

Rakesh Kumar

Vs

Sunil Kumar

(CJI Dr. A.S. Anand, M. Srinivasan, U. C. Banerjee JJ)

Civil Appeal No. 8695 of 1997

09.02.1999

JUDGMENT

Dr. A. S. Anand CJI

1. This appeal, under Section 116A of the Representation of People Act, 1951 (hereinafter the 'Act'), is directed against the judgment and order of the High Court of Punjab and Haryana dated November 5, 1997. By the impugned judgment a learned Single Judge of the High Court allowed Election Petition No. 3 of 1997 filed by the respondent herein and set aside the election of the appellant herein, the returned candidate, from 57, North Ludhiana Assembly Constituency of the Punjab Vidhan Sabha.

2. The Election Commissioner of India notified the holding of elections to the Punjab Vidhan Sabha. The election programme for 57, North Ludhiana Assembly Constituency was fixed as under :

"Last date of filing of nomination 20.1.1997

Scrutiny of nominations 21.1.1997

Last date for withdrawal of candidate/candidature 23.1.1997

Date of polling 6.2.1997

Counting of the ballots 8.2.1997

The Election Commission of India, however, re-scheduled the programme, as 23rd January, 1997 was declared as a National Holiday. The re-scheduled programme was as follows :-

Last date for withdrawal of candidate/candidature 24.1.1997

Date of polling 7.2.1997

3. The appellant contested the election as a candidate of the Indian National Congress (Congress-I). Respondent, Sunil Kumar filed his nomination paper for contesting the election as a candidate of Bhartiya Janta Party (hereinafter `BJP'). Vir Abhimanyu also filed his nomination paper as a candidate set up by BJP while Harish Kumar filed his nomination paper as a `substitute' candidate of BJP.

4. According to the case set up by respondent in his Election Petition he had submitted his nomination paper on 20th January, 1997 at 12.10 p.m. as a candidate set up by BJP and along with the nomination paper he had also submitted Forms A and B as envisaged by paras 13(c) and 13(d) of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter `Election Symbols Order'). Forms A and B had been signed by Shri L.K. Advani, President of the BJP and Shri Balramji Dass Tandon, President of Punjab State BJP, who had been authorised by BJP to intimate the names of the candidates set up by the party to the returning officer. Shri Vir Abhimanyu also filed his nomination paper as a BJP candidate on 20th January, 1997 at 12.50 p.m. supported by Forms A and B also duly signed by Shri L.K. Advani and Shri Balramji Dass Tandon, who had been authorised by BJP to intimate the names of the candidates set up by BJP to the Returning Officer. Shri Harish Kumar had similarly filed his nomination paper on the same day as a `substitute' candidate of the BJP. On 21st of January, 1997 when the nomination papers came up for scrutiny before the Returning Officer, a *suo motu* objection was raised by the Returning Officer to the effect that BJP had set up more than one candidate in the election and, therefore, none could be treated as a candidate set up by a recognised political party - BJP. He, therefore, rejected the nomination papers of respondent, Sunil Kumar as well as Vir Abhimanyu and Harish Kumar, in spite of the fact that respondent Shri Sunil Kumar had made an application, at the time of the scrutiny, stating that he was the official BJP candidate and requesting that his nomination paper be accepted and the symbol reserved for BJP be allotted to him. He requested for 24 hours time to produce an official confirmation of his candidature. Aggrieved by the rejection of his nomination paper, the respondent filed a Civil Writ Petition in the High Court challenging the order of the Returning Officer dated 21st of January, 1997. The Writ Petition was, however, dismissed on the ground that the remedy available to the writ petitioner was to file an Election Petition, if so advised.

5. On the last date of withdrawal of the candidature, the appellant and 9 other candidates remained in the fray. After the polling, the counting of ballots took place on 9th of February, 1997 and the appellant was declared elected having secured 33614 votes. After the declaration of the result of the election, the respondent filed an Election Petition (No. 3 of 1997) challenging the election of the returned candidate on the ground that his nomination paper as well as those of S/Shri Vir Abhimanyu and Harish Kumar had been wrongly and illegally rejected. It was alleged by the respondent that the Returning Officer had wrongly rejected his application, filed under Section 36(5) of the Act, seeking an opportunity to meet the objection raised by the Returning Officer. The Election Petition was contested and the appellant resisted the same asserting that the nomination papers of the respondent as well as of S/Shri Vir Abhimanyu and Harish Kumar had been rightly rejected for non-compliance with the mandatory provisions of Section 33(1) of the Act as amended by Act No. 21 of 1996. It was maintained that since no intimation had been given to the Returning Officer till 3.00 p.m. on the date of the scrutiny about the official candidate by BJP, the Returning Officer was justified in rejecting their nomination papers. From the pleadings of the parties, following issues were raised :

"1. Whether the order of rejection of nomination papers filed by the petitioner Sunil Kumar was illegal and improper, if so, its effect ? OPP

2. Whether the order of rejection of nomination paper filed by Shri Vir Abhimanyu was illegal and improper, if so, its effect ? OPP

3. Whether the order of rejection of nomination paper filed by Shri Harish Kumar was illegal and improper, if so, its effect ? OPP

4. Relief."

6. At the request of the parties, the record including the nomination papers and the material relating to the rejection of the nomination papers was summoned from the District Election Commissioner and on receipt of the same, learned counsel for the parties stated before the learned Single Judge that no other evidence was required to be led. They addressed their arguments on the issues on the issues on the basis of the summoned record.

8. Placing reliance on Section 36(5) of the Act, the learned Single Judge decided issues 1 to 3 in favour of the election petitioner (respondent herein) and held that the Returning Officer fell into a grave error by declining to give time to the election petitioner to meet the objection raised by him *suo motu* and as such the order of rejection of nomination paper filed by the election petitioner Shri Sunil Kumar was illegal and improper. It was also found that the rejection of nomination papers of S/Shri Vir Abhimanyu and Harish Kumar were also illegal and improper. As a result of the findings on issue Nos. 1 to 3, issue No. 4 was decided in favour of the election petitioner and the Election Petition was allowed and election of the appellant was set aside. Aggrieved by the order of the learned Single Judge, the returned candidate has filed this statutory appeal.

9. We have heard Mr. P.S. Mishra, learned senior counsel appearing for the appellant and Mr. S.P. Jain learned counsel appearing for the respondent and examined the record.

10. The controversy in this appeal lies in a rather narrow compass. It revolves around the ambit and scope of Section 36(5) of the Act as well as the effect of the amendment of Section 33(1) of the Act, as amended in 1996, read with Rule 13 of the Election Symbols Order, on Section 36(5) of the Act. It is, therefore, appropriate to extract the relevant provisions of the Act and the election symbols order at the first instance. Section 33(1) after the amendment in 1996 reads as follows :

"33. - Presentation of nomination paper and requirements for a valid nomination. - (i) 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, delivered 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 public holiday :

Provided also that in the case of 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 of "ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers."

Relevant provisions of Section 36 of the Act prove :

"36. Scrutiny of nominations. - (1) On the date fixed for the scrutiny of the 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.

XX XXX XXX

(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 in 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.

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(8) Immediately after all the nomination papers have been scrutinised 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, candidate whose nominations have been found valid, and affix it to his notice board."

The rule 13 of the Election Symbols Order reads :

"13. When a candidate shall be deemed to be set up by a political party. - For the purposes of this Order, a candidate shall be deemed to be set up by a political party if, any only if, -

- (a) the candidate has made a declaration to that effect in his nomination paper;
- (b) a notice in writing to that effect has, not later than 3.00 p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency and the Chief Electoral Officer of the State;
- (c) The said notice is signed by the President, the Secretary or any other office bearer

of the party and the President, Secretary or such other office bearer is authorised by the party to send such notice; and

(d) the name and specimen signature of such authorised person are communicated to the Returning Officer of the constituency and to the Chief electoral of the State, not later than 3.00 p.m. on the last date for making nominations."

11. A conjoint reading of the aforesaid provisions *inter alia* shows that after the amendment of Section 33(1) of the Act, a nomination paper of a candidate in order to be valid must be :

(i) *where the candidate is set up by a political party :*

(a) signed by the candidate and a proposer;

(b) contain a declaration by the candidate to the effect that he has been set up by a recognised political party;

(c) be supported by a notice (Forms A & B) duly signed by the President, Secretary or any other office bearer of the party duly authorised by the party to send such a notice; and

(d) the name and specimen signatures of such an authorised person are communicated to the Returning Officer of the constituency and to the Chief Electoral Officer of the State, not later than 3.00 p.m. on the last date for making nominations;

(ii) *where the candidate is not set up by a recognised political party*, his nomination paper shall be valid *only* if it is subscribed by ten proposers, being electors of the constituency.

(In view of the limited nature of controversy in this case in this case, we are not referring to the other requirements of a valid nomination paper)

12. That in the instant case, the respondent had filed his nomination paper signed by one proposer only is an admitted case. It is also not disputed that the respondent had made a declaration in the nomination paper to the effect that he had been set up by BJP and that the notice in Form A & B delivered to the Returning Officer within the prescribed time was signed by the authorised officers of BJP - Shri L.K. Advani, President, and Shri Balramji Das Tandon, President of State unit of BJP. During the scrutiny, it had transpired that Shri Vir Abhimanyu had also filed his nomination paper as a candidate set up by the BJP and his nomination paper was also supported by a notice duly signed by Shri L.K. Advani and Shri Balramji Das Tandon. Indeed, there could not be *two* official candidates set up by a recognised political party, since, the official reserved symbol of BJP could be allotted to *only one* official candidate. The respondent claimed before the returning officer that he was the official candidate of BJP. No one present at the time of scrutiny of nomination papers on behalf of various candidates including Shri Vir Abhimanyu appears to have raised any objection to the respondent's claim of being the official candidate of BJP. The Returning Officer, however, had *suo motu*, raised an objection regarding the validity of the nomination paper of the respondent on the ground that BJP had set up more than one candidate from the same constituency. To meet the objection raised by the Returning Officer, respondent, Shri Sunil Kumar, at the time of scrutiny itself, submitted the following written application to the Returning Officer :

"Ludhiana

21.1.1997

The Returning Officer,  
57, Ludhiana North,  
Ludhiana.

Sub : Scrutiny of Nomination paper.

Sir,

I am an Bhartiya Janta Party candidate from 57, Ludhiana North. I have already submitted the Form `A' and Form `B' for nomination as party candidate. Now I have come to know that other/others candidate/candidates has/have also applied nomination paper/papers as BJP candidate. As I am the official Bhartiya Janta Party candidate, so my nomination papers be accepted and the symbol reserved for Bhartiya Janta Party be allotted to me. Please give me 24 (twenty four) hours time for getting official confirmation for record.

Thanking you,

Yours sincerely,

Sd/-

(SUNIL KUMAR)"

This application apparently had been filed keeping in view the provisions of the proviso to Section 36(5) of the Act.

13. The prayer for grant of time to meet the objection of the Returning Officer, contained in this application was, however, rejected. The order rejecting the nomination paper of Shri Sunil Kumar reads as follows :

*"ORDER REGARDING SCRUTINY*

The Nomination of Sunil Kumar was received on 20.1.1997 at 12.10 p.m. His name was proposed by one proposal and was registered at serial No. 8. On 20.1.1997 the candidate brought Form A and Form B wherein it has been mentioned by the President of the Bhartiya Janta Party that Sunil Kumar would be main party candidate. However another candidate namely Shri Vir Abhimanu also filed Form A & form B along with his application wherein it has been mentioned that he is the main candidate of Bhartiya Janta Party. However on the date of scrutiny it was noticed that his authorisation does not any where state that the earlier authorisation has been cancelled. Shri Sunil Mehra has placed that since his papers are in order his

candidature cannot be rejected at this stage - opportunity should be given to the party to withdraw candidature before the last date of withdrawal. He also argued that the party has a right to cancel or substitute an authorisation in favour of any candidate before the last date of withdrawal. However am unable to agree with this contention. The Representation of People Act, 1996 has been amended as per amended section 33 of the Representation of People Act 1951, the Nomination of the candidate to a state Legislative assembly to be subscribed by :

(i) One elector of the constituency if the candidate has been set up either by a recognised national Party or by a recognised Party in the State or in the States in which it is recognised as a State party.

(ii) Ten (10) electors of the Constituency as proposer if the candidate has been set up by a Registered unrecognised political party or if he is an independent candidate. The political parties are required to intimate the names of the candidate set up by them to the Returning Officer before scrutiny of Nomination papers. In this case the last date for the party to make nomination in Form 'A' and Form 'B' was 20.1.1997 upto 3 p.m.

Therefore, under the amended law the nomination made by the party in Form 'A' and Form 'B' prescribed for this purpose by the Commission under para 13 of the Election Symbols (Reservation and Allotment) Order 1968 also become part of scrutiny. The Returning officer has to determine the validity of nomination order (paper), keeping in view whether the candidate has been set up by the Political party or not. If he has been set up by the Political party only one proposer is required and if he has been an independent then proposers are required. The political parties has to decide before scrutiny of the Nominations as to which it is sponsoring. It cannot be given further time to change such authorisation *after scrutiny*. Hence the contention of Shri Sunil Kumar that party be given time till date of withdrawal is not valid. Hence I am duty bound to decide the matter today itself. Accordingly I have scrutinised the nomination papers of Sunil Kumar and also Vir Abhimanyu. Since the party has submitted authorisation in respect of both these candidates as main candidates and no authorisation mention the cancellation of the other authorisation. I have to reach the conclusion that the party has set up two main candidates which it cannot do. Therefore, as per law both candidates have to be treated as independent candidates.

But the law also required that the independent candidate should be sponsored by 10 proposers.

In this case there is only one proposer, hence the requirement of law has not been fulfilled and therefore, the Nomination paper of Sunil Kumar is rejected.

Dated 21.1.1997.

Sd/- Daljit Singh,

Returning Officer,

57-Ludhiana North"

14. As already noticed, after the amendment of Section 33(1) of the Act in 1996 a change has been brought about by the Legislature with regard to the requirement of the number of proposers of nomination papers to be filed by the candidates. After the amendment, the nomination of a candidate to a State Legislative Assembly is required to be subscribed by only one elector of the constituency, where the candidate has been set up either by a recognised national political party or by a recognised political party in the State or in the States in which it is recognised as a party and in other cases the nomination paper has to be subscribed by 10 electors of the constituency, as proposers, where the candidate has been set up either by an un-recognised political party or is an independent candidate. The political parties are also required to intimate the names of the candidates set up by them to the Returning Officer before scrutiny of nomination papers in Forms A & B.

15. The returning officer rejected the nomination paper of the respondent, relying upon Section 33(1) of the Act, as amended. It was held that since BJP had set up more than one candidates and had not decided before scrutiny of the nomination papers as to who was its official candidate by cancelling the authorisation of the other candidate, both the BJP candidates could be treated only as 'independent' candidates and not the candidates set up by a recognised political party and since neither of the candidate had been sponsored by *ten* proposers, their nomination papers were invalid.

16. The Election Commissioner of India has issued instructions in exercise of its statutory functions. Those instructions are contained in the Hand Book for Returning Officer. Chapter VI of the Handbook deals with scrutiny of nomination papers by the returning officer. The learned single Judge of the High Court has referred to various provisions of the instructions and has rightly come to the conclusion that returning officer did not follow those instructions while scrutinising the nomination papers, thereby adopting a wrong procedure. We agree with the view of the High Court in that behalf. We are unable to persuade ourselves to agree with the submission of Mr. Mishra that the returning officer was justified in rejecting the nomination paper of the respondent for non-compliance with the requirements of Section 33(I), as amended, without any further enquiry. The argument over looks the proviso to Section 36(5) of the Act as well as the instructions issued by the Election Commission of India (*supra*). The legislature in its supreme wisdom did not amend the proviso to Section 36(5) of the Act after Section 33(1) was amended in 1996, thereby clearly exhibiting its intention that the said proviso was required to be given its full effect, more particularly because the duty which a returning officer performs while scrutinising the nomination papers is *quasi judicial* in character, even after Section 33(1) had been amended. The proviso to Section 36(5) of the Act lays down :

Provided that in 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. Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, the validity of a nomination paper of a candidate, the Returning Officer, *may*, give an opportunity to the concerned candidate to rebut the objection by giving him time "not later than the next day". This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer *suo motu*, the mandate of the proviso to Section 36(5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his *quasi judicial* function. In the present case, the respondent had sought

an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play.

17. The Returning Officer would have been justified in rejecting the nomination paper of the respondent, had the respondent either not sought an opportunity to rebut the objection raised by the Returning Officer or was unable to rebut the objection within the time allowed by the returning officer. Since, the respondent, had by his written application (supra), filed at the time of scrutiny of the nomination papers itself claimed to be the *official candidate* set up by BJP, which claim was not disputed by any one else during the scrutiny, and had sought time of 24 hours to provide relevant material in support of his submission, it was obligatory on the part of the Returning Officer to allow time to him to rebut the objection, *suo motu*, raised by the Returning Officer. He could have given him any time to do so "within 24 hours" but to deny him such an opportunity, in the facts and circumstances of the case, was neither fair nor proper or justified. It was expected of the Returning Officer to adjourn the scrutiny of the nomination paper to enable the respondent to meet the objection. The use to the expression "not later than the next day but one following the date fixed for scrutiny" under proviso to sub-section (5) of Section 36 of the Act un-mistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the returned candidate and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation *after* scrutiny." Under the proviso to Section 36(5) of the Act, the scrutiny *itself* would have been *postponed* to the adjourned time and, therefore, it was not a case of meeting the objection *after* scrutiny of the nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent, even after the respondent had sought time to meet the objection, indeed rendered the rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper, without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection, capable of being met, particularly where such an opportunity is sought for by the candidate or his representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection *suo motu*, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell into a grave error in rejecting the nomination paper of the respondent. The learned Single Judge of the High Court was, therefore, perfectly justified in holding that the nomination paper of the respondent had been wrongly and illegally rejected, thereby rendering the election of the returned candidate as void. The impugned order, thus, suffers from neither a jurisdictional defect nor any other error whatsoever.

18. In the view that we have taken, we need not detain ourselves to consider the effect of the rejection of nomination papers of S/Shri Vir Abhimanyu and Harish Kumar as the Election Petition was bound to succeed for the improper and illegal of the nomination paper of respondent, Sunil Kumar itself.

This appeal consequently has no merits and is dismissed with costs. Counsel fee Rs. 7,000/-.