Navuba Gokaiji Chavda and ors. Vs. Returning Officer and ors.

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Court : Gujarat

Decided On : Mar-23-1982

Reported in : AIR1982Guj281; (1982)2GLR397

Judge : S.B. Majmudar, J.

Acts : Constitution of India - Article 226; Gujarat Panchayats Act, 1962 - Sections 24; Gujarat District Panchayats and Election Rules, 1962 - Rules 8, 10 and 14(2); Evidence Act, 1872 - Sections 115

Appeal No. : Special Civil Appln. No. 112 of 1981

Appellant : Navuba Gokaiji Chavda and ors.

Respondent : Returning Officer and ors.

Advocate for Def. : A.K. Mankad, Adv. and; K.J. Vaidya, Adv. for; Purnanand

Advocate for Pet/Ap. : N.J. Mehta, Adv.

Judgement :

ORDER

1. In this petition under Article 226 of the Constitution of India, the petitioners who are the voters residing within the local limits of Khanusa Gram Panchayat in Vijapur taluka of Mehsana district, have challenged the action of respondent No. I Returning Officer, rejecting the nomination paper of petitioner No. I whereby she was prevented from contesting the election from Ward No. 74 of the Khanusa Gram Panchayat, held in the closing months of year 1980. Petitioner No. I was the sole contestant from that ward wherein only one seat was earmarked as reserved for women. Petitioner No. 1 was not opposed by any rival female candidate. She filled in the nomination form on 27-11-1980 for contesting from the aforesaid ward on the reserved seat for women. Her nomination form came to be rejected by the Returning Officer by his order dated 29-11-1980, on the ground that on scrutiny of the nomination paper, it was found that the candidate had not mentioned her number in the voters' list. The aforesaid order below the nomination form as passed by the first respondent-Returning Officer rejecting the nomination paper is annexed as Annexure 'A' to the petition. It is obvious that when petitioner No. I being the sole candidate was not permitted to contest the election to Khanusa Gram Panchayat on the reserved seat, no candidate was returned from the said ward on the reserved seat and the said seat remained vacant. In the meanwhile, petitioner No. I with petitioner No. 2 who is also from the same ward brought this petition under Art. 226 before this Court praying for the relief that respondent No. I be directed to accept the petitioner No. I's nomination paper and to declare petitioner No. I as duly elected to the reserved seat for women from Ward No. 74 of the Khanusa Gram Panchayat. It was also prayed that respondents be restrained from holding election of the Deputy Sarpanch for the said Gram Panchayat.

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3. Mr. N. J. Mehta, learned Advocate appearing for the petitioners contended that first respondent-Returning

Officer had patently erred in law in rejecting the nomination paper of petitioner No. I on the ground that she had not stated her number in the voters' list. He submitted that this was at the highest a technical error of trivial nature which could have been got rectified by the Returning Officer in exercise of his powers under R. 10 (2) of the Gujarat Gram and Nagar Panchayats Election Rules,1962 (hereinafter called the election rules) where under the Returning Officer is required to bold a summary inquiry for considering the objections regarding given nomination form before deciding to reject the concerned nomination paper. In as much as the first respondent-Returning Officer, failed to exercise his aforesaid powers coupled with duty as enjoined upon him under R. 10 (2) of the said Rules, his decision is patently erroneous and liable to be quashed. In this connection, Mr. Mehta heavily relied upon a decision of A. N. Surti, J. in Special Civil Appln. No. 95 of 1981 decided by him on 4/5-2 1981 : (reported in AIR 1981 Guj 195).

4. On the other hand, Mr. Mankad, learned advocate appearing for respondent No. 2 Panchayat submitted that the present petition under Art. 226 is totally misconceived. That the petitioner has got equally efficacious alternative remedy by way of election petition under S. 24 of the Gujarat Panchayats Act. That the petitioners equally had an alternative remedy by way of an appeal under R. It (4) of the Election Rules and consequently, this petition was liable to be dismissed on the preliminary ground that the petitioners ought to have exhausted the alternative remedies available to them. On merits, Mr. Mankad contended that provisions of R. 8 of the said Rules were mandatory in character and as petitioner No. I had failed to comply with the mandatory requirements of form A-1 prescribed under Rule 8 laying down various requirements of a valid nomination paper, the first respondent was quite justified in rejecting the nomination paper.

5. Mr. K.J.Vaidya learned Advoate appearing for the election authority and the Retuning Officer on the other hand submitted to the orders of the court.

6. Before considering the controversy between the pal with the preliminary objection contained in the Municipal Act or the Panchayat Act or the Rules thereunder, it must be established that the election of the returned candidate was materially affected thereby.'

The aforesaid decision of the Division Bench, therefore, makes it clear that if effective remedy by way of election petition is available, the present petition under Art. 226 would not be maintainable. In this connection, Mr. Mankad also relied upon a Division Bench decision of this Court in Kanchanbhai v. Maneklal, 6 Guj LR 200: (AIR 1966 Guj 19). In the aforesaid decision, Bbagwati, J. (as he then was) considered the scope and ambit of S. 24 of the Act and held that :-

'The word 'election' in S. 24 of the Gujarat Panchayats Act, 1961, has a wider meaning which is used to connote the entire process culminating in a candidate being declared elected. If the Returning Officer has rejected a nomination paper otherwise than in accordance with the grounds mentioned in sub-rule (2) of R. 14 of the Gujarat District Panchayats Election Rules, 1962, the rejection of the nomination paper would clearly amount to a breach or non-compliance with sub-rule (2) of R. 14 and if in consequence of that, the result of the election has been materially affected - which it undoubtedly would be - the election can be set aside by the Civil Judge.'

It has been observed in this connection :-

'Reading Section 24 along with sub-rule (8) of R. 14 and applying the rule of harmonious construction, it is clear that so far as the machinery of election is concerned, the decision of the Returning Officer regarding acceptance or rejection of nomination papers is final in the sense that it cannot be questioned until the election is completed, but when the election is completed, any aggrieved person may prefer an application before fifteen days from the date of declaration of the result questioning the validity of the election on the ground that the nomination paper was improperly accepted or rejected in breach of or non-compliance with sub rule (2) of R. 14.'

7. In support of his preliminary objection, Mr. Mankad also relied upon a decision of the Division Bench of this

Court consisting of M. P. Thakkar, J. (as he then was) and R. C. Mankad, J. in Letters Patent Appeal No. 17 of 1981 decided on 3-2-1981(Reported in 1982 Guj LH 645).

In the aforesaid decision, it has been held that when alternative remedy by way of election petition is available, a direct petition under Art. 226 of the Constitution challenging the order of the Returning Officer rejecting the nomination paper of a given candidate, would not be maintainable. But in the last para of the said judgment, it has been made clear as under:-

'We wish to make it clear that inasmuch as the impugned decision of the Returning Officer turned on a disputed question of fact which cannot be agitated in the course of a petition under Art. 226 of the Constitution, we do not consider it proper to express any opinion on the moot question whether the ad hoc finality can come in the way of exercise of constitutional powers when the decision of the Returning Officer is not built on any disputed question of fact and the order is patently erroneous.'

Mr. Mankad also relied upon a decision of A. N. Surti, J. in Special Civil Application No. 410 of 1981 decided on 19-2-1981 wherein Surti, J. refused to interfere in proceedings under Art. 226 when alternative remedy by way of election petition for challenging the result of the concerned election was available to the petitioners. The aforesaid decisions on which Mr. Mankad has placed reliance clearly indicate that in case where the petitioner in a petition under Article 226 raises a question which can be effectively thrashed out in election petition, remedy under Art. 226 cannot be normally made available to the concerned petitioner and the petitioner would be relegated to the alternative Act remedy by way of election petition where the disputed question can be thrashed out on evidence. So far as the facts of the present case are concerned, it has been seen above that the petitioner No. I was the sole contestant on the reserved seat for women from Ward No. 7-J and once her nomination paper was rejected, there remained no candidate in the contest and as a direct consequence, the said reserved seat remained vacant. If in the meanwhile, a fresh election would have been held and any candidate was returned on the said seat, the petitioner No. I would certainly have been required to resort to the alternative remedy by way of election petition under Section 24. But on the peculiar facts of the present case, it is found that the remedy under Section 24 of the Act would not be available to the pctitioners herein. A mere look at S. 24 shows that remedy by way of election petition contemplated by the said section pertains to a case where validity of election of a member of the Panchayat is brought in question, by any person contesting the election or qualified to vote at the election to which such question refers. Consequently, in such an election petition, election of the concerned returned candidate can be brought in challenge by either unsuccessful contestant or even by other persons who are qualified to vote at the concerned election. But all the same, there must be a contest between the election petitioner on one hand and the returned candidate on the other. On the peculiar facts of the present case, no such possibility of challenging the election of any returned candidate from Ward No. 7-J at all arises for consideration. In fact, as petitioner No. I was the sole contestant, once her nomination paper was rejected, there remained no question of holding at that stage any election for the reserved seat for women from the said ward. It is, therefore, impossible to ask petitioner No. 1 to go by way of election petition and to challenge the result of the election from Ward No. 7-J when no election is held for Ward No. 7-J. Consequently, remedy of S. 24 of the Act is not available to the petitioners in the peculiar facts of this case. It is pertinent to note at this stage that the aforesaid decisions to which Mr. Mankad invited my attention were concerned with the fact situations wherein elections had taken place for the concerned wards of the municipalities or panchayats as the case may be and there were returned candidates whose elections could be challenged by way of election petitions. It is in the background of the afore said fact situations that the ratio of various decisions relied upon by Mr. Mankad will have to be appreciated. As in the peculiar facts of this case, there was no election from Ward No. 7-J and there was no returned candidate for the reserved seat for women, no occasion arises for asking the petitioners to prefer an election petition under Section 24, for determination of validity of such election. Mr. Mankad submitted that the word 'election' as mentioned in S. 24 has wide connotation as laid down by Bhagwati, I, (as he then was) in the case of Kanchanlal (AIR 1966 Guj 19) (supra). It is true that Bhagwati, J, speaking for the Division Bench observed in that decision that the word 'election' in Section 24 of the Gujarat Pancbayats Act, 1961 has a wide

meaning which is used to connote the entire process culminating in a candidate being declared elected and in the said process, rejection of nomination paper would form part of the entire process. However, it is pertinent to note that in the aforesaid decision, there had resulted an election from the given ward and a candidate was declared as successful. Consequently, petition under S. 24 could have been filed on the facts of the aforesaid case. In the present case also, if during the pendency of this petition, respondent No. I had held fresh election for Ward No. 7-J, and if there was already a duly elected candidate in the field, the petitioners would have been required to pursue the Act remedy under Section 24. But as there is no such election for the said ward till today, it is no use asking the petitioners to prefer an election petition under See. 24 against a non-existing returned candidate or to challenge the validity of election for Ward No. 7-J, which has never taken place. Under these circumstances, in the background of the peculiar facts of this case, it must be held that the remedy by way of election petition under Section 24 is not available to the petitioners in the present case. It is also required to be noted that no disputed questions of facts arise for decision in the present case. Only question in controversy between the parties is as to whether the Ist respondent was justified' in rejecting the nomination form of the petitioner No. I only because she bad admittedly not mentioned in the nomination form, her serial no. in the voters' list. The relevant provisions of law are to be applied to the admitted facts of the case for resolving the above controversy. This is an additional ground why relegation of the petitioners to the remedy under S. 24 of the Act does not appear to be called for in the present case even assuming that such an election petition can lie.

8. So far as the second plank of the preliminary objection of Mr. Mankad is concerned, he invited my attention to R. 11 (4) of the Election Rules. It reads as under:-

'(4) Any candidate whose nomination paper has been rejected may prefer an appeal to the election authority against the order of the Returning Officer within two days of the date of the order and send a copy of the appeal to the Returning Officer. The election authority shall, within three days of the Presentation of the appeal give his decision thereon and immediately communicate the decision to the Returning Officer. The order passed by the election authority shall be final.'

It is obvious that the said remedy which was available to the petitioners has got totally stale by now. The nomination form of petitioner No. I was rejected by the first respondent on 29-11-1980, that is before one year and four months from today. The appeal could have been filed within two days of the order and was required to be disposed of within three days thereafter. Thus, the appellate proceedings under the rules could have been over by the beginning of Dec. 1980. We are at the fag end of March 1982. No useful purpose can be served, therefore in directing the petitioners now to approach the election authority by way of an appeal. Apart from the question of delay and the question of its condonation by the concerned appellate authority, no useful purpose can be served by the said appeal at this late stage as the appellate authority being the appellate election authority under R. 11 (4) is itself a party respondent before me and has submitted to the orders of this Court. It is further pertinent to note that interim relief was granted pending admission by A. N. Surti, J. on 15-1-1981 and later on, the petition was admitted to final hearing on 5-2-1981. In the meantime, the respondents appeared through their learned Advocate before this Court. Mr. Mankad, learned Advocate for respondent No. 2 states before me that he had appeared before Surti, J. last year when the petitioner has come up for admission hearing. The learned Advocate for the Returning Officer as well as the election authority had also appeared before Surti, J. last year at the time when the petition came up for admission hearing. If at that time, the preliminary objection regarding preferring of appeal under Rule 11 (4) was taken up, this Court at that stage could have asked the petitioners to exhaust the said remedy. Now, it is too late in the day to raise such a preliminary objection when this petition was admitted last year and at that stage, the respondents did not think it proper to raise such a contention regarding non-maintainability of the 1petition on the ground of available alternative remedy under R. 11 (4). They must, therefore, be held to have waived this objection at that stage. In that view of the matter, after a passage of more than one year after the admission of the present petition by this Court, it is neither fair nor proper to ask the petitioners to be relegated to the remedy under R. 11 (4) by way of preferring an appeal to the election authority, respondent

No. 3 herein. Even otherwise, it has to be kept in view that decisions of the Returning Officer or the election authority as appellate authority regarding rejection or acceptance of nomination forms have only ad hoc finality and ultimately the said questions can be thrashed out either by way of election petition or by way of a petition under Article 226 if otherwise they are maintainable on the facts of a given case. As I have found on the peculiar facts of the present case that the Act remedy by way of election petition under S. 24 is not available to the petitioners, the second preliminary objection regarding non-exhausting of the remedy by way of appeal before the election authority under R. 11 (4) cannot be entertained at this stage and consequently both these preliminary objections raised by Mr. Mankad on behalf of respondent No. 2 stand overruled.

9. That takes me to the consideration of the merits of the controversy between the parties. In order to appreciate the grievance between the parties, pertaining to the nomination form of petitioner No. 1, it is necessary to turn to the relevant election rules applicable to the facts of the present case. Rule 8 of the Gujarat Gram and Nagar Panchayats Election Rules, 1962 provides:-

'On any day appointed for the nomination of candidates under Rule 7, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon, each person desirous of standing as a candidate for election as a member of the panchayat shall fill in a nomination paper in form At and each person desirous of standing as a candidate for election as a Sarpanch shall fill in a nomination paper in form A2 and each such person shall sign the nomination paper concerned and present it either in person or through a representative authorised in writing in this behalf by him to the Returning Officer.

(2) On receiving a nomination paper under sub-rule (1), the returning officer shall enter therein his serial number and shall endorse thereon a certificate stating the date on which and the exact time at which nomination paper was delivered to him.'

Rule 10 provides for scrutiny of nomination. Sub-rule (1) of R. 10 states:-

'(1) At the time and place appointed for the scrutiny of nominations intending candidates and any other person duly authorised in writing by each such intending candidate shall alone be entitled to be present. The Returning Officer shall allow such persons reasonable facilities for examining the nomination papers of intending candidates.'

Sub-rule (2) of R. 10 is relevant and it reads thus -

6 (2) The Returning Officer shall examine the nomination papers and decide all objections raised before him against any nomination and may either on such objection or on his own motion and after such summary inquiry, if any, as he considers necessary, reject a nomination paper on any of the following grounds, namely:-

(i) that the candidate is disqualified under the Act or these rules for election; or

(ii) that the candidate has failed to comply with any of the provisions required by these rules or the Act.

(iii) that the signature of the candidate is not genuine or has been obtained by fraud.'

Under sub-rule (3) of R. 10, it has been provided that for the purpose of sub-rule (1), the production of a certified copy of an entry made in the list of voters shall be conclusive evidence of the right of any voter named in that entry to stand for election unless it is proved that the candidate is disqualified. Sub-rule (4) provides that the Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character.

10. As per R. 8, petitioner No. 1 was required to fill in the nomination paper as prescribed under form A-1. Form A-1 does mention that amongst other details, the concerned candidate has to mention the name of the electoral division for which the candidate is nominated and the number in the voters' list. The nomination form filled in by petitioner No. I gave all other details but missed to state serial number of petitioner No.1 in

the voter's list. The aforesaid infirmity resulted in rejection of petitioner No. 1's nomination form at the hands of the first respondent-Returning Officer. Mr. Mehta, learned Advocate for the petitioners contends that the first respondent could not have rejected the nomination form on account of the aforesaid infirmity for two obvious reasons. Firstly, the concerned defect in the nomination form was not of substantial character and hence under R. 10 (4), there was prohibition against the Returning Officer requiring him not to reject such a nomination form, on the ground of the aforesaid technical defect. The second reason given by Mr. Mehta is that under R. 10 (2), before rejecting the nomination form, the Returning Officer was required to hold a summary inquiry and in the said summary inquiry, be could have permitted the petitioner to rectify the error and as that opportunity was not given to petitioner No. I by respondent No. I herein, his order rejecting the nomination form is patently erroneous in law. So far as the first contention of Mr. Mehta is concerned, Mr. Mankad, learned Advocate for respondent No. 2 raises a serious controversy and submits that non-mentioning of the name (number?) in the voters' list is not a technical defect but it is a defect of substantial character. In order to support his aforesaid submission on merits, he invited my attention to a decision of the Supreme Court in Dharam Singh Rathi v. Hari Singh, M. L. A., (1975) 2 SCC 240: (AIR 1975 SC 1274). In the aforesaid decision, the Supreme Court was concerned with the question regarding validity of the election held under the provisions of the Representation of People Act, 1951. The Returning Officer in that case had rejected certain nomination papers on the ground that the person concerned had not given the name of his father and his full address. In the view of the Returning Officer, this defect was a technical one but as there was no one present at the time of the scrutiny of the nomination papers, rectification could not be made. The High Court of Punjab and Haryana took a contrary view and held that the defect of non-compliance with the requirements of S. 33(1) of the said Act was a substantial defect and hence the nomination papers were held to be rightly rejected by the Returning Officer. The Supreme Court speaking through Untwalia, J. concurred with the aforesaid decision of the said High Court. The provisions of S. 36 'of the Representation of the People Act~ 1951 were noticed by the Supreme Court and it was held that under sub-section (4) of Sec. 36, the Returning Officer had rejected the nomination paper on the ground of a defect of substantial character. Non-supply of postal; address was held to be a defect of substantial character. It is difficult to appreciate how the aforesaid decision of the Supreme Court can be pressed into service by Mr. Mankad in the peculiar facts of the present case. The question posed for my consideration is entirely different. In the case, the nomination form substantially complies with the requirements of form A-1 save and except to the limited extent that voters' list number of the candidate viz petitioner No. I is not mentioned. So far as such a defect is concerned, it cannot be considered to be a defect of substantial character for the simple reason that ward number is clearly mentioned. The nature of the reserved seat is also pointed out. Full name and address of the candidate is also mentioned. So far as non-mention of the voters' list number is concerned, there is internal indication provided by R. 10 (3) itself that such a defect would not be substantial in character. I have also referred to R. 10 (3) of the aforesaid rules. To recapitulate, it has been provided therein that for the purpose of subrule (1), the production of a certified copy of an entry made in the list of voters shall be conclusive evidence of the right of any voter named in that entry to stand for election unless it is proved that the candidate is disqualified. This shows that production of certified copy of entry made in the list of voters would furnish an independent and conclusive evidence regarding the position of the concerned voter in the list of voters. Under these circumstances, non-mentioning of the voters' list number in the nomination form, by itself and standing as a lone circumstance, can-not be said to be such a defect which would go to the root of the matter and would render it a defect of substantial character. It must be held that such a defect would be a defect of technical nature which could not have been pressed into service by the first respondent for outright rejecting the nomination form of petitioner No. 1. Even S. 33 of the Representation of the People Act, 1951 indicates that such type of defects are not considered by the legislature to be substantial defects which could have any vitiating effect on the nomination forms of the persons who are contesting elections to the Parliament or Legislative Assemblies, The relevant provisions of S. 33(4) of the Representation of the People Act, 1951 along with the proviso read as under:-

'33 (4). On the presentation of a nomination paper, the 'Returning Officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the

same as those entered in the electoral rolls: Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the, electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the Returning Officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.'

It is, therefore, obvious that such defects about mentioning or non-mentioning of electoral roll numbers in nomination forms are not considered by legislature to be defects of substance for major elections like Parliament and Assembly elections and hence much less can it be said that for the election to local body like the Gram Panchayat, such defect would stand elevated to the pedestal of a substantial defect. It must, therefore, be held that the first respondent was not justified in rejecting the nomination form of petitioner No. I only on the ground that serial number in the voters' list was not mentioned by petitioner No. I in her nomination form. It was an error of technical nature which could have been got corrected and in any case, it cannot result in vitiation of the nomination form as such. In fact, Rule 10 (4) of election rules prohibits respondent No. I from. rejecting the nomination form on the ground of such a technical defect.

11. The second ground on which Mr. Mehta assailed the order of the rejection of nomination form at the bands of the first respondent was that under R. 10 (2) of the Election Rules, the first respondent ought to have held a summary inquiry regarding the defect in question and ought not to have rejected the nomination paper straightway. So far as the aforesaid contention of Mr. Mehta is concerned, he placed strong reliance on a decision of this Court rendered in Special Civil Appln. No. 95 of 1981 by Surti, J. on 4/5-2-1981 : (reported in AIR 1981 Guj 195).

In the aforesaid case before Surti, J. a grievance was made in the petition under Art ' 226 of the Constitution by the petitioner whose nomination paper was rejected on the ground that the petitioner had, in that case, omitted to mention the name of the Scheduled Caste to which he belonged. The petitioner in that case was seeking election to the concerned panchayat for which relevant election rules were the Gujarat Taluka and District Panchayat Election Rules, 1975. Rule 15 (2) of these rules is pari materia with R. 10 (2) of the election rules in the election pertinent present case. Interpreting the said rule, Surti, 1. made the following observations :-

'This is a clear ease where the Returning Officer had not discharged his function as contemplated by R. 15 (2). When the Returning Officer examined the nomination papers, he should have noticed the aforesaid technical defect in the nomination paper, particularly in view of the objection from respondent No. 2, that the petitioner had not mentioned the name of the scheduled caste to which he belongs in the nomination paper. When such a pointed attention was drawn of the Returning Officer by the contesting candidate, was it not the duty of the Returning Officer to make the summary inquiry? Was it not the duty and the statutory function of the Returning Officer to draw the attention of the petitioner, that the petitioner had not mentioned in the nomination paper that he belongs to a particular scheduled caste? In any event, in my view having regard to the fact and circumstances of the case, the aforesaid technical error was not of a substantial character. He merely omitted to mention the name of the scheduled caste to which he belongs, and such a technical error in the best interest and furtherance of the democratic set up at all levels in our country should not defeat the right of the petitioner to contest the election.'

On the anology of the aforesaid decision, it must be held that in the present case, the first respondent failed to discharge his statutory obligation of holding a summary inquiry under R. 10 (2) of the Elections Rules wherein he could have given an opportunity to petitioner No. I to correct the technical error of non-

mentioning of her serial number in , the voters' list instead of straightway rejecting the nomination paper of petitioner No. 1. This is the additional ground on which the order passed by the first respondent cannot be sustained.

12-13. xx xx xx xx

14. Order accordingly.