that as soon as a candidate takes the oath or makes and subscribes the oath or affirmation he would become qualified within the terms of Art. 173 of the Constitution, and this qualification would exist "on the date fixed for the scrutiny" because the date of scrutiny of nomination paper - in this case January 21, 1967 - would not have passed away by the time the oath or affirmation is taken or subscribed.

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 candidates should be in a position to raise all possible objections before the scrutiny of a particular nomination paper starts. In a particular case, an objection may be taken to the form of the oath; the form of the oath may have been modified or the oath may not have been sworn before the person authorised in this behalf by the Election Commission. It is not necessary under Art. 173 that the person authorised by the Election Commission should be the returning officer.

In *Paynter v. James* [(1866-67) L.R. 2 C.P. 348], Bovill, C.J., quoted, with approval, the passage from the judgment of Tindal, C.J., in *Reg v. Humphrey* [10 A.D. & E. 335], in which the following occurs :

"..... we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word 'upon' which, in different cases, may undoubtedly either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the enactment."

Bovill, C.J., observed that "that is a very clear statement of the various meanings of the word "on" or "upon"."

In this connection it must also be borne in mind that law disregards, as far as possible, fractions of the day. It would lead to great confusion if it were held that a candidate would be entitled to qualify for being chosen to fill a seat till the very end of the date fixed for scrutiny of nominations. If the learned counsel for the petitioner is right, the candidate could ask the Returning Officer to wait till 11.55 p.m. on the date fixed for the scrutiny to enable him to take the oath.

Reference was also made to Form 2B in the Conduct of Elections Rules, 1961. It was pointed out that in this form there is no place where it can be stated by the candidate that he had taken the requisite oath or affirmation. But, this in our view does not mean that the oath or affirmation can be taken and subscribed on the date fixed for scrutiny. It seems to us that the nomination paper does not provide for the statement about the oath because the oath or affirmation has to be taken after a candidate has been nominated.

Our attention was invited to an unreported decision of the Patna High Court in Shiva Shankar Kanodia v. Kapildeo Narain Singh [Election Appeal No. 4 of 1965; judgment dated September 22, 1965]. That decision proceeded on the basis that "one can be said to be so nominated only when, after scrutiny of the nomination papers, the Returning Officer finds him to be validly nominated, as provided under Section 36(8) of the Representation of the People Act, 1951." With respect, the High Court proceeded on a wrong basis. The form of oath does not say 'having been validly nominated' but only "having been nominated."

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

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