

Serial No. 03
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 485 of 2022

Date of Decision: 03.02.2023

Shri. Saket S. Gokhale

Vs. Election Commission of India & Ors.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K. Paul, Sr. Adv. with
Mr. S. Chanda, Adv.
Mr. F. Askari, Adv.
Mr. S.K. Hassan, Adv.

For the Respondent(s) : Dr. N. Mozika, Sr. Adv. with
Mr. B. Shangrit, Adv.
Mr. Philemon Nongbri, Adv. (For R 1 & 2)
Mr. S. Sahay, Adv. with
Ms. S. Laloo, Adv. (For R 3).

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

Oral:

1. The instant writ petition has been filed by the petitioner, who is a Spokesperson of the All India Trinamool Congress, praying for

action to be initiated against the respondent No. 3, by the respondents No. 1 and 2 (Election Commission of India) for violation of electoral rules given in Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968.

2. When the matter was initially taken up on earlier dates, the respondent No. 3, had raised questions on the maintainability of the writ petition, and on a preliminary hearing, while allowing the parties to complete the pleadings, the matter has been fixed today for admission hearing, on the point of maintainability.

3. Heard learned counsel for the parties.

4. Mr. S. Sahay, learned counsel for the respondent No. 3, has raised the following grounds to question the maintainability of the petition, which are under the following heads;

- i) Writ petition not maintainable in view of the bar under Article 329(b) of the Constitution of India.
- ii) Writ petition barred by inordinate delay and laches.
- iii) Petition under Article 226, not maintainable for failure to make out mandatory pre-conditions for invoking writ jurisdiction.
- iv) Writ petition liable to be dismissed for concealment of material facts.

v) Writ petition is a 'political' interest litigation and petitioner lacks locus.

vi) Writ petition unsustainable on merits.

5. Mr. S. Sahay, learned counsel has advanced arguments on the respective heads as noted above, and on the first objection, submits that a constitutional bar exists against interference by Courts in electoral matters and has referred to Article 329(b) of the Constitution, to support this point. He further submits that, the bar to interference includes all matters directly or incidentally connected with the electoral process, which is already under way in the State of Meghalaya, whereby elections to the Legislative Assembly, has been notified on 18.01.2023. Learned counsel in support of his submission, has placed reliance on the case of *Election Commission of India through Secretary Vs. Ashok Kumar, (2000) 8 SCC 216*.

6. On the point of inordinate delay, learned counsel submits that, the writ petition is hit by inordinate delay and laches, inasmuch as, the filing of election expenditure report relates to 2018, whereas, the writ petitioner has instituted the present writ petition only in 2022, without providing any explanation for the delay in preferring the same. He submits that, the fact that, the writ petition was filed only in December, 2022, clearly shows that the same is actuated by political motive, as it

has been filed immediately prior to the 2023 elections, at the behest of the political party, to which the petitioner belongs. Learned counsel has placed the following decisions, in support of his contentions, namely *City and Industrial Development Corp. Vs. Dosu Aardeshir Bhiwandiwalla, (2009) 1 SCC 168* and *Karnataka Power Corp. Ltd. Vs. K. Thangappan, (2006) 4 SCC 322*.

7. On the point of failure to meet the pre-conditions for invoking writ jurisdiction under Article 226 of the Constitution, the learned counsel submits that, it is settled law that, there must be a judicially enforceable right, as well as, a legally protected right to seek a mandamus. The petitioner he submits, is seeking a direction from this Court, for the respondent No. 1 to act against respondent No. 3, which is neither based on an enforceable legal right or a fundamental right. The exercise of powers of Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968, he contends, is a discretion vested with the respondent No. 1, and there can be no mandamus for enforcing discretionary power, especially against respondent No. 1, which is a constitutional body under Article 324 of the Constitution.

8. On the point of locus and concealment of materials facts, the learned counsel submits that, the writ petitioner is neither an elector nor a candidate in any constituency within Meghalaya, and that, the writ

petition has been instituted with a personal and political motive, to convert the Court proceedings into a political arena. This he submits, is apparent from the mass press and media coverage of the pendency of this writ petition, which includes the contents of the filings made by the petitioner, which has appeared in many articles. Learned counsel also contends that the statements on affidavit made by the petitioner, that he does not have any personal interest, personal gain, or private motive is palpably false as by his own admission, he is a spokesperson of a political party having private motives against the respondent No. 3. As such, he submits, the instant writ petition is nothing but a political interest litigation, couched in the form of a writ petition. In this context, the learned counsel has placed reliance in the cases of *Janata Dal Vs. H.S. Chowdhary (1992) 4 SCC 305*, *Tehseen Poonawalla Vs. Union of India (2018) 6 SCC 72*, and *Dr. M. Ismail Faruqui Vs. Adityanath (2022) SCC OnLine All 768*.

9. On the writ petition being unsustainable on merits, the learned counsel submits that, no statutory provision has been set out in the petition, which has been purportedly not complied with. The answering respondent he submits, has already submitted its election and expenditure report in compliance with the notices of the respondent No. 1, and as such, the basis of the writ petition itself, is no longer in

existence, as there is no violation to speak of. He lastly submits that, the conduct of the petitioner, is a case of attempting to gain political mileage from the pendency of these proceedings and an abuse of the process of law, and on this count alone, the petition is liable to be dismissed.

10. Mr. K. Paul, learned Senior counsel for the petitioner in reply has at the outset, given a brief outline as to the circumstances that, has caused the writ petitioner to come before this Court. He submits that, after the petitioner came to learn that the respondent No. 3, had not filed the election expenditure statements for several elections, including the Meghalaya Assembly Elections of 2018, a petition was filed before the respondent No. 2 on 07.09.2022, to take immediate action against the respondent No. 3, political party. Thereafter, he submits with information received by RTI on 03.10.2022, wherein, letters dated 15.06.2018, 20.08.2018 and 14.09.2022 of the respondent No. 1 were enclosed, it became clear that, the respondent No. 3 had breached the stipulation given in Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968, which mandated that, the election expenditure was to be filed within a period of 75 days, after the completion of Assembly Elections. The learned Senior counsel then submits that, as the respondent No. 3, had violated this provision, necessary punitive action was to be inflicted by the respondent No. 1, which however, had failed

to take any action, warranting the filing of the instant writ petition, for issuance of appropriate directions.

11. On the grounds of maintainability, the learned Senior counsel submits that, Article 329 will not be attracted, as no election has been called into question. Reliance has been placed upon Para – 32 of *Election Commission of India through Secretary Vs. Ashok Kumar (supra)*, to support his contention that, the filing of the instant writ petition will not have the effect of interrupting or obstructing the election proceedings, and that, the decision sought will not amount to calling in question an election, but in fact, will subserve and is in furtherance of the election proceedings. He further submits that, the notification for elections was issued only on 18.01.2023, after the writ petition had been filed.

12. On the question of locus, the learned Senior counsel submits that, Article 144, makes it the bounden duty and obligation of all to aid in the implementation of the directions of the Hon'ble Supreme Court, and for this purpose, it is merely sufficient that the directions of the Supreme Court be brought to the notice of constitutional authorities and Courts. He further submits that, it was only on 16.12.2022, that the election expenditure statements were filed by the respondent No. 3 before the respondent No. 1, after the instant writ petition had been instituted, which indicates the efficacy of the instant proceedings.

13. The learned Senior counsel submits that, delay is not a factor and there is no question of delay, but a question of compliance. The writ petition, he submits is not politically motivated, but the petitioner is a person who has an interest in politics, and that, it was only after he came to learn that election expenditure of the respondent No. 3, had not been filed, and the subsequent events that transpired thereafter, which then prompted him to prefer the instant writ petition as there was a clear violation of Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968.

14. The learned Senior counsel then submits, that Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968, vest power on respondent No. 1 to take action and it is not clear, as to whether any action as contemplated under the Rules is sought to be taken. He submits that, though the wording of Rule 16A uses the word 'may' the same however, is to be read as 'shall', inasmuch as, it is a mandatory requirement for a political party to file election expenditure returns, which in turn will attract a penal action on the same not being complied with.

15. Dr. N. Mozika, learned Senior counsel appearing for the respondents No. 1 and 2 submits that, the instant case, is no longer a case of non-filing of statement of election expenditure, but one of delay and

the penalty for non-filing is not the same as for delay. He further submits that, as elections have been notified, it is for the respondent No. 1, to take a call on the matter being the competent authority. At this stage, he submits no directions may be issued as the returns have since been filed.

16. I have heard learned counsel for the parties. To the mind of this Court, the maintainability of the instant writ petition has first to be examined from the stand point of Article 329 of the Constitution of India. For the sake of convenience, Article 329 is reproduced herein below;

***“329. Bar to interference by courts in electoral matters.-
[Notwithstanding anything in this Constitution]***

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.”

17. Article 329 bars the interference by Courts in electoral matters, and as such, will normally oust the jurisdiction of this Court in any matter

relating to election, by way of a writ petition under Article 226 of the Constitution, except where the assistance of the Court is sought merely to correct or smoothen the progress of election proceedings, or to remove the obstacles that may stall an election process. The instant petition has been filed seeking action to be taken by the respondent No. 1, under Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968, against the respondent No. 3. As such, the purport of this rule is to be considered as to its implications and whether the writ petition can be entertained, on the prayer contained therein. The Election Symbols (Reservation and Allotment) Order, 1968, it is noted was formulated in exercise of the powers conferred by Article 324 of the Constitution [read with section 29A of the Representation of the People Act, 1951 (43 of 1951)] and rules 5 and 10 of the Conduct of Elections Rules, 1961 and all other powers enabling it by the Election Commission of India (respondent No. 1).

18. The source of power of The Election Symbols (Reservation and Allotment) Order, 1968, as given, and Rule 16A of the Election Symbols (Reservation and Allotment) Order, 1968 reads as follows;

NOW THEREFORE, in exercise of the powers conferred by Article 324 of the Constitution 1 [read with section 29A of the Representation of the People Act, 1951 (43 of 1951)] and rules 5 and 10 of

the Conduct of Elections Rules, 1961 and all other powers enabling it in this behalf, the Election Commission of India hereby makes the following Order :.....

“16A. Power of Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission-

Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the ‘Model Code of Conduct for Guidance of Political Parties and Candidates’ as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available

facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National Party or, as the case be, the State Party.”

19. The non-compliance of Rule 16A, therefore, will come within a wider ambit, which will necessarily include the purport of Article 324 of the Constitution, as also the provisions of the Representation of the People Act, 1951, inasmuch as, the Election Symbols (Reservation and Allotment) Order, 1968 was made by powers conferred by the Constitution and by the Representation of the People Act, 1951. The issue of non-compliance of Rule 16A, an Order made under the powers vested under Article 324, will in turn, be covered by Section 100 (1) (d) (iv) of the Representation of the People Act, 1951, which is widely worded to include all kinds of infractions which are residual in nature, within the scope of the Representation of the People Act, 1951. Section 100(1)(d)(iv) reads as follows;

“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)

(b)

(c)

(d)

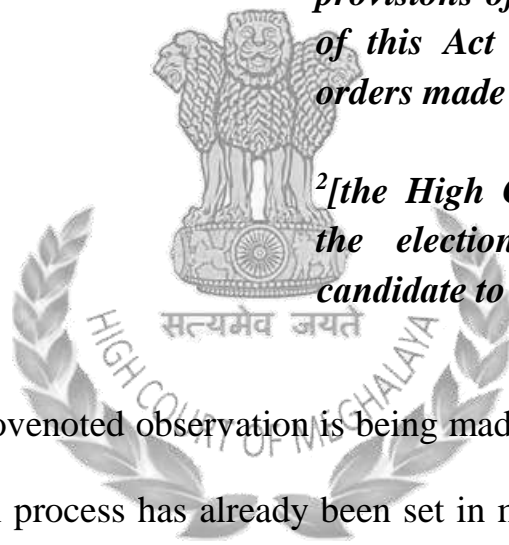
(i)

(ii)

(iii)

(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,

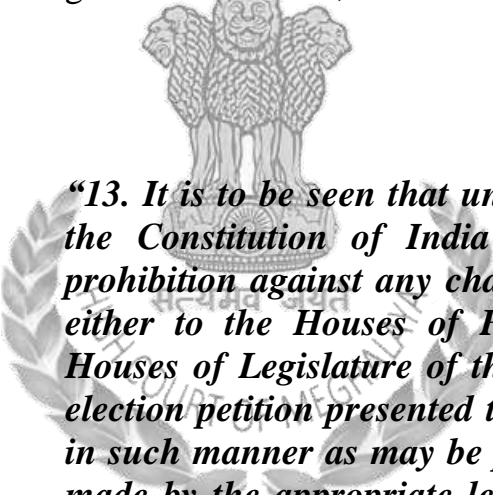
²[the High Court] shall declare the election of the returned candidate to be void.”



20. The abovenoted observation is being made, in view of the fact that, the election process has already been set in motion and therefore, apart from a proceeding under the Representation of the People Act, 1951, no other forum can adjudicate in such matters. No special circumstances that, the writ petition has been filed in aid of and in furtherance of the election process, are visible or apparent in any manner, as the petitioner seeks that action be taken against the respondent No. 3, which cannot be said to subserve the election process. Therefore, the decision relied upon by the Senior Counsel for the petitioner that is

Election Commission of India through Secretary Vs. Ashok Kumar (supra) is of no assistance to his case.

21. On the question of ouster of jurisdiction under Article 226 of the Constitution, and the scheme of Section 100 of the Representation of the People Act, 1951, especially clause (1)(d)(iv), it would be apposite to refer to the judgment of the Supreme Court in the case of *Manda Jaganath Vs. K.S. Rathnam & Ors. (2004) 7 SCC 492*, wherein to settle the dilemma, with regard to this issue, has held in Paras – 13-16 as follows;



***“13. It is to be seen that under Article 329(b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. Parliament has by enacting the Representation of the People Act, 1951 provided for such a forum for questioning such elections hence, under Article 329(b) no forum other than such forum constituted under the RP Act can entertain a complaint against any election.*”**

14. The word “election” has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

15. In Ponnuswami this Court held: (AIR p. 68, para 9)

The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition.

16. The above view of this Court in Ponnuswami case has been quoted with approval by the subsequent judgment in M.S. Gill wherein this Court after quoting the passages from the said judgment in Ponnuswami case held that there is a non obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in Ponnuswami case. It is while considering the above unexplored situations in Ponnuswami that in M.S. Gill case this Court held thus: (SCC p. 429, para 34)

"34. This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz. Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been

designedly drafted to embrace all conceivable infirmities which may be urged. To make the project foolproof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election."

(Emphasis supplied)

22. The above quoted judgment, having covered any lacunae that, may have existed, in the considered view of this Court, the dispute sought to be raised by the writ petitioner will not be entertainable under Article 226 of the Constitution, more specifically with the electoral process already underway. Further, as submitted by the learned Senior counsel for the respondents No. 1 and 2, the basic issue also no longer survives for adjudication, as it is no longer a case of non-compliance of Rule 16A, but rather a case of delay in complying with the same.

23. This Court having come to a finding on the maintainability of the writ petition to be barred by Article 329(b) of the Constitution, the other questions and the authorities placed are not gone into or discussed, and this writ petition accordingly stands dismissed, as not maintainable.

Judge

Meghalaya
03.02.2023
"D.Thabah-PS"