

**Kerala High Court Rejects Objections Against Maintainability Of Election Petition Against Muslim League MLA**

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**IN THE HIGH COURT OF KERALA AT ERNAKULAM  
A. BADHARUDEEN, J.**

I.A.No.2 of 2021 in Election Petition No.4 of 2021; 11 November, 2022

**NAJEEB KANTHAPURAM versus K.P.MOHAMMED MUSTHAFA @ K.P.M. MUSTHAFA**

*T. Krishnanunni (Sr.), Meena A., Vinod Ravindranath, M.R. Mini, Ashwin Sathyath, K.C. Kiran, M. Devesh, Anish Antony Anathazhath, Advocates for the Petitioner.*

*S. Sreekumar (Sr.), P. Martin Jose, P. Prijith, Thomas P. Kuruvilla, Manjunath Menon, Ajay Ben Jose, Sachin Jacob Ambat, R. Githesh, Harikrishnan S., Anna Linda V.J, M. Muhammed Shafi, Advocate for the respondents.*

**O R D E R**

This is a petition filed by the 1<sup>st</sup> respondent in this Election Petition arraying the petitioner as well as other respondents as the respondents. The prayer in this petition is to consider the question as to rejection of election petition as provided under Order 7 Rule 11 r/w Order 6 Rule 16 of Code of Civil Procedure. In the affidavit in support of this petition, it has been stated that the grounds alleged by the election petitioner are illegal and improper. Detailed written statement has been filed by the 1<sup>st</sup> respondent in this regard. It is submitted further that the Election Petition does not contain necessary pleadings and the necessary details to constitute a complete cause of action for challenging the election. The following are the main contentions raised in the written statement to reject the Election Petition.

- i) Allegations in paragraph 25 of the Election Petition are also incorrect. Only postal ballots which did not comply with legal formalities were rejected. The fact that Rules 24 to 27 of the Conduct of Elections Rules, 1961 are mentioned in the proceedings of the Returning Officer is of no consequence.*
- ii) The allegations in paragraph 28 of the Election Petition are untrue. The allegation that at the time of counting of 348 postal ballots of absentee voters, no substantial defects were pointed out is not correct. To the knowledge of this respondent, the poll officers have complied with all legal formalities before getting the votes cast by the absentee voters. The declaration is to be filled up and signed by the voter. If the voter has committed any mistake, poll officers cannot be blamed. If at all it is found that there were some omissions on the part of the poll officer, that cannot be a reason for treating any invalid vote as valid. In any view of the matter, even from the averments in the Election Petition, it can be seen that there was substantial compliance. To the knowledge of this respondent, all the voters were properly briefed with respect to the way in which votes are to be cast, declarations to be filled up and the way in which the declaration and votes are to be placed in the covers provided for the same. The averment that same yardstick of counting of ballots by physical voting shall be applied in the case of postal ballots, poll officers stand in the same footing as that of the polling officers in polling stations where elector's personal visit etc. are not correct. In any view, these are matters of interpretation of the concerned rules and guidelines.*
- iii) The allegation that the election petitioner was not informed about the schedule of visit of the poll officers is incorrect. The allegation that there was total violation of the guidelines is denied.*
- iv) Annexures-R, S and T cannot be admitted in evidence. They are only parts of video footage obtained by the election petitioner from Election Commission. It is evident that tampering was done with respect to those videos. Apart from that, those videos will not in any way show that there was no compliance of the legal formalities by the poll officers. The allegation that poll officers*

*themselves had undertaken the task of filling up the declaration is factually incorrect. The allegation that almost all the senior citizens were either completely laid up or unable to exercise the franchise themselves without the aid of others also is incorrect. Similar is the allegation that filling up of Form 13 A declaration and all other tasks were undertaken by the poll officers themselves. Even if the allegations against the poll officers are true, the same will not be a reason for setting aside the election under Section 100 of the Representation of the People Act, 1951 (hereinafter referred to as 'R.P Act' for convenience). Annexures-F and G are only guidelines and violation of the provisions in the guidelines will not be a ground for setting aside an election under Section 100 of the Representation of the People Act. The allegation that 348 postal ballot papers were improperly rejected, is not at all correct.*

*v) The allegations in paragraph 32 of the Election Petition are incorrect. The interpretation of various provisions in the rules and guidelines attempted to be projected in this paragraph is not legally correct.*

*vi) The allegations in paragraph 33 of the Election Petition are also incorrect. It can be seen from the Statutes, Rules and guidelines that the votes cast by absentee voters are postal ballots. Rule 54-A of the Conduct of Elections Rules, 1961 squarely applies to those votes. The interpretation projected in the above paragraph to various rules and guidelines is not legally correct.*

*viii) The Election Petition is silent about the number of votes which happened to be rejected, according to the election petitioner, because of the non-compliance of the provisions by the poll officers. A mere assertion that there will be such 300 votes and the rejection of those votes have materially affected the result of the election, is not sufficient.*

*ix) This Election Petition is liable to be rejected under Order 7 Rule 11 of C.P.C. Pleadings necessary to establish a complete cause of action are not available in the Election Petition. Only very vague statements are made in the Election Petition with respect to the alleged impropriety and illegality in rejecting the postal ballots. The actual number of postal ballots rejected improperly under various categories has not been mentioned.*

2. The original petitioner filed counter to the petition on the specific assertion that the entire material facts were pleaded in the Election Petition and the same would constitute a cause of action warranting trial of the matter and therefore the Election Petition is not liable to be summarily rejected as prayed for.

3. I shall refer the parties in this Petition as to their status in the Election Petition, ie. '1<sup>st</sup> respondent' as well as the 'petitioner'.

4. Heard the learned Senior Counsel Sri Krishnanunni appearing for the 1<sup>st</sup> respondent and Advocate S.Sreekumar, appearing for the petitioner in extention.

5. It is argued by the learned counsel for the 1<sup>st</sup> respondent that in cases involving election disputes, it is necessary to plead all the essential facts in detail and deviation or lack of pleadings is a reason to reject the plaint in a summary manner. In support of this contention the learned Senior Counsel placed decisions reported in [AIR 1986 SC 1253 : (1986) 1 SCC 573 : 1986 Supp(1) SCC 315 : 1986 (Supp) SCC 315 : (1986) 2 SCR 782], **Azhar Hussain v. Rajiv Gandhi**; [AIR 2004 SC 1941 : (2004) 1 SCC 429 : (2003) Supp6 SCR 690], **Ajay Kumar Poeia v. Shyam & Ors.**, [AIR 2004 SC 2066 : (2004) 4 SCC 522] : (2004) 3 SCR 683], **Jaipal Singh v. Sumitra Mahajan & Ors.** and [AIR 2012 SC 913 : 2012 (92) ALR 233 : 2012(2) BLJ 98 : 2012 (3) JCR 198 (SC), 2012 (3) SCALE 107 : (2012) 4 SCC 194], **Jitu Patnaik v. Sanatan Mohakud & Ors.**

6. In **Rajiv Gandhi's** case (*supra*), election petition was filed by one Azhar Hussain challenging the election of Rajiv Gandhi and was dismissed by the High Court on the

ground that the mandatory requirement to furnish material facts and particulars enjoined under Section 83 of R.P Act was not complied with. When appeal filed under Section 153-A of the R.P Act challenging the High Court order was considered by the Apex Court, the dismissal of the Election Petition by the High Court was upheld. In para.4 of the judgment while dealing with the mandate of pleadings in an election petition it was held as under:

*“4. In a democratic polity `election' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the Election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the `true' will of the people is reflected in the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. In order that the “true will” is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the `free' and `true' will be exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established. So also, when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled, the fact that the successful candidate is the true choice of the people is a consideration which is totally irrelevant notwithstanding the fact that it would be virtually impossible to re-enact the elections and reassertion the wishes of the people at the fresh election the time-scenario having changed. And also, notwithstanding the fact that elections involve considerable expenditure of public revenue (not to speak of private funds) and result in loss of public time, and accordingly there would be good reason for not setting at naught the election which reflects the true will of the people lightly. In matters of election the will of the people must prevail and Courts would be understandably extremely slow to set at naught the will of the people truly and freely exercised. If Courts were to do otherwise, the Courts would be pitting their will against the will of the people, or countermanding the choice of the people without any object, aim or purpose. But where corrupt practices are established the result of the election does not echo the true voice of the people. The Courts would not then be deterred by the aforesaid considerations which in the corruption-scenario lose relevance. Such would be the approach of the Court in an election matter where corrupt practice is established. But what should happen when the material facts and particulars of the alleged corrupt practices are not furnished and the petition does not disclose a cause of action which the returned candidate can under law be called upon to answer? The High Court has given the answer that it must be summarily dismissed. The appellant has challenged the validity of the view taken by the High Court.”*

7. In the said decision, one M.H.Beg, who at one time was the Chief Justice of the Supreme Court of India, was a close friend of the Nehru family and was personally known to and friendly with Rajiv Gandhi, appeared on the Government controlled news media and made a speech praising the Rajiv Gandhi and comparing his entry into politics as the birth of new Arjuna, the insinuation being that the opposition were the kauravas. His appearance on the television was relayed day after day on the Government controlled media. Television sets had been installed practically in every election office of the Rajiv Gandhi in Amethi constituency and throughout the election campaign thousands and thousands of voters were exposed to the television appearance and speech of the said Mr. Beg. Mr. Beg was then a gazetted officer, being the Chairman of the Minorities Commission. His services were procured and obtained by Rajiv Gandhi, his agents and other persons with the consent of the respondent with a view to assist the furtherance of the prospects of Rajiv Gandhi's election. Mr. Beg was seen and heard on the television as later as 21<sup>st</sup> December, 1984. Propaganda about Mr.Beg's was done particularly amongst the members of the Muslim community. Apart from being gross misuse of the

office of Chairman of the Minorities Commission, the same constituted a gross corrupt practice under the election law.

8. When the High Court dismissed the election petition for want of necessary pleadings, it was observed that the petitioner had not stated in the pleading that Mr. Beg was a person in the service of the government as specifically required by Section 123(7) of the Act. This requirement is a requirement of the statute and is, therefore, a material fact within the meaning of Section 83(1)(a) of the Act. Similarly, the statement that the services of Mr. Beg were procured and obtained “by the respondent, his agents and other persons with the consent of the respondent” is clearly vague as discussed above. It was incumbent upon the petitioner to specify which of the three alternatives he meant to plead; in particular it was necessary for him to indicate the names of the respondent's agents and other persons to enable the respondent to know that what was the case which he was expected to meet. The expression “a speech praising the respondent” and comparing his “entry into politics as the birth of new Arjuna” was not what Mr. Beg might have said. The decision in [MANU/SC/0241/1978 : (1979)1SCR701], **K.M. Mani v. P.J. Antony** was also referred.

9. In **K.M. Mani's** case (*supra*), the speech made by a Police Officer exhorting the electors in an election meeting to support a candidate was questioned. It was held that a mere statement of the making of the speech or exhortation was not enough, and that transcript of the alleged speech or contemporaneous record of the points or at least substance of the speech should have been made available. In these circumstances the proposed pleading in this paragraph does not set out the material facts and, therefore, constitutes an incomplete cause of action under Section 123(7) of the Act.”

10. While dealing with the issue the Apex Court held that:

*“It is not mentioned as to who procured or obtained the services of Shri Beg, in what manner he obtained the services and what were the facts which went to show that it was with the consent of the respondent. Unless these “essential facts which would clothe the petitioner with a cause of action and which will call for an answer from the returned candidate are pleaded as per the law laid down in Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi and Ors., (supra) it cannot be said that the petition discloses a cause of action in regard to this charge. In the absence of these material facts and particulars the Court could not have rendered a verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition. It is not sufficient to show that a government servant had appeared on the public media to praise one of the candidates. It must also be shown that the assistance of the Government servant was obtained either by the respondent or his agent or by any other person with the consent of the election candidate or his election agent. The averments made in the petition do not show (i) who had obtained or procured the assistance from Shri Beg; (ii) how he had obtained or procured the assistance of Shri Beg; and (iii) how it was said that it was with the consent of the respondent of his election agent. Nor is it shown which, if any, facts went to show that it was in furtherance of the prospects of the respondent's election. In the absence of material facts and particulars regarding these aspects, the petition would not disclose the cause of action. The High Court, was therefore, perfectly justified in reaching this conclusion. The petition also does not disclose the exact words used in the speech; or the time and date of making such a speech. Now, unless the relevant or offending passage from the speech is quoted, it cannot be said what exactly Shri Beg had said, in which context, and whether it was calculated to promote the election prospects of the respondent. Be that as it may, inasmuch as these material facts and particulars to show that the services of Shri Beg were procured by someone with the consent of the respondent or his election agent are not there, the averments pertaining to the charge do not disclose a cause of action. Unless the nexus between the appearance of Shri Beg on the media and the prior consent of the respondent or his election agent regarding what he was going to say and the purposes for*

*which he was going to say is set out in the material particulars it cannot be said that it disclosed a cause of action and the test laid down in Manubhai Nandlal's case, as also Hardwari Lal's case is satisfied. The High Court was therefore justified in taking the view that it has taken. We may, in passing, mention a point made by learned Counsel for the respondent. It was submitted that the averment must also mention whether the interview was a live one telecast after the date of filing of the nomination. If it was one recorded prior to the said date it may not be of any consequence. This argument also requires consideration but we do not propose to rest our conclusion on this aspect as it is not necessary to do so."*

**11.** This decision has been highlighted by the learned counsel for the 1<sup>st</sup> respondent to contend that the minute details as regards to allegation to be specifically pleaded in an election petition otherwise election petition is liable to be rejected since election process involves considerable expenditure of public revenue and loss of public time.

**12.** In **Ajay Kumar's case** (*supra*) when the election commission issued notification calling upon election to the State of Uttar Pradesh with date of notification as 16.01.2002 and the last date of filing nomination due as 23.01.2002 where the last date of withdrawal of nomination was 28.01.2002 and the appellant and the 1<sup>st</sup> respondent in the said case were the contesting candidates. The appellant filed election petition questioning the election of the 1<sup>st</sup> respondent as member of legislative assembly from 346 Govardhan (S.C.) Assembly Constituency. The election was challenged on the ground that the 1<sup>st</sup> respondent was not a member of Scheduled Caste. The 1<sup>st</sup> respondent filed application under Order 6 Rule 16 of the Code of Civil Procedure for striking of grounds (i) to (v) and paragraphs 5 to 29 of the election petition on the ground that those paragraphs did not contain material facts as required under Section 81(3) of the Representation of People Act, 1951. The High Court took the view that since no fact warranting declaring the election of the 1<sup>st</sup> respondent void has been alleged and documents referred to therein were not supplied, the same did not satisfy the requirement of Section 81 of the Act. Since the election was not challenged for any other grounds, the High Court dismissed the petition. Appeal was preferred before the Apex Court under Section 116A of the R.P Act. In this case the question considered was whether there was a pleading as regards the ground that the 1<sup>st</sup> respondent was not a member of the Scheduled Caste. In the said case the Apex Court held that: *a bare perusal of the documents contained in the aforementioned paragraphs would show that the appellant in effect or substance did not raise any material fact that the first respondent herein was not a member of the Scheduled Caste. Learned counsel appearing, on behalf of the appellant, however, submitted that the averments contained in ground No.4 (ii) contains the requisite fact. The said paragraphs contain the grounds for getting aside the improper acceptance of the nomination papers filed by the first respondent and cannot be treated to be statements containing the requisite material facts, which, if proved, would entitle the appellant in obtaining the reliefs sought for. Furthermore, the said statements had been verified and purported to be based on the legal advice. It may be true that for improper verification of the material facts pleading in the election petition, the same cannot be dismissed at the threshold, but apart from the fact that the appellant herein did not move any application for revivification of the election petition, the averments contained in paragraph 4(ii) does not satisfy the requirement of Section 81(1) of the Representation of People Act, 1951 and in that view of the matter, the said plea is not available to the appellant.*

*For the aforesaid reason, we do, not find any merit in the appeal. It is, accordingly, dismissed. There shall be no order as to costs.*

**13.** In **Jaipal Singh's case** (*supra*) the question considered was whether lack of material facts as required under Section 83(1)(a) of the R.P Act would constitute rejection

of an election petition. In this case, the appellant was a member of Indian Administrative Service, aged 40 years to his credit and who was 59 ½ year old. By letter dated 13.03.2002 he sought voluntary retirement under Rule 16(2) of All India Services (Death-cum-Retirement Benefits) Rules, 1958, with immediate effect. The appellant was registered as an elector at 535, Halqa No.62, Mujeggar Plot No.9A, Sector-6, Faridabad in the State of Haryana and eligible to contest election to Rajya Sabha, in which two vacancies had occurred which were to be filled from the State of Haryana. A notification was issued to fill up the two vacancies under which the last date of filing the nomination papers was 14.03.2002, the date of scrutiny was 15.03.2002, the last date for withdrawal was 13.03.2002 and the date of polling was on 27.03.2003. The appellant sought voluntary retirement from service as he wanted to contest the election in the Rajya Sabha. On 15.03.2003, the Returning Officer rejected the nomination papers of the appellant on the ground that Rule 16 of the 1958 Rules warranted giving three months previous notice to the appointing authority and since the said period had not elapsed on the date of scrutiny, the appellant, was, holding the office of profit on that day and therefore, stood disqualified under Article 102(1)(c) of the Constitution. On 18.03.2002 election results were announced since there was no contest after rejecting the nomination paper submitted by the appellant. The appellant challenged the election and it has been contended that on completion of 40 years of service and on attaining the age of 59 years, he was eligible to seek voluntary under the 1958 Rules; though he had applied for the same through proper channel on 13.03.2002. Further he raised the contention that request to waive the notice period of 3 months also was made to the appointing authority for seeking voluntary retirement and he had relinquished the charge on 13.03.2002.

**14.** In the said election petition a preliminary objection was raised to the effect that the averments contained in the election petition were vague and lacked material facts and particulars, as such, the said petition was liable to be dismissed. In the written statement the respondent submitted that the petition was liable to be dismissed as the appellant had not disclosed any material facts as to on which day, he had received communication regarding acceptance of his application for voluntary retirement. While considering the said question, the Apex Court while dismissing the appeal held in para.11 as under:

*“11. Before concluding, we may state that several judgments were cited by the learned counsel for the appellant on the question as to what constitutes material facts. It is not necessary to discuss the said judgments as the answer depends on the facts of each case. In all the judgments cited on behalf of the appellant, it has been held by this Court that material facts are primary facts disclosing cause of action and such facts have got to be pleaded and failure to do so shall result in rejection of election petition though defect in material particulars can be cured at a later stage by amendment. In the present case, we are concerned with the application of the above law to the facts of this case. Hence, it is not necessary for us to burden this judgment with various authorities cited on behalf of the appellant.”*

**15.** In *Jitu Patna*'s case (*supra*), the question considered was as under:

*“13. The crux of the above averments is that one of the independent candidates Akhila Kumar Mohanta had died on April 13, 2009 after the expiry of withdrawal date; his death was duly notified to the returning officer but despite that his name was displayed on the EVM on the date of the polling (although he was already dead) and had his name not been shown/displayed on the EVM, all the 550 votes polled in his favor would have been voted in favour of the election petitioner as the deceased candidate and the election petitioner shared the common ideology and both were members of the Indian National Congress and on account of wrong committed by the returning officer, the prospect of the election petitioner has been adversely affected. In light of the above pleadings, the question that falls for determination is: if an independent contesting candidate dies after the publication of list of contesting candidates, does the electoral law as contained in 1951*

Act or the Rules framed hereunder cast any obligation upon the returning officer not to display the name of such deceased candidate in the EVM.

14. In order to answer the above question, it is appropriate to survey the scheme of the 1951 Act in regard to the conduct of elections. Part V, Chapter I of the 1951 Act is relevant in this regard. Section 30 requires the Election Commission, as soon as the notification calling upon a consti to elect a member or members is issued, to appoint (a) the last date for making nominations, (b) the date for the scrutiny of nominations, (c) the last date for the withdrawal of candidatures, (d) the date or dates on which a poll shall, if necessary, be taken and (e) the date before which the election is to be completed. Section 31 requires the returning officer, on issue of the notification under Section 30, to give public notice of the intended election inviting nominations of candidates for such election. Sections 32 and 33, *inter alia*, provide for nomination of candidates for election, presentation of nomination paper and requirements for a valid nomination. Under the scheme of these two sections, a candidate for election has to be validly nominated. As per Section 36, after the nomination papers are received, on the date fixed for the scrutiny, returning officer is to hold scrutiny of nominations. Immediately after all the nomination papers have been scrutinised and decisions accepting or rejecting the same have been recorded, the returning officer is to prepare a list of validly nominated candidates and affix it on his notice board. Section 37 enables any of the validly nominated candidates to withdraw his candidature on or before the last date for the withdrawal of candidature.”

**16.** In para.22 and 23 the Apex Court summarised as follows:

“22. A significant departure was thus made from the original Section 52 concerning the death of a candidate before the poll. On death of a candidate set up by recognized political party, the consequence of countermand of the poll was provided in three situations set out there in namely; (a) a candidate dies at any time after 11 a.m on the last date for making nominations and his nomination is found valid on scrutiny under Section 36; or (b) a candidate whose nomination has been found valid on scrutiny under Section 36 and who has not withdrawn his candidature under Section 37, dies and (c) a candidate dies as contesting candidate before the commencement of the poll. Section 52 substituted by Act 2 of 1992 provided that in any of the above situations, the returning officer upon being satisfied about the death of the candidate shall countermand the poll.

23. Section 52 which was brought in the 1951 Act by Act 2 of 1992 was further substituted by Act 21 of 1996. The substituted Section 52 by Act 21 of 1996 has already been quoted above. The provision in 1951 Act now existing takes cognizance of the death of a candidate of recognized political party before poll only in three situations as were brought by Act 2 of 1992. The significant change brought in law by 1996 amendment is that the death of a candidate of a recognized political party before poll in three situations set out in Clauses (a), (b) and (c) results in adjournment of the poll to a date to be notified later and not countermand of the poll. Proviso that follows Sub-section (1) of Section 52 provides that no order for adjourning poll shall be made in a case if a candidate set up by a recognised political party dies at any time after 11.00 a.m. On the last date for making nomination and his nomination is found valid on scrutiny under Section 36 except after the scrutiny of all the nominations including the nomination of the deceased candidate. Sub-section (2) of Section 52 provides that the Election Commission shall on receipt of the report of the returning officer call upon the recognized political party to nominate another candidate in place of the deceased candidate for the said poll within seven days of issue such notice. Sections 30 to 37 shall apply in relation to such nomination as far as applicable. According to Sub-section (3) in a situation where list of contesting candidates had been published under Section 38 before the adjournment of the poll under Sub-section (1), the returning officer shall again prepare and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under Sub-section (2). Section 52 takes care of the situation in case of death of a candidate of recognized political party before poll. However, the electoral law as enacted in 1951 Act does not contemplate cognizance of the death of an independent candidate after publication of list of contesting candidates in Section 38. Section 52 enjoins that if a candidate set up by recognized political party dies before the poll, the

*poll must be adjourned; it does not provide any obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate does after the list of the contesting candidates as defined in Section 38 is published.”*

**17.** After appraising the legal position that in election disputes all minute details should find a place in the petition, the learned counsel for the 1<sup>st</sup> respondent submitted that otherwise the same is a reason to reject the petition or strike down the pleadings.

**18.** Controverting this contention, the learned counsel for the petitioner submitted that the importance of pleadings and its meticulous evaluation would apply in cases where the election is challenged on the ground of any corrupt practice committed, in the interest of the returned candidate. He would submit further that in the present election petition, election of the returned candidate is put under challenge on two grounds specifically covered by Section 100(1)(d)(iii) and (iv). He would submit further that no corrupt practice alleged in this petition and the election sought to be set aside is on the ground of improper rejection of votes and for noncompliance of the provisions of the constitution and R.P Act read with the Conduct of Election Rules.

**19.** While crystallising the rival contentions, it is apposite to refer Sections 83 and 100 of the R.P Act and the same are extracted hereunder:

*“83. Contents of petition:-- (1) An election petition--*

- (a) shall contain a concise statement of the material facts on which the petitioner relies;*
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and*
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:*

*[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]*

*(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]*

*“100. Grounds for declaring election to be void.-- (1) Subject to the provisions of sub-section (2) if the High Court is of opinion—*

- (a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or*
- (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or*
- (c) that any nomination has been improperly rejected; or*
- (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—*
  - (i) by the improper acceptance or any nomination, or*
  - (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or*
  - (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or*



(iv) *by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.*

(2) *If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice the High Court is satisfied—*

(a) *that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;*

*[Cl.(b) omitted by Act 58 of 1958, S.30]*

(c) *that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and*

(d) *that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the High Court may decide that the election of the returned candidate is not void.*

**20.** Indubitably the legal position emerges is that when corrupt practice is alleged, to set aside the election of a returned candidate, the very minute details of the allegation should be specifically pleaded as provided under Section 83(1)(b) of the R.P Act and any sort of omission is a reason to reject the Election Petition, resorting to Order 7 of Rule 11 r/w Order 6 of rule 16 of the Code of Civil Procedure. However, when the election of a returned candidate is put under challenge specifically for the ground (iv) of S.100(1)(d), for any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, then also the Election Petition shall contain a concise statement of the material facts on which the petitioner relies as mandated under Section 83(1)(a) of the R.P Act with sufficient pleading highlighting the non-compliance with the provisions of the Constitution or of the R.P Act or of any rules or orders under the R.P Act. Similarly, when the election is challenged on the ground of improper rejection, refusal or rejection of any vote or the rejection of any vote, which is embodied under Section 100(i)(d)(iii), the petition shall contain a concise statement of the material facts on which the petitioner relies, as provided under Section 83(1)(a) of the R.P Act.

**21.** It is argued by the learned counsel for the 1<sup>st</sup> respondent that when the election is put under challenge on the grounds embodied under Section 100 (1)(d)(iv), election can be set aside only for non-compliance with the provisions of the Constitution or the R.P Act or any rules or orders made under the R.P Act and mere guidelines issued by the Election Commission to regulate election would not fall under Section 100(1)(d)(iv) and, therefore, the present election petition alleging violation of the guidelines also could not succeed.

**22.** Repelling this argument, the learned counsel for the petitioner submitted that the present Election Petition has been filed specifically alleging grounds (iii) and (iv) of Section 100(1)(d). He has placed decision of the Apex Court reported in [(1978) 1 SCC 405], **Mohinder Singh Gill & anr. v. The Chief Election Commissioner, New Delhi & Ors.** to contend that Article 324 of the Constitution of India is wide enough to supplement the powers under the R.P Act and therefore, orders, guidelines and procedure for election issued by the Election Tribunal also would come under Section 100(1)(d)(iv).

**23.** In **Mohinder Singh Gill** 's case (*supra*), the Apex Court considered the impact of Article 324 of the Constitution. In the said decision, in para.38 and 39, the Apex Court held as under:

*“38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge*

that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. Has observed in *Indira Gandhi (supra)* (p.523) (SCC p.136, paras 335-6) :

*In the opinion of some of the judges constituting the majority in **Bharati's** case, Rule of Law is a basic structure of the Constitution apart from democracy.*

*The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.*

*And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.*

39. *Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So, it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words `superintendence, direction and control, as well as `conduct of all elections', are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism – instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like, the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra and Harishankar* discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J.*

*But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.”*

24. Finally it was held that Article 324 of the Constitution is a plenary power to enable the commission to act even in the absence of specific legislation though not contrary to valid legislation and the same is wide enough to supplement the powers under the Act, but subject to the several conditions on its exercise which were set out in the decision. The plenary power of the election commission under Article 324 is more emphasised by the learned counsel for the petitioner highlighting the decision reported in [(1985) 4 SCC 628], **Kanhiya Lal Omar v. R.K.Trivedi & Ors.** In this decision, the Apex Court considered the word `election' in Article 324 of the Constitution and held that the term is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process. Here, the constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 issued by the Election Commission was under challenge. Ultimately in para.9 it has been observed as under:

“9. .... The superintendence, direction, and control of the conduct of elections referred to in Article 324(1) of the Constitution are entrusted to the Commission. The words `superintendence', `direction' and `control' are wide enough to include all powers necessary for the smooth conduct of elections. It is, however, seen that Parliament has been vested with the power to make law under Article 327 of the Constitution read with Entry 72 of List I of the Seventh Schedule to the Constitution with respect to all matters relating to the elections to either House of Parliament or to the House of either House of the Legislature of a State subject to the provisions of the Constitution. Subject to the provisions of the Constitution and any law made in that behalf by Parliament, the Legislature of a State may under Article 328 read with Entry 37 of List II of the Seventh Schedule to the Constitution make law relating to the elections to the House or Houses of Legislature of that State. The general powers of superintendence, direction and control of the elections vested in the Commission under Article 324(1) naturally are subject to any law made either under Article 327 or under Article 328 of the Constitution. The word `election' in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate. Hence there is need for using symbols to denote the candidates who contest elections so that the illiterate voter may cast his vote in secrecy in favour of the candidate of his choice by identifying him with the help of the symbol printed on the ballot paper against his name.”

**25.** Ultimately it was held by the Apex Court that a *direction* may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffers from want of authority on the part of the Commission, which has issued it.

**26.** While defending this argument, the learned counsel for the respondent submitted that though the Election Symbols (Reservation and Allotment) Order, 1968 is an order to be read as rules made by the power of superintendence under Article 324 of the Constitution of India covered under Section 100(1)(d)(iv) of the R.P Act, it cannot be said that the guidelines issued by the Election Commission in the matter of issuance of postal ballot paper and the process of counting etc. would come under Rules within the ambit of Section 100(1)(d)(iv) of the R.P Act.

**27.** Both sides vehemently given emphasis to the other provisions of the R.P Act and the Conduct of Election Rules in this regard.

**28.** Part III of Conduct of Election Rules deals with postal ballot. In Section 18 by way of amendment incorporated w.e.f 22.10.2019, sub section (v) to Section 18(a) is added so that *persons notified under clause (c) of section 60 of the Act, including absentee voters* were also included in the category of voters entitled to vote by postal ballot. In this case, improper rejection of postal ballot by absentee voters coming under the above newly incorporated

**29.** provisions is the subject matter of dispute. It is relevant to note that Rule 27B of the Conduct of Election Rules deals with intimation by a notified elector and proviso to Section 27C introduced w.e.f 22.10.2019 deals with the procedure of notification to an absentee voter. Rule 27E of the Conduct of Election Rules deals with procedure for issue of ballot paper in relation to the post ballot and proviso to Section 27E brought into force w.e.f 22.10.2019 stipulates that in the case of absentee voter, the postal paper shall be issued

in such manner as may be specified by the Election Commission. Similarly, in Section 271 of the Conduct of Election Rules also, proviso has been incorporated by way of amendment w.e.f 22.10.2019 and it has been stipulated that in the case of absentee voter, postal ballot paper shall be returned to the centre provided for recording of vote under sub rule 3 of Rule 27F subject to any direction that may be issued by the Election Commission of India.

**30.** That apart, Section 54A of the Conduct of Election Rules deals with counting of votes received by post and the procedure provided therein shall be followed in the matter of counting of postal votes and in violation thereof would attract Section 100(1)(d)(iv) of the Act.

**31.** Regarding improper rejection of postal ballot paper, the learned counsel for the 1<sup>st</sup> respondent argued that though it has been stated in the Election Petition in para.21 (middle portion) that Sri C.H.Ashique, the election agent of the election petitioner, submitted representation dated 2.5.2021 in writing to the Returning Officer, 038-Perinthalmanna Assembly Constituency requesting to consider the said ballot paper which was kept aside, the Returning Officer issued Annexure-P reply dated 2.5.2021 to Sri C.H.Ashique, the Election Agent of the election petitioner, alleging that the said 348 postal ballots were rejected for non-compliance of Rules 24 to 27 of the Conduct of Election Rules. It is further alleged in Annexure-P that at the time of rejection of the postal ballots, the counting agents were satisfied about the reasons for such rejection and obtained signatures in the tabulation sheets. It is further alleged that before the declaration of result of the election, those 348 postal ballots kept aside were verified and the reasons for rejections were satisfied. However, in the election petition, though it is stated that Annexure-P reply was issued on the ground that 348 postal ballots were rejected for non-compliance of Rules 24 to 27 of the Conduct of Election Rules, 1961 and as per Annexure-P1 it was informed by the election commissioner that at the time of rejection of postal ballots the counting agents were satisfied about the reason for rejection and obtained the signature in the tabulation sheet, the said aspect was not denied in the pleadings and, therefore, there is absence of sufficient pleadings to go with the election petition and as such the same is a reason to non-suit the election petition at the threshold.

**32.** Dispelling this argument, the learned counsel for the petitioner would submit that the rules mentioned in Annexure-P itself viz., 24 to 27 are wrong and the election petitioner specifically contended in para.21 that 348 postal ballots were rejected without any justification and, therefore, there is sufficient pleadings in this regard and accordingly the election petition requires consideration by adducing evidence and the same cannot be given a go-bye by way of rejection.

**33.** While concluding the question regarding the sufficiency of pleadings, I have gone through the election petition running into 47 pages. It has been categorically pleaded that 348 postal ballots were improperly rejected and the guidelines akin to rules made under Article 324 of the Constitution of India have been violated. As I have already pointed out, Section 100(1)(d)(iii) provides that election petition shall be maintainable if it is pleaded that there was improper rejection of ballots. The specific case of the petitioner as pleaded in the petition, especially in para.21 is that if 348 postal ballots were improperly rejected, the said pleading is sufficient to go further in this election petition without setting rest to the entire proceedings before having trial.

**34.** As far as the contention in as much as Annexure-F notification dated 2.2.2021 issued by the Election Commissioner of India under the caption `Guidelines for voting through postal ballot by absentee voters in the category of senior citizens, PwDs and

Covid-19 suspect or affected persons' to be considered as mere guidelines to keep the guidelines outside the orbit of Article 324 of the Constitution of India, it is held that the same shall have to be read as guidelines in the form of Rules issued by the Election Commission of India by invoking powers under Article 324 of the Constitution of India within the ambit of Section 100(1)(d)(iv) of the R.P Act.

**35.** Before conclusion, another point argued by the learned counsel for the petitioner also required to be referred. It is submitted by the learned counsel for the petitioner that in the present case the reason for rejecting 348 votes is stated as improper signing of the declaration appended to the postal ballot papers and, in fact, the said attestation is empowered to the officials of the election commission. He would submit that in the decision reported in [(2003) 6 SCC 452], ***Jibontara Ghatowar v. Sarbananda Sonowal & Ors.*** the Apex Court considered the impact of sub rule (1) of 38 and relevant part of Rule 56 of the Conduct of Election Rules and in para.14 it was observed that a candidate has no role to play in the performance of such duty by the polling officer. However, still, where the Returning Officer feels satisfied that such defect has been caused by any mistake or failure on the part of the Presiding Officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect.

**36.** In this matter, indubitably the reason for rejection of 348 ballot papers is a matter to be decided on merits, for which also the Election Petition shall go for trial.

For the reasons discussed above, I.A.No.2/2021 must fail and is accordingly dismissed.

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