
Qamar Ahmad Vs Sri Prabhu Manohar Gopalkrishna Parrikar

Election Petition No. 8 of 2014

Court: ALLAHABAD HIGH COURT (LUCKNOW BENCH)

Date of Decision: May 15, 2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) - Order 8 Rule 11#Conduct of Elections Rules, 1961 - Rule 2(d), Rule 2-C#Representation of the People Act, 1951 - Section 2(e), Section 33, Section 81, Section 83

Citation: (2017) 2 ADJ 273

Hon'ble Judges: Pankaj Mithal, J.

Bench: Single Bench

Advocate: Qamar Ahmad, In Person, for the Petitioner

Final Decision: Dismissed

Judgement

Pankaj Mithal, J.â€”The biennial elections to the ten out of 38 seats to the Council of State (Rajya Sabha), from U.P. were notified by the

Election Commission fixing 10.11.2014 as the last date for filing nomination papers, 11.11.2014 for scrutiny and 27.11.2014 for voting, if

necessary.

2. In the said election, petitioner who is a legal practitioner and a member of the Awadh Bar also submitted his nomination papers, besides

respondents 1 to 10. His nomination was rejected by the Returning Officer and the respondents 1 to 10 were declared elected unopposed.

3. The petitioner in person has filed this election petition under Section 80/81 of the Representation of People Act, 1951 challenging the aforesaid

election specially the election of respondent No.1 on the ground that he is not a resident of U.P. or an electoral from U.P. and secondly on the

ground that the petitioner's nomination was illegally rejected.

4. In addition to the above, the petitioner also challenges the vires of Section 3, 59, 81 and 152 of the above Act, as amended vide Act No.40 of

2003, Rule 4 read with Form 2-C and Rule 96 of the Conduct of Election Rules, 1961 (hereinafter referred to as the "Rules").

The relief claimed in the petition, in short, is to declare the nomination of respondent No.1 to be invalid, that of the petitioner to be valid and the

entire election to be null and void.

5. Article 329 of the Constitution of India (hereinafter "Constitution" only) bars the interference of Courts in electoral matters and sub Article (b) of

it provides that no election to either house of Parliament (with which we are concern in this petition) shall be called in question except by an

election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature.

The mechanism for challenging the election to either House of the Parliament is provided under Chapter II of the Representation of People Act

No.1951 (hereinafter referred to as the "Act"). Thus, no election to either of the House of the Parliament is liable to be called in question except by

an election petition presented in accordance with the provisions of the above Act.

6. The grounds for declaring the election to be void and for declaring a candidate other than the returned candidate to be elected are enumerated

under Section 100 and 101 of the Act. Therefore, the scope of an election petition challenging the election to the Lok Sabha or Rajya Sabha is

very limited and is confined to the grounds contained in the above provisions of the Act. Thus, the validity of an election has to be adjudged within

the four corners of the grounds mentioned therein only. The aforesaid provisions do not provide for challenging the elections on the ground of

invalidity of any provision of the Statutes. Therefore, the elections cannot be assailed on the ground that some provisions of the Act or the Rules

framed thereunder are ultra vires to the Constitution or are otherwise invalid for any other ground not contemplated in the above provisions. The

challenge to any election on the ground of vires of any provision of the Act or the Rules appears to be completely alien to an election petition.

7. In Hari Shankar Jain's case¹ the Apex Court laid down that a Judge of the High Court while hearing an election petition, can adjudicate upon

the validity of any statutory provision subject to two limitations that: (1) it is necessary to go into the question for the purposes of trying election

petition on anyone or some of the grounds specified in Section 100 of the Act and for granting anyone or some of the reliefs under Section 98 of

the Act; and (2) a specific case for challenging the validity or vires of any law is made out on the pleadings contained in the election petition.

8. In view of the above law declared by the Court, a Judge trying an election petition is competent to go into the validity of any provision of the

Act, provided its validity and vires is challenged, there is sufficient pleadings to that effect and it is necessary for adjudging the validity of the

election on the ground specified and for granting the relief permissible in law.

In this situation it is beneficial to first examine the validity/vires of the above referred statutory provisions.

9. During the course of the arguments the main emphasis of the petitioner was upon vires of Section 3 of the Act which was amended with effect

from 28.8.2003 vide Representation of People (Amendment) Act, 2003 (Act No. 40 of 2003).

Section 3 of the Act before its aforesaid amendment stood as under:

3. Qualification for membership of the Council of States. - A person shall not be qualified to be chosen as a representative of any State or Union

territory in the Council of State unless he is an elector for a Parliamentary constituency in that State or territory.

(Emphasis supplied)

10. The aforesaid Section 3 of the Act was amended and the words ""in that State or territory"" were substituted by the words ""in India"". The

aforesaid Section 3 of the Act after amendment reads as under:

3. Qualification for membership of the Council of States. - A person shall not be qualified to be chosen as a representative of any State or Union

territory in the Council of State unless he is an elector for a Parliamentary constituency in India.

(Emphasis supplied)

11. A comparative reading of the pre-amended and amended Section 3 of the Act demonstrates that prior to the amendment a person who

happened to be an elector from a Parliamentary constituency of a particular State or Union territory alone was qualified to be chosen to the Rajya

Sabha as a representative of that State or Union territory. After the amendment, any person who is an elector from any Parliamentary constituency

in India is qualified to be chosen as a representative of any State or Union territory in the Rajya Sabha.

In short, the requirement of domicile of the State or Union territory concern for getting elected to the Rajya Sabha has been deleted and a person

who is an elector from any Parliamentary constituency in India can represent any State or the Union territory. In other words, the existing Section 3

of the Act enables a person who is an elector from any Parliamentary constituency of India to represent any State or Union territory in the Rajya

Sabha irrespective of the State/Union territory from where he is an elector.

12. The vires of this amendment to Section 3 of the Act is being questioned on the premise that it is arbitrary, inasmuch as a person who is an

elector of a Parliamentary constituency of a different State cannot be a true representative of another State in the Rajya Sabha.

The law of representation is basically founded on the principle of agency. A representative is a person who stands in place of another as agent,

delegate or substitute. A person chosen by a principal to exercise for him a power or to perform for him in trust is his representative. The idea of a

representative implies a person chosen for some purpose, and codified in to represent his principal therein. The representative by fiction of law is

authorised to represent another by standing in his place. In simple terms, one who stands for and acts on behalf of another is his representative. A

"representative" acts as an "agent" of the "principal".

13. A Member of the Rajya Sabha who represents the State or the Union territory is in the capacity of representative of the State or the Union

territory. The States or Union territories in their wisdom are free to choose their representative to the Rajya Sabha subject to the limitations, if any,

provided in law. The law of agency is representation in common and in its simplest form puts no riders on the person qualified to be chosen as

representative except that he should be a person of age of majority and of sound mind. No bar in choosing a representative on the ground of his

place of residence, religion, sex or cult can legally be placed upon a citizen of India who is otherwise eligible to represent other. All citizens of the

country are equal in law and can represent one another without making any distinction on the ground of his place of origin or the place of his

elector of a Parliamentary constituency. The only requirement of law is that he should have the capacity to represent. The Members of Legislative

Assembly are the best persons to decide who should represent them or the State in the Rajya Sabha. It can be an elector from a parliamentary

constituency of the State/Union Territory or some other State/Union Territory. A person otherwise having the capacity to represent can

not be disqualified to be a representative for the reason that he is an elector from a different State/Union Territory or is resident of another State.

14. In this view of the matter, amended Section 3 of the Act which permits the State to choose a representative to the Rajya Sabha a

person who is living in a different State or who is an elector from the Parliamentary constituency outside the State cannot be held to be invalid or

violative of any constitutional provision and is rather in consonance with the principle of equality before law.

15. The above aspect of the matter may not detain me for long or any further for the reason that the validity/vires of the above amended Section 3

of the Act on similar grounds of challenge had come up for consideration before the Supreme Court in Kuldip Nayar's case, (2006) 7 KLT 1.

In the aforesaid case the vires of the amended Section 3 of the Act and certain other provisions of it as in the present case, were challenged being

violative of principles of federalism and the basic structure of the Constitution of India. It was also urged that the Rajya Sabha is constituted to

provide representation of various States and Union territories and that its members must represent the people of the State/Union territory or

to enable the Legislature to understand their problems.

16. It was held that it is no part of federal principle that the representatives of the States must belong to that State. There is no such principle

discernible as an essential attribute of federalism. So long as the State has a right to be represented in Rajya Sabha by its chosen representatives

who are citizens of the country, it cannot be said that the federalism is being affected. The residential requirement for membership to the Rajya

Sabha is not an essential basic feature of the Constitution. Hence, if the Parliament, in its wisdom has chosen not to require residential qualification

for the members of the Rajya Sabha it would definitely not violate the basic principles of the federalism.

17. In the end the Court ruled that amendment to Section 3 of the Act cannot be assailed as unconstitutional. It does not transgress the provisions

of Part III of the Constitution, nor any other provision, express or implied, of the Constitution.

18. The petitioner in this context argued that the judgment rendered by the Supreme Court in Kuldip Nayar's case is without jurisdiction as it has

been rendered in exercise of power under Article 32 of the Constitution wherein directions or orders or writs for the enforcement of fundamental

rights alone can be issued. He, therefore, submits that the aforesaid decision is not by a competent court and is nullity, which is liable to be ignored

enabling adjudgment of the vires of amended Section 3 of the Act independently. He further submits that in the above scenario the aforesaid

decision is not a binding precedent and since the petitioner was not a party to the said decision it would not operate as res judicata against him.

19. In support of the above contention, the petitioner has relied upon several decisions to the effect that the Supreme Court under Article 32 of the

Constitution is competent to rule about the violation of fundamental rights only and a judgment and order passed without jurisdiction is a nullity

which has no binding precedent.

In M/s. Bhagwandas Gangasahai, (AIR 1956 SC 175 M/s. Bhagwandas Gangasahai v. Union of India and others) the Constitution Bench

observed that a petition for writ under Article 32 of the Constitution is not maintainable unless there has been a violation of some fundamental right.

20. A similar view had been expressed by another Constitution Bench of the Supreme Court in Fertilizer Corporation Kamgar Union (AIR 1981

SC 344 Fertilizer Corporation Kamgar Union Sindri and others v. Union of India and others) and in carving out distinction between Article

32 and 226 of the Constitution it was held that violation of fundamental right is sine qua non for exercising jurisdiction under Article 32 of the

Constitution.

In Kiran Singh (AIR 1954 SC 340 Kiran Singh and others v. Chaman Paswan and others) it has been held that it is fundamental principle of

civil jurisprudence that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it

is sought to be enforced and even in collateral proceedings.

21. There may not be any difficulty in accepting the above legal prepositions or that no one is above law or that Supreme Court is also subservient

to law provided it is established that the said judgment is without jurisdiction.

22. It must be kept in mind that there is it cannot be found to be violative of fundamental rights in Part III of the Constitution always a presumption

in favour of constitutionality of an enactment and that a legislation can be declared invalid and unconstitutional primarily only on two counts: (1) the

lack of legislative competence; and (2) violation of any fundamental right or any provision of the Constitution.

In Ram Saran's case (AIR 2004 SC 481 State (Union of India) v. Ram Saran) it has been observed that the vires of any provision of a statute

can only be questioned in a constitutional court exercising powers of judicial review under Article 32/226 of the Constitution. The High Court or

the Supreme Court have the exclusive power for such purpose.

23. It is important to note that the power of judicial review conferred upon the superior judiciary in India, is perhaps, the widest and the most

extensive known to the world of law. It extends not only to examine the validity of any Statute or the Rule but also the validity of a provision of the

Constitution or an amendment to the Constitution.

Article 32 confers right to move to the Supreme Court for the enforcement of rights conferred by Part III of the Constitution i.e. the

fundamental rights. Article 32(2) empowers the Supreme Court to issue high prerogative writs for the enforcement of the rights contained under

Part III of the Constitution of India. The aforesaid jurisdiction of the Supreme Court is important and integral part of the basic structure of the

Constitution. It cannot be found to be violative of fundamental rights in Part III of the Constitution

In Kuldip Nayar's case, the vires of amended Section 3 of the Act was assailed directly under Article 32 of the Constitution of India on the

ground that it is arbitrary and violative of doctrine of federalism and the basic structure of the Constitution of India affecting the fundamental rights

of the citizens. The Constitutional Bench in upholding its vires held "The impugned amendment does not infringe any Constitutional provision. It

cannot be found to be violative of fundamental rights in Part III of the Constitution".

It means that the Supreme Court was consciously dealing with vires of the provisions of the Act vis-a-vis the fundamental rights in exercise of

jurisdiction under Article 32 of the Constitution which was well within its jurisdiction. Therefore, the argument that the Supreme Court was not

competent to rule about the vires of amended Section 3 of the Act in Kuldip Nayar's case is completely misplaced and the said judgment cannot

be held to be without jurisdiction or a nullity having no binding effect.

24. Even independent of the said decision, the amended Section 3 of the Act, does not infringe upon any legal right or fundamental right of the

petitioner and is not violative of any constitutional provision as has been discussed in the earlier part.

The validity of other provisions of the Act was not assailed independent of the vires of Section 3 of the Act. No separate arguments in relation to

the vires of other provisions of the Act were advanced except that Form 2C is not in conformity with the definition of the elector. The said aspect of

the matter shall be dealt with by me at an appropriate stage later while dealing with the rejection of the nomination of the petitioner.

25. Therefore, the first ground taken in the election petition that the nomination of respondent No.1 was incorrectly accepted for the reason he is

not an elector from any Parliamentary constituency in U.P. automatically falls to the ground as soon as the validity of the amended Section 3 of the

Act is upheld.

26. A plain and simple reading of Section 3 of the Act, as it exists permits any person who is an elector from any Parliamentary constituency in

India to represent any State or Union territory in Rajya Sabha. It is not necessary in law that he should be an elector from the State/Union territory

he is likely to represent or is representing.

There is no factual dispute that respondent No.1 is not an elector in India. There is no pleading to the contrary in the petition. The only averment is

that he is not an elector from U.P. This by itself does not mean that he is not an elector from any other State or Union Territory or any

Parliamentary constituency in India.

In view of the above, as respondent No.1 is an elector in India, his nomination paper has rightly been accepted for being elected as a

representative in Rajya Sabha from the State of U.P.

27. Now coming to the rejection of the nomination of the petitioner, it is important to note that it has been rejected by the Returning Officer for

more than one reason.

The first ground on which the nomination of the petitioner has been rejected is that his name was not proposed by the members of the State

Legislative Assembly.

28. The other ground for rejection of the nomination of the petitioner is that he had made changes in the prescribed Form of the nomination paper

leading to altering materially and substantially the nomination Form as set out in Rule 2-C of the Rules.

There is no dispute that the petitioner is an elector from 174 Lucknow Central Assembly Constituency and his ten proposers are all electors from

171 Lucknow West Assembly Constituency.

The submission of the petitioner is that it is not the requirement of law that the persons proposing a candidate for election to the Rajya Sabha from

the State should be the members of the Legislative Assembly, rather the requirement of law is that they should be electors only.

29. Section 33 of the Act lays down that a candidate not set up by a recognised political party shall not be deemed to be duly nominated unless his

nomination paper is subscribed by ten proposers who are electors from the "constituency".

30. The petitioner was not a candidate of any recognised political party. Therefore, it was mandatory that his nomination paper should have been

subscribed by ten proposers who are "electors" of the "constituency".

31. The word "elector" has been defined in Section 2(e) of the Act to mean a person whose name is entered into the electoral roll of the

constituency for the time being in force and not otherwise disqualified.

Explanation to Section 81 of the Act provides that an "elector" means a person entitled to vote at the election to which the election petition relates.

The Rules vide Rule 2(d) define "elector" in relation to an election by assembly members to be a person entitled to vote at that election.

The above provisions for the sake of convenience are reproduced herein below:

Section 2(e) of the Representation of the people Act, 1951

2. Interpretation. - (1) In this Act, unless the context otherwise requires, -

(a)....

.....

.....

(d)....

(e) "'elector'" in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force

and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950);

Rule 2(d) of the Conduct of Elections Rules, 1961

2. Interpretation. - (1) In these rules, unless the context otherwise requires, -

(a).....

(b).....

(c).....

(d) "'elector'", in relation to an election by assembly members, means any person entitled to vote at that election;

Section 81 of the Representation of the people Act, 1951

81. Presentation of petition. - (1) An election petition calling in question any election may be presented on one or more of the grounds specified in

sub-section (1) of section 100 and section 101 of the High Court by any candidate at such election or any elector within forty-five days from, but

not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and date of their

election are different, the later of those two dates.

Explanation. - In this sub-section, "'elector'" means a person who was entitled to vote at the election to which the election petition relates, whether

he has voted at such election or not.

32. A conjoined reading of the above provisions make it clear that for election to the Rajya Sabha only the members of the Legislative Assembly

concern, who are entitled to vote are recognised as "electors". The word "elector" used and defined under the Act is in context with the elections

and comprise of the persons entitled to vote therein.

The word "elector" in Section 2(e) of the Act has to be construed in harmony with the definition of the "'elector'" contained in the Rules and the

explanation to Section 81 of the Act in reference to the particular election viz in the case of Rajya Sabha, the members forming the electoral college

or the members of the legislative assembly who are entitle to vote and elect in the said election.

It is for this reason that the nomination paper for the election to the Rajya Sabha in Form 2C provides for a declaration to be made by the

proposers that they are elected members of the Legislative Assembly and that there names are entered in the list maintained under Section 152 of

the Act.

Relevant portion of Form 2C is as under:

FORM 2C

(See rule 4)

NOMINATION PAPER

Election to the Council of States

[PART I]

We hereby nominate as a candidate for election to the Council of States:

Candidate"s Name

..... (father"s/mother"s/husband"s name) His postal

address..... His name is entered at S. No.....in Part No..... of the

electoral roll for the assembly/*Parliamentary constituency.

We declare that we are elected members of the Legislative Assembly of.....electoral college for..... and our

names are entered as indicated below in the list maintained under section 152 and we append our signatures below in token of subscribing to his

nomination:

33. The contents of Form 2C supports the view that, the word "elector" used in Section 2(e) of the Act in relation to the elections to the Rajya

Sabha connotes electors to be persons forming part of the electoral college consisting of members of Legislative Assembly entitle to participate and

vote in that election and would not include the voters of the Assembly or Parliamentary constituency. Accordingly, Form 2C is not contrary to the

definition of the "elector" in context to the elections to the Rajya Sabha.

34. In the net result, the persons who are simply electors in any constituency but are not members of the Legislative Assembly and who are not

supposed to vote for electing a representative to the Rajya Sabha would not be "electors" competent to subscribe the nomination of any candidate

for the election to the Rajya Sabha.

None of the ten proposers to the nomination of the petitioner were members of the State Legislative Assembly. Their names do not figure in the list

of members of the Legislative Assembly maintained with the Returning Officer in accordance with Section 152 of the Act. Therefore, they were not

competent to propose the name of the petitioner as a candidate for election to Rajya Sabha from the State of U.P.

35. In addition to the above, the petitioner has materially altered the nomination Form 2C by deleting the form of declaration contained therein and

by substituting a different form of language declaring themselves to be electors of the Assembly constituency in place of the elected members of the

Legislative Assembly. This change in the declaration and the prescribed Form 2C is impermissible in law as it defeats the very purpose of providing

the format of nomination paper.

36. In view of the above legal position, there is no flaw in the rejection of the nomination of the petitioner as a candidate for the election to the

Rajya Sabha from the State of U.P.

Except for the above two grounds of illegal acceptance of the nomination of respondent No.1 and incorrect rejection of nomination of the

petitioner, there is no other ground or cause of action for the petitioner to maintain this election petition. Both the above grounds which are pure

and simple legal in nature on the undisputed facts or the admitted facts having been decided at the threshold with the consent of the petitioner in the

negative against him, leaves no further cause of action for maintaining this petition. Therefore, after the decision of the above two aspects of the

matter the election petition ceases to have any other cause of action for seeking any relief.

37. Section 83(1)(c) of the Act provides that an election petition shall be signed and verified in the manner prescribed in C.P.C. and Section 87 of

the Act provides that it shall be tried in accordance with the procedure applicable under the Civil Procedure Code, 1908 for the trial of suits,

meaning thereby that the provisions of CPC are fully applicable to the trial of election petition.

Section 83 of the Act mandates that an election petition shall contain concise statement of the material facts on which the petitioner relies. A similar

mandate is contained in Order 6, Rule 2 C.P.C.. It provides that every pleading shall contain in a concise form, the material facts on which the

parties rely for their claim or defence. Material facts are necessary to formulate a complete cause of action.

The law is settled that an election petition can be and must be dismissed if the mandatory requirements enjoined by Section 83 of the Act to

incorporate material facts in the pleadings are missing AIR 1986 SC 1253 Azhar Hussain v. Rajiv Gandhi.

Order 7, Rule 11 C.P.C. provides for the rejection of the plaint inter alia on the ground where it does not disclose a cause of action. It is the duty

of the Court to see on the presentation of the plaint whether it contains the necessary allegations making out a cause of action if proved to decree

the suit. A plaint which fails to disclose a cause of action is liable to be rejected and mere issuance of summons without carefully reading of the

plaint does not compel the court to proceed with the trial (1990)3 JT 68 (SC) Smt. Patasibai and others v. Ratanlal.

38. The provision of Order 7, Rule 11 is based upon the public policy to avoid long drawn litigation and to nip a bogus one in the bud so as to

save valuable time and energy of the Courts and to allow parties to rest in peace.

39. It is settled in law that the power of rejection of the plaint is exercisable at the threshold (1986) 4 KLT 78 Bhagwati Prasad Dixit v. Rajeev

Gandhi and only the averments in the plaint (here the election petition) are germane for deciding if the plaint is liable to be rejected under Order 7,

Rule 11 C.P.C. AIR 2003 SC 759 Salim Bhai and others v. State of Maharashtra and others.

It may be important and material to note that a plaint which fails to disclose a cause of action or a plaint wherein on the material facts no cause of

action survives after decision of a legal issue would attract the provisions of Order 7, Rule 11 (a) C.P.C.

The pleadings in the election petition, even if true or correct, if fail to disclose any cause of action, entails the rejection of the election petition AIR

1984 SC 307 Charan Lal Sahu v. Gioani Zail Singh.

40. In the instant case after the decision of the above two legal points, on the pleadings contained in the election petition, no further material facts

constituting any other cause of action survives. Thus, in the absence of any triable cause of action surviving in the petition, it is liable to be rejected.

41. Accordingly, this election petition is rejected under Order 7, Rule 11 (a) of the Code of Civil Procedure, 1908 read with Section 83 of the Act

and Order 6, Rule 2 C.P.C.

42. In rejecting/dismissing the election petition as aforesaid, I record my appreciation to the demeanor, the precision and the ability with which the

petitioner had addressed the Court. He had assisted the Court not as a person aggrieved but as a true friend of the Court. His anxiety for the cause

ex facie is not for satisfaction of his any personal grievance but probably to espouse as a vigilant citizen, the concern of a common man or to bring

forth the motivated changes in the Legislation which ordinarily may not have the approval of little Indians.