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IN THE HIGH COURT OF ORISSA AT CUTTACK

WRIT PETITION (CIVIL) No.10633 of 2018

Uma Charan Mishra .... ***Petitioner***

-versus-

Union of India and Another .... ***Opposite Parties***

Advocates appeared in this case:

For Petitioner : Mr. Ashutosh Mishra, Advocate

For Opposite Parties : Mr. P.K. Parhi
Asst. Solicitor General
Mr. D.K. Sahoo
Central Government Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

JUDGMENT
26.04.2022

Dr. S. Muralidhar, CJ.

1. This petition under Article 226 of the Constitution of India challenges the constitutional validity of Section 34 of the Representation of the People Act, 1951 (RP Act) on the ground that the stipulation therein that eligible citizens can contest the election for being a Member of the Legislative Assembly (MLA) of the State only if each of them deposits Rs.10,000/- and for being a Member of Parliament (MP) only if they deposit Rs.25,000/- is *ultra vires* the Constitution of India apart from

being arbitrary and discriminatory against persons without adequate financial means.

2. The Petitioner claims to be the President of Odisha Durniti Sangharsa Mancha, which is a registered organization under the Societies Registration Act, 1860. The Petitioner claims to have contested from Khurda Constituency for the House of the People (Lok Sabha) and deposited the security money of Rs.10,000/-. However, the security money was forfeited as he could not muster the sufficient minimum number of votes. He claims that he requested some of his friends to contest for MLA/MP seats but they did not contest as they could not arrange the security money.

3. It must be mentioned here that this Court had by an order dated 7th December, 2018 required the Petitioner to place on record the objects and reasons behind the amendment to the RP Act in 2009 which enhanced the security money as above. An affidavit dated 25th January, 2019 was filed by the Petitioner stating that in terms of 2011 census, more than 22% of Indian population is below the poverty line i.e. having an annual income of not less than Rs.27,000.

4. The Union of India filed its counter affidavit on 21st May, 2019 pointing out that the last amendment to the RP Act and Section 34 in particular was by the amending Act, 2009 which prescribed the above sums for election as an MLA or an MP, as the case may be. It is pointed out that the RP Act has been enacted by the

Parliament in exercise of the powers conferred under Article 327 of the Constitution of India read with Entry 72 of the Union List (List-I) in the Seventh Schedule of the Constitution of India. It is explained that in exercise of such powers, the Parliament as a matter of policy decides what qualifications, other than those prescribed by the Constitution of India, shall be made mandatory for being fulfilled by the persons seeking to contest elections. It is submitted that the increase in the deposit amount was made with a view to curtailing unnecessary increase in the nominations and therefore, the measure was legal, valid and reasonable. Reference has been made to the decision of the Supreme Court in ***Jyoti Basu v. Debi Ghosal (1982) 1 SCC 691*** to urge that the right to contest an election as much as the right to vote in the election is only a statutory right and not a fundamental right.

5. On 26th June 2019, the Petitioner filed a rejoinder stating that the right to contest an election and the right to cast a vote is part of the democratic process and the system of free and fair elections, both of which are part of the basic structure of the Constitution. It is accordingly contended that debarring a large section of the population, which cannot afford the security money stipulated, from contesting an election, would make it a prerogative of those economically affluent; this adversely impacts the democratic process and the system of free and fair elections.

6. When the case was taken up for hearing by this Court on 16th February, 2022 the Court required the learned counsel for the

Petitioner to support his petition with some empirical data, to show *inter alia* that as a result of increase the nominations fees, the number of nominations for election to the Lok Sabha as well as the State Assembly "has dropped perceptibly".

7. Pursuant thereto, the Petitioner filed an affidavit dated 12th April, 2022 in which it is stated *inter alia* as under:

> "[From the information obtained from the Election Commission of India], ….in 2009 General Election for 147 seats of MLA in Odisha total number of contestants were 1288 whereas in 2014 general election the total number of contestants were 1420. In 2009 election the number of eligible voters were 1,40,75,854/- (One Crore Forty lakhs Seventy five Thousand Eight Hundred and Fifty four) and in 2014 election the number of eligible voters were increased to 1,51,94,477/- (One Crore Fifty One Lakhs ninety four thousand four hundred and seventy seven."

8. Another statistic put out is that in 2009 General Election for the post of 543 MPs, 8070 candidates contested all over India in all the constituencies. In 2014 total number of candidates contesting for the 543 seats in the Lok Sabha was 8251. In 2019 total number of candidates contesting for 542 seats for MPs was 8039.

9. Reliance is placed by Mr. Ashutosh Mishra, learned counsel appearing for the Petitioner on the decision of Ireland High Court in ***Thomas Redmond v. The Minister for the Environment, Ireland and the Attorney General*** (judgment dated 31st July,

2001 in 1997 No.4318P) which held that every citizen has an equal right to contest in an election.

10. Mr. P.K. Parhi, learned Assistant Solicitor General of India, appearing for the Opposite Parties along with Mr. D.K. Sahoo, learned Central Government Counsel submitted that the increase in the deposit money can neither be characterized as arbitrary nor unreasonable and this was to curb non-serious candidates from contesting elections, thereby making the whole process cumbersome. He also drew attention to Section 158 of the RP Act which set out the conditions under which the deposit could be returned to a candidate. Therefore, serious candidates who may have even to borrow money to file a nomination would, if they obtain a sufficient number of votes, be able to get refund of the amount so deposited without any serious prejudice to themselves.

11. The above submissions have been considered. It is now a settled position in law that the right to contest an election or even to vote in an election in the Indian legal system is a statutory right and not a fundamental or common law right. In ***Jyoti Basu v. Debi Ghosal*** *(supra)* the Supreme Court held as under:

> "8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation."

12. In ***Peoples' Union for Civil Liberties v. Union of India (2003) 4 SCC 399*** it was clarified that while the right to vote may not be a fundamental right it would be a constitutional right. While it is correct that democracy is a part of the basic structure of the constitution as declared in ***Keshavananda Bharati v. State of Kerala AIR 1973 SC 1461*** and as further explained in ***Smt. Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299***, the question that arises here is whether the increase in the deposit amount for contesting elections to the State Legislative Assembly and the Parliament brought about by the 2009 Amendment to Section 34 of the RP Act violates the basic structure of the Constitution? In other words, does the increase in the deposit money unreasonably infringe the right to contest in an election to the State Legislative Assembly or the Parliament?

13. Although learned counsel for the Petitioner has not argued that the Parliament lacks legislative competence to enact Section 34 of the RP Act or make an amendment thereto, the legal position in that regard is well settled. Article 327 of the Constitution of India reads as under:

> "327. Power of Parliament to make provision with respect to elections to Legislatures. — Subject to the provisions of this constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls,

> the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

14. Although Article 84 of the Constitution which prescribes the qualification for the Membership of the Parliament and Article 173 which is the corresponding provision for the State Legislature do not stipulate the requirement of making a money deposit for being able to contest elections to those legislative bodies, Article 327 read with Article 246 (1) read with Entry 72 of List I (Union List) of the Seventh Schedule to the Constitution of India, it is plain that the Parliament has the power to make such a law. Therefore, there is no manner of doubt that the Parliament has legislative competence to enact Section 34 of the RP Act and make amendments thereto.

15. The question of Section 34 of the RP Act as it presently stands being *ultra vires* the Constitution of India rests on the Petitioner demonstrating that it suffers from "manifest arbitrariness" or unreasonableness which is violative of Article 14 of the Constitution. In ***Shayara Bano v. Union of India (2017) 9 SCC 1***, a Constitution Bench of the Supreme Court examined judicial precedents and held that the decision of the Constitution Bench of the Supreme Court in ***Natural Resources Allocation, In re Special Reference No.1 of 2012, (2012) 10 SCC 1*** which examined the doctrine of arbitrariness in detail "broad-based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is

found in Article 14 itself whenever legislation is "manifestly arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc."

16. The threshold for the Petitioner to cross if he has to succeed in the present case is, therefore, to demonstrate that the impugned amendment to Section 34 of the RP Act is 'manifestly arbitrary' and liable to be struck down as being violative of Article 14 of the Constitution.

17. At this stage it may be noted that the National Commission to Review the Working of the Constitution in its report submitted in 2002, *inter alia* made the following recommendations:

> "57) In order to check the proliferation of the number of independent candidates and the malpractices that enter into the election process because of the influx of the independent candidates**, the existing security deposits in respect of independent candidates may be doubled. Further, it should be doubled progressively every year for those independents who fail to win and still keep contesting elections.** If any independent candidate has failed to get at least five percent of the total number of votes cast in his constituency, he/she should not be allowed to

> contest as independent candidate for the same office again at least for 6 years.
> [Para 4.20.4]
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> 58) An independent candidate who loses election three times consecutively for the same office as such candidate should be permanently debarred from contesting election to that office.
> [Para 4.20.5]
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> (59) The minimum number of valid votes polled should be increased to 25% from the current 16.67% as a condition for the deposit not being forfeited. This would further reduce the number of non-serious candidates.
> [Para 4.20.6]"(emphasis supplied)

18. The legislative intent becomes explicit when one examines the Statement of Objects and Reasons (SOR) preceding the 2009 amendment to Section 34 of the RP Act., which reads as under:

> "In any Parliamentary form of Government and in a democracy, the process of election has to be free, fair and equitable. During the years, it has been felt that it is necessary to take some need-based measures to remove certain loopholes noticed in the Representation of the People Act, 1950 (43 of 1950) and the Representation of the People Act, 1951 (43 of 1951). In July, 2004, the Election Commission of India had forwarded a set of 22 proposals on electoral reforms to the Government for consideration.
>
> 2. While considering the proposals of the Election Commission, it was considered appropriate to examine certain proposals in respect of the electoral reforms. The following five proposals have been

examined by the Government which relates to amendments of the aforesaid Acts of 1950 and 1951. The said amendments are as follows:—

(a) the Representation of the People Act, 1950:—

appointment of the appellate authority within the district against the orders of the electoral registration officers (amendment of section 24);

(b) the Representation of the People Act, 1951:—

(i) simplification of procedure for disqualification of a person found guilty of corrupt practices (specifying a time limit in section 8A);

(ii) increase in the security deposit of the candidates nominated for elections (amendment of section 34);

(iii) inclusion in section 123(7) of all officials appointed in connection with the conduct of elections so as to bring them within the ambit of corrupt practices, if they indulge in furtherance of the prospects of the candidates at elections; and

(iv) restricting the publication of results of all exit polls by whatever means till the last poll in an election is held, by insertion of new sections 126A and 126B. This is considered necessary due to the complexities of the election process, which is increasing day-by-day, and as such elections are being held in several phases. In such staggering of election schedules over a large period of time it is felt that the telecast of exit polls after each phase of polling affects the outcome in the subsequent phase of elections. It is believed that such telecast of exit polls affect the turnout of voters also." (emphasis supplied)

19. The above SOR was in turn based on the position taken by the Election Commission of India in its background paper as under:

> "2. NEED TO INCREASE THE SECURITY DEPOSIT OF CANDIDATES:
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> "Under Section 34 of the Representation of the People Act, 1951, each candidate for election to the House of the People is required to deposit an amount of Rs.10,000/- as security deposit. For State Assembly elections and elections to the Council of States and Legislative Councils, the security deposit is Rs.5,000/-. The amount of security deposit was last revised in 1996, raising the earlier amount of Rs. 500/- for Lok Sabha elections and Rs.250/- for Assembly elections to the current levels. The revision was made primarily to discourage non-serious candidates from jumping to the electoral arena. There were instances in the past where hundreds of candidates filed nominations from some constituencies with the intention of upsetting the election process there. The revision in the security deposit in 1996 had the desired result in the Lok Sabha elections in 1998 and 1999, as there was a substantial decline in the number of candidates in these elections and in the assembly elections during this period. The average number of candidates at the Lok Sabha elections of 1998 was nine. At the recently held general election to the House of the People and Legislative Assemblies, the number of contesting candidates showed an increasing trend again. A large number of such candidates are non-serious candidates and they predictably end up polling negligible number of votes. Too many candidates in the election fray puts unnecessary and avoidable stress on the management of elections and increases expenditure on account of security, maintenance of law and order, and requires

extra number of balloting units of voting machines, etc. Prior to the recent elections, the Commission had made a proposal for increasing the security deposit to Rs. 20,000/- in the case of election to the House of the People and Rs.10,000/- for Legislative Assembly election. For candidates belonging to Scheduled Castes and Scheduled Tribes, the deposit amount would be half the respective amounts. However, there has been no response from the government to this proposal. The Commission is also of the view that aforesaid Section 34 should be suitably amended so as to empower the Commission to prescribe the security deposit before every general election to the House of the People. Resorting to amendment of the Act will not be feasible before every general election."

20. Section 34 of the RP Act after its amendment in 2009 reads as under:

"34. Deposits.—

(1) A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited,—

(a) in the case of an election from a Parliamentary constituency, a sum of ten thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of five thousand rupees; and

(b) in the case of an election from an Assembly or Council constituency, a sum of five thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of two thousand five hundred rupees: Provided that where a candidate has been nominated by more than one nomination paper for election in the same constituency, not more than one deposit shall be required of him under this sub-section.]

> (2) Any sum required to be deposited under sub-section (1) shall not be deemed to have been deposited under that sub-section unless at the time of delivery of the nomination paper 1[under sub-section (1) or, as the case may be, sub-section (1A) of section 33] the candidate has either deposited or caused to be deposited that sum with the returning officer in cash or enclosed with the nomination paper a receipt showing that the said sum has been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury."

21. The fact of the matter is that the people of this country have, by and large, accepted Section 34 of the RP Act as a necessary measure to curb non-serious candidates. While it is true that the previous amounts of deposit were Rs.10,000/- for an MP election and Rs.5,000/- for MLA election (for SC and ST Candidates) these amounts were Rs.5,000/- and Rs.2,500/- respectively. This has been enhanced to Rs.25,000/- and Rs.10,000/- respectively. In other words, this change has happened more than 13 years ago and if one were to adjust it for the Consumer Price Index, the increase in the amounts cannot be said to be arbitrary or unreasonable.

22. The early challenge to the unamended Section 34 of the RP Act was unsuccessful. In ***Bholanath Srivastava v. Union of India AIR 1963 All 363,*** the Allahabad High Court upheld the validity of Section 34 of the RP Act 1951 and held that

> "7. …Whatever may be the ground of challenge, the challenge must be made in the way provided by the statute, i.e., in an election petition. The second point

urged on behalf of the petition cannot, therefore, be accepted."

23. In ***Raju V.B v. Chief Electoral Officer, State of Gujarat AIR 1976 Guj 66***, the Gujarat High Court held that Section 34 is not ultra vires the Constitution. It was held that the Parliament made this provision so that the elections can be held in an orderly manner and may not result in chaos.

> "7….The said sections in so far as they prescribe a person desiring to contest election to file nomination paper or to make deposit or in case of his failure to obtain prescribed percentage of votes at the election the consequence of forfeiture of his deposit are merely procedure prescribed for the conduct of Election. They are as a matter-of-fact different formalities, which the Parliament has prescribed for purposes of conducting and completing the elections in an orderly manner. To urge that a person should be allowed to contest election without filing nomination paper, or without making a deposit, or without subjecting him to the liability of forfeiture of deposit in case of his failure to obtain a prescribed percentage of votes at the election, would, if accepted, result in a complete chaos. The Parliament or the Legislature has prescribed these different formalities for the elections only with a view to see that the elections are conducted in an orderly manner so as to avoid any confusion that may ensue in the process itself."

A similar challenge was also negatived by the Patna High Court in ***Ramayan Singh v. Union of India (2003) 2 PLJR 698.***

24. Even otherwise, empirically the Petitioner has not been able to demonstrate any negative impact that the increase in the deposit

amount has had on the right to contest an election. On the contrary, on the Petitioner's own showing, in 2009 General Elections to the Lok Sabha 8070 candidates contested for 543 seats all over India. The figure rose to 8251 in 2014 and fell to 8039 in 2019. The Petitioner has been unable to demonstrate that in the absence of the impugned amendment to Section 34 of the RP Act, the number of candidates at the election may have increased. As his own affidavit indicates, it largely remained in the region of 8000 candidates. Therefore, it cannot be said that the increase in the deposit amount has somehow curtailed the right of persons to contest in the elections.

25. A serious candidate for an election, who is keen on contesting will be able to find the resources to make the deposit of Rs.10,000/- for an election to the Legislative Assembly or Rs.25,000/- for the Parliament. These are days where crowd sourcing is not unknown. A candidate should be able to count on a minimum number of supporters for such an exercise.

26. While Mr. Mishra, learned counsel for the Petitioner, argued that instead of requiring money to be deposited, there could be a signing of nomination papers by 100 or even 200 supporters, these are essentially matters of policy. The Court is only required to see whether the measure is reasonable or not?

27. In this context, Section 34 of the RP Act has to be read with Section 158 of the RP Act which reads as under:

"158. Return of forfeiture of candidate's deposit.—

(1) The deposit made under section 34 or under that section read with sub-section (2) of section 39 shall either be returned to the person making it or his legal representative or be forfeited to the appropriate authority in accordance with the provisions of this section.

(2) Except in cases hereafter mentioned in this section, the deposit shall be returned as soon as practicable after the result of the election is declared.

(3) If the candidate is not shown in the list of contesting candidates, or if he dies before the commencement of the poll, the deposit shall be returned as soon as practicable after the publication of the list or after his death, as the case may be.

(4) Subject to the provisions of sub-section (3), the deposit shall be forfeited if at an election where a poll has been taken, the candidate is not elected and the number of valid votes polled by him does not exceed one-sixth of the total number of valid votes polled by all the candidates or in the case of election of more than one member at the election, one-sixth of the total number of valid votes so polled divided by the number of members to be elected: Provided that where at an election held in accordance with the system of proportional representation by means of the single transferable vote, a candidate is not elected, the deposit made by him shall be forfeited if he does not get more than one-sixth of the number of votes prescribed in this behalf as sufficient to secure the return of a candidate.

> (5) Notwithstanding anything in sub-sections (2), (3) and (4),—
>
> (a) if at a general election, the candidate is a contesting candidate in more than one Parliamentary constituency or in more than one assembly constituency, not more than one of the deposits shall be returned, and the others shall be forfeited.
>
> (b) if the candidate is a contesting candidate at an election in more than one council constituency or at an election in a Council constituency and at an election by the members of the State Legislative Assembly to fill seats in the Legislative Council, not more than one of the deposits shall be returned, and the others shall be forfeited."

28. The legislative scheme appears to be that even if a person of modest means who has to borrow to make a deposit of the minimum amount for elections to the Parliament or the Legislative Assembly, as the case may be, is unable to win the election, she can still hope to get the amount refunded provided of course he is able to secure a minimum number of votes. This way the elections are open to serious candidates and not to non-serious ones, who are not in a position to even muster the minimum range of support. The Court is unable to find the Scheme itself to be arbitrary and irrational. It appears to be logical. It gives sufficient room for serious candidates to contest the election and requirement of deposit of money does not act as deterrent, particularly since it is an amount that is refundable in terms of Section 158 of the RP Act. Therefore, the negative impact of the increase in the deposit amount brought about by the 2009

amendment is to a large extent neutralised by Section 158 of the RP Act. The Court is thus unable to view the above amendment as being arbitrary much less "manifestly arbitrary" so as to strike it down as being unconstitutional.

29. The decision of the High Court of Ireland in ***Thomas Redmond*** *(supra)* has to be understood in the context of the size of the population of the Republic Ireland and the chances on offer for the serious candidates to contest in the elections. Therefore, the Court is not satisfied that in the Indian context the deposits would reduce the instances of "obsessive and anti democratic candidates wishing to open exploit the system for commercial gain". The High Court of Ireland felt that there was no reasonable alternative route to ballot paper "such as the nomination and signature system". Therefore, it was held that the deposit system would have effect of excluding persons from the ballot paper. In the present case, however, there is no such empirical demonstration of the negative effects of the requirement of a candidate having to make the monetary deposit for contesting the elections. In fact this system has been in vogue in India right from beginning and all that had happened in 2009 is the increase in the amount.

30. The Court is not satisfied that any ground has been made out for striking down Section 34 of the RP Act as being *ultra vires* the Constitution.

31. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K.Jena/Secy.