

GAHC010040202022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./172/2022

DR. HIMANTA BISWA SARMA
S/O- LATE KAILASH NATH SARM, R/O. CHIEF MINISTER' QUARTER,
DISPUR, GUWAHATI- 781006, UNDER DISPUR POLICE STATION, DIST-
KAMRUP(M), ASSAM

VERSUS

THE ELECTION COMMISSION OF INDIA AND 5 ORS
REP. BY THE CHIEF ELECTION COMMISSIONER, ELECTION COMMISSION
OF INDIA, NIRVACHAN SADAN, ASHOK ROAD, NEW DELHI-110001

2:CHIEF ELECTION COMMISSIONER
ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOK ROAD
NEW DELHI- 110001

3:SENIOR PRINCIPAL SECRETARY
TO THE ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOK ROAD
NEW DELHI- 110001

4:STATE ELECTION COMMISSION
ASSAM
REP. BY CHIEF ELECTORAL OFFICER
ASSAM
BLOCK-C
ASSAM SECRETARIAT
DISPUR
GHY-781006

5:CHIEF ELECTORAL OFFICER

ASSAM
BLOCK-C
ASSAM SECRETARIAT
DISPUR
GHY-781006

6:SRI VIBEKANANDA PHOOKAN
S/O- LATE BOLU RAM GOGOI
R/O HOUSE NO- 40
NIZARAPAR
CHANDMARI
GHY-781006
UNDER CHANDMARI POLICE STATION
IN THE DISTRICT OF KAMRUP (M)
ASSA

Advocate for the Petitioner : MR P NAYAK

Advocate for the Respondent : SC, ECI

BEFORE

HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN
ORDER

02.03.2022

Heard Mr D Saikia, learned Senior Counsel appearing for and on behalf of the petitioner and Mr A Ali, learned Standing counsel for the respondent Nos. 1 to 3 and respondent No. 5.

The petitioner has been arrayed as one of the accused in CR Case No. 1843^c/2019, under Section 126 (1) (b) of the Representation of the People Act, 1951, now pending in the Court of learned CJM, Kamrup (M), at Guwahati. Raising the grievances against the impugned orders dated 10.01.2022, 24.01.2022, 11.02.2022 and 25.02.2022 and various other orders, passed by the learned trial Court, the present petition has been preferred for quashing of the impugned orders as well as the entire proceedings of the case.

As per the direction of the Election Commission of India, the Secretary, Election Department-cum-Additional Chief Electoral Officer, Assam, lodged a complaint that the

present petitioner, by violating the Model Code of Conduct of Lok Sabha Election was telecasting a Live Interview on 10.04.2019, at 07:55 pm, within 48 hours of the 1st Phase of Polls, scheduled on 11.04.2019, with a prayer for taking cognizance of the matter against the petitioner under Section 126 (1) (b) of the Representation of the People Act, 1951. The complaint was filed on 14.05.2019 and the learned trial Court on receipt of the complaint, passed the order on 15.05.2019.

As per the bunch of documents, that have been annexed with the present petition, it reveals that the learned CJM directed the complainant to submit all relevant documents, including the Electronic Records of the alleged occurrence, including the complaint submitted by the President and General Secretary of APCC, but the complainant did not produce the documents as directed till 04.02.2022.

The order of the Court dated 10.01.2022, also reveals that despite the complainant was absent and unrepresented, the Court was pleased to issue notice to the Election Commission of India with direction to the complainant, to take the step. Subsequent to such direction given by the Court, on 04.02.2022, documents were filed and on 11.02.2022, one Sri Pradip Doley, Joint Secretary to the Government of Assam, Election Department entered his appearance. On 11.02.2022, the Court, on the basis of those documents, took cognizance of offence against the accused petitioner under Section 126 (1) (b) of the Representation of the People Act, 1951, fixing 25.02.2022, issued summon to him for appearance before the Court. However, on the date so fixed on 25.02.2022, as the accused petitioner did not turn up before the Court till 10:55 am, the Court passed an order issuing bailable warrant of arrest against the accused petitioner with cost of Rs. 1,000/-. On that day, the complainant was also absent, but represented by the learned counsel. Immediately after passing of the order, a petition was moved on behalf of the accused at 10:58 am, for recalling the said order and the learned Court passed an order at about 11:00 am, endorsing the petition. In the said petition, it was assigned that as the petitioner was pre-occupied with official duty with the Hon'ble President of India, he

was not in a position to appear before the Court and prayed for 4 (four) weeks' time for his appearance before the Court, but the learned Court, was, however of the view that the case was filed on 14.05.2019 and the summon was passed on 11.02.2022 and more than 2 ½ years have elapsed, for the appearance of the accused persons and the Court was persuaded to pass an order, imposing a cost of Rs. 2,000/-, while allowing the petition and granted three weeks' time for their appearance, with further direction that they have to appear before the Court on 21.03.2022.

The learned counsel for the petitioner has placed reliance on documents that have been annexed with the petition, to submit that the learned trial Court has crept into serious illegality in taking cognizance of the offence, inasmuch, as in passing of the orders, which reflects from various orders.

It has been contended that the learned trial Court failed to take into consideration that the third Phase of Polling was scheduled to be held on 23.04.2019 in Dhubri, Kokrajhar and Guwahati, as per the notification issued by the Election Commission of India and the alleged Live Interview was telecasted on 10.04.2019, when there was no Polling as per the notification in the next 48 hours, to attribute any misconduct on the part of the petitioner for violation of the Model Code of Conduct.

On the next, it is also submitted that there are various other facets of the case that the learned trial Court has not applied its mind to the provision of law as envisaged under Section 126 of the R. P. Act. Referring to the various orders of the Court, it has been submitted that despite the complainant remained absent without presenting the matter, the Court itself took active part in pursuing the matter and issued different directions to the Election Commission of India to produce the documents, whereas as per the law, the complainant has to pursue his own case and not the Court.

On the other hand, it has also been pointed out that since the filing of the case in the year 2019, till 2022, no step was taken by the complainant to produce the relevant documents and only at the behest of the Court subsequently, another person has appeared before the Court to step into the shoes of the complainant and has also filed the

documents.

It has also been contended that the learned trial Court at the time of taking cognizance of offence against the petitioner, has not hesitated to discard the earlier order of his predecessor, which tantamount the review of order and same is not permissible. Various other documents have been pressed into, to submit that there is no violation of the provision under Section 126 (1) (b) of the Act, in view of the standing notification of the Election Commission itself, as there was no polling at that time at Guwahati to be considered as a silence period.

In a similar situation, while there is an allegation against Sri Rahul Gandhi, the President of Indian National Congress about violation of such Model Code of Conduct in Gujarat Elections, 2017, and the Election Commission has given certain response in this regard, vide Annexure-IX and a Committee was also constituted to revisit Section 126 of the RP Act and other related provisions requiring revisiting to cater to the requirement and challenges of the present and emerging situations and the Commission was pleased to withdraw the allegation against Sri Rahul Gandhi. Subsequent thereto, the Election Commission of India also issued an advisory on 15.03.2019, with a clarification of the provisions of Section 126 of the RP Act. In Paragraph- 3, it is stated that in a multiphased election, the silence period of last 48 hours may be on in certain constituencies while campaign is ongoing in other constituencies. In such event, there should not be any direct or indirect reference amounting to soliciting support for parties or candidates in the constituencies observing the silence period. Although the amendment has not taken effect but the advisory is still prevailing as submitted by the learned Senior Counsel for the petitioner.

I have also heard the learned counsel appearing for the respondent/Election Commission of India, who has sought for time to submit response on the matter.

I have given anxious consideration to the learned counsel appearing for the parties.

Going by the submission of the learned counsel for the petitioner, particularly, and

the documents that have been annexed and the orders so passed by the learned trial Court, it reveals that the complainant himself did not annex the relevant copies of the documents, along with the complaint, at the time of filing of the same in the year 2019 and only in the year 2022, after much pursuance by the Court itself, the authority has produced the documents by authorizing some other person, to appear in place of the earlier complainant.

That being so, as observed by the learned trial Court on 25.02.2022, the accused petitioner cannot be attributed for such delay in appearance before the Court for no fault on his part.

That apart, it appears that the learned trial Court, has, however, overstepped in the side of the complainant, which are not healthy affairs for a Court of law (the orders reflect). Furthermore, it appears that in the last order dated 25.02.2022, while the Court accepted the cause of absence of the complainant, who was stated to be busy in election duty, but refused to accept the ground that was given on behalf of the accused petitioner, who was busy with the Hon'ble President of India. Perhaps, this aspect was known to all the citizens of Assam that on the very day, the Hon'ble President of India was in Assam for 3 days tour and the petitioner being the Chief Minister of Assam, was present with the Hon'ble President of India, and his absence before the Court cannot be viewed with serious complicity and particularly, a petition was also moved on behalf of the petitioner, assigning reasons. In that view of the matter, imposition of cost appears to be not on lawful consideration.

Serious aspect of law and other related issues have been raised in the present petition, which deserves consideration of this Court.

The petition is admitted for hearing.

Issue notice to the respondent No. 4 and respondent No. 6, by registered post with A/D as well as by usual process, returnable by 4 (four) weeks and by impleading the complainant in the present petition as respondent No. 7.

All the respondents will submit their response so far as regards the contentions

raised in the present petition, by the petitioner.

Considering all entirety of the matter, the impugned order(s) so passed by the Court and the entire proceeding pertaining to CR Case No. 1843^c/2019, is hereby stayed, till the returnable date.

The petitioner will furnish extra copies of the petition to the learned Standing Counsel for the State Election Commission and take steps for dasti service, so far as regards the private respondent.

Also call for the LCR from the concerned Court.

JUDGE

Comparing Assistant