

12/03/2021
Unlisted
Court No.1.

Through Video Conference

MAT 366 OF 2021

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CAN 1 OF 2021

The Chief Election Commissioner & Ors.

Vs

Ujjwal Kumar & Anr.

Mr. Rakesh Divedhi, Sr. Adv.
Mr. Jaydip Kar, Sr. Adv.
Mr. Indranil Roy
Mr. Daipayan Chowdhury
Mr. S. Chowdhury
Mr. Souma Bhattacharya
Ms. Priyanka Chowdhury ...for the Appellants.

Mr. Kapil Sibal, Sr. Adv.
Mr. Sanjay Basu
Mr. Jishnu Chowdhury
Mr. A.K. Nag
Mr. Sandip Dasgupta
Mr. Sourav Bhagat
Mr. Ayan Dey
Mr. D. Sarkar
Ms. M. Cholera
Mr. Kunal Vajani For the respondent no. 1.

1. This intra-court appeal by the Chief Election Commissioner and Others is filed challenging the order of the learned Single Judge interfering with the “noting of defects” on the writ petitioner’s nomination for the election notified by the Election Commission of India on 02.03.2021 to the Constituent Assembly in the State of West Bengal in terms of the

provision of the Representation of the People Act, 1951; hereinafter, “RP Act”, for short.

2. The appeal is founded fundamentally on the plea that the order of the learned Single Judge was issued on the face of the bar to interference by courts in electoral matters imposed under Article 329(b) of the Constitution of India. It is also the plea that the order impugned in this appeal was issued without notice to the statutory authorities under the RP Act, including the Returning Officer.
3. Supporting the appeal, learned Senior Counsel Rakesh Divedhi made reference to the decision of the Hon’ble Supreme Court of India in *Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi & others* (1978) 1 SCC 405 and *Election Commission of India Vs. Ashok Kumar & others*, (2000) 8 SCC 216 = AIR 2000 SC 2977. Specific reference was made to paragraphs 28 and 30 of the judgment in *Election Commission of India Vs. Ashok Kumar* as reported in AIR.
4. Per contra, learned Senior Advocate Kapil Sibal supporting the impugned judgment argued that, seeking judicial review in relation to the defects noted regarding

nomination and the resultant decision will not have the effect of interrupting, obstructing or protracting the election proceedings in any manner when such question is raised before the time fixed for withdrawal of the nominations; and thus, judicial review is available. Reference was also made to the material papers of the writ petition to demonstrate that there was no defect of a substantial nature or otherwise in the nomination submitted by the writ petitioner.

5. Examining Section 36(4) and Section 100(1)(c) of the RP Act, we note that scrutiny of nomination papers is a stage in the election process and the result of such scrutiny would be available for adjudication in terms of Section 100(1)(c) of the RP Act which makes improper rejection of nomination as a ground to declare the election to be void; while clause 4 of Section 36 which relates to scrutiny of nomination provides that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a “substantial character”. Trying to draw a line between the phrase ‘improperly rejected’ in Section 100(1)(c) of the RP Act and the rejection of

nomination paper on the ground of any defect which is not of a “substantial character” as occurring in Section 36(4) of the RP Act, it would be so thin that it always swings in favour of having that issue open for consideration in the Election Petition. This is also because, any rejection of the nomination paper by the returning officer on the ground of any defect and the question whether such defect is of a ‘substantial character’ or not, as well as the question whether such rejection amounts to improper rejection for the purpose of Section 100(1)(c) of the RP Act are essentially mixed questions of facts and law. In the trial of Election Petition in terms of Chapter III in Part VI of the RP Act, such issue could be gone into comprehensively. Such questions are not to be decided by the writ court merely as if it is a jurisdictional issue or an issue of law only.

6. Relying on the decision of the Hon’ble Supreme Court of India referred in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. & others reported as AIR 1952 SC 64*, Their Lordships of the Apex Court, in *Manda Jaganath Vs. K.S. Rathnam and others reported in (2004) 7 SCC 492*, held that the possible erroneous

actions of Returning Officer which could be considered as amenable to correction in the writ jurisdiction are only such errors which would have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election. It was held that if by an erroneous order, conduct of the election is not hindered, then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officer, remedy for which lies in an Election Petition only. The paramount consideration is and ought to be the progress of the election.

7. For the aforesaid reasons, this appeal succeeds. It is accordingly allowed and the order of the learned Single Judge is set aside.

(Thottathil B. Radhakrishnan, C.J.)

(Aniruddha Roy, J.)

Later

The prayer for stay made by learned counsel appearing for the respondent no. 1 is considered and rejected.

(Thottathil B. Radhakrishnan, C.J.)

(Aniruddha Roy, J.)