

Reserved on 23.6.2022

Delivered on 16.7.2022

AFR

Court No. - 39

Case :- WRIT - C No. - 17250 of 2022

Petitioner :- Pallavi Singh Patel

Respondent :- Election Commission Of India And 3 Others

Counsel for Petitioner :- Saroj Kumar Yadav

Counsel for Respondent :- C.S.C., Ashutosh Mishra

Hon'ble Mrs. Sunita Agarwal, J.

Hon'ble Vikram D. Chauhan, J.

(Delivered by Justice Sunita Agarwal)

1. Heard Sri Anil Kishore Sharma learned Senior Advocate assisted by Sri Saroj Kumar Yadav learned counsel for the petitioner, Sri Rakesh Pande learned Senior Advocate assisted by Sri Ashutosh Mishra learned counsel for the Election Commission of India and Sri J.N. Maurya learned Chief Standing Counsel for the State respondents.

2. By means of the present writ petition, the petitioner herein seeks to challenge the notice dated 18.5.2022 issued by the respondent no. 4 namely the Sub-Divisional Magistrate, Sirathu, Kaushambi as also the reminder notices dated 25.5.2022 and 3.6.2022 issued by him. The prayer is to quash the entire proceedings initiated by the respondents with the aforesaid notices.

3. The brief facts of the case are that the petitioner herein is an elected representative of the people to the State assembly, Member of Legislative Assembly of the State, from the Constituency No. 251, Sirathu, District Kaushambi. In the elections notified on 1.2.2022, the petitioner herein had filed her nomination paper on 8.2.2022, polling took place on 27.2.2022 and in the result declared on 10.3.2022, the petitioner herein was returned as a winner.

4. It is stated in the writ petition that during the nomination process, certain objections were raised alleging suppression of material facts by the petitioner as required to be declared in Form-26, the affidavit submitted along with the nomination paper, describing her criminal

antecedents. The contention is that the Returning Officer had examined the documents filed by the petitioner in light of the complaint and turning down the complaint, accepted the nomination papers as valid. The petitioner having won the election, took oath of the Member of Legislative Assembly in the house of Legislature and participated in the Budget Session in the fall of May, 2022.

5. It seems that an undated complaint was filed by a resident of the constituency namely Sirathu, alleging that the right of the ordinary voter of the constituency has been infringed as the petitioner did not disclose the criminal cases lodged against her in the affidavit appended with the nomination paper. The undated complaint filed by one Dileep Singh Patel was followed by another complaint of one Omkar Nath Gautam. Both the complaints are appended as Annexure '4' to the writ petition.

On these complaints, the notices impugned have been issued by the Sub-Divisional Magistrate, Sirathu, District Kaushambi. It is stated that two previous notices issued in the month of May were not served upon the petitioner and only after the service of the third notice dated 3.6.2022, she came to know about the said complaints. It is also stated in the writ petition that the Sub-Divisional Magistrate, Sirathu, District Kaushambi made an enquiry about the genuineness of the complaint and in the report submitted by the Revenue Lekhpal, Kshetra Nara, Sirathu, it was indicated that three persons in the name of Dileep Patel were met in the village. They were Dileep Singh Patel son of Indra Pal Singh, Dileep Singh son of late Ram Sewak Singh and Dileep Kumar Singh son of Sri Ram Singh, all residents of village Udahin Khurd, Sirathu, District Kaushambi and these three persons filed notarized affidavits before the District Magistrate/the District Election Officer that they did not file any complaint. The affidavits are appended as Annexure '7' to the writ petition.

A perusal of the copy of the complaint made by the complainant Sri Dileep Patel indicates that he did not disclose his parentage and it is not

possible to identify him from the description therein.

6. It is brought on record of the writ petition that the Election Commission of India by a communication dated 17th May, 2022 had forwarded the complaint lodged by Dileep Patel with the direction that appropriate proceeding be initiated in the matter in light of the circular dated 24th August, 2021 issued by it. On receipt of the same, by the letter dated 26th May, 2022, the Chief Electoral Officer, U.P. forwarded the complaint to the District Election Officer, Kaushambi with the direction to submit a report by making an enquiry on the point-wise issues raised in the complaint, in accordance with the Circular/letter of the Election Commission of India dated 24.8.2021.

7. A perusal of the impugned notices issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi makes it evident that the notice dated 18th May, 2022 was directly issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi on the complaint of Sri Dileep Patel, an elector/voter received in the office of the District Election Officer/the District Magistrate, Kaushambi and reminder was also sent on 25th May, 2022 on the same. Further, the District Magistrate, Kaushambi with his letter dated 1.6.2022 has forwarded the complaint with the letter dated 26.5.2022 sent by the Chief Electoral Officer, U.P. to the Sub-Divisional Magistrate, Sirathu, Kaushambi. Another complaint which was submitted by Sri Omkar Nath Gautam to the District Magistrate, Kaushambi was also sent alongwith the said letter and direction was issued to the Sub-Divisional Magistrate, Sirathu, Kaushambi to make an enquiry. The third notice dated 3rd June, 2022, as a reminder to the previous two notices dated 18.5.2022 and 25.5.2022, was then served upon the petitioner.

8. At this juncture, it is relevant to note that the record placed alongwith the writ petition makes it clear that the Sub-Divisional Magistrate, Sirathu, Kaushambi had issued two previous notices on the directions of the District Magistrate, Kaushambi, who is the District Election Officer, Kaushambi, on the undated complaint of Sri Dileep

Patel, addressed to the District Election Officer/District Magistrate, Kaushambi, U.P. It further shows that the complaint made to the Election Commission of India by Dileep Patel was later forwarded to the Chief Electoral Officer, who in turn, had directed the District Election Officer, Kaushambi to make enquiry. The second complaint of Omkar Nath Gautam was also directly entertained by the District Election Officer/the District Magistrate, Kaushambi and on all these complaints, directions were issued by the letter dated 1.6.2022 to the Sub-Divisional Magistrate, Sirathu, Kaushambi to make enquiry, pursuant to which he had issued the third notice dated 3rd June, 2022.

9. The learned Senior Counsel for the Election Commission of India and the Chief Standing Counsel appearing for the State-respondents do not dispute the sequence of events as narrated in the writ petition and noted above, leading to issuance of three notices which are subject matter of challenge herein.

10. The dispute in the present writ petition as raised by the learned Senior Counsel for the petitioner is that the Chief Electoral Officer, U.P., the District Election Officer/the District Magistrate, Kaushambi and the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi have no jurisdiction to inquire into the complaint relating to the election as they have become *functus officio* after declaration of the result of the election on 10.3.2022.

11. It is argued by the learned Senior Counsel for the petitioner that these authorities had transgressed their jurisdiction in instituting proceedings against the petitioner who is an elected representative of the people of the State. After election, any dispute relating to election can only be raised by way of an election petition, to be filed in accordance with the provisions of Section 80 of the Representation of the People Act, 1951 (In short as "the R.P. Act, 1951"), framed in the spirit of Article 329(b) of the Constitution of India. Three notices issued by respondent no. 4, the Returning Officer/the Sub-Divisional Magistrate, Sirathu,

Kaushambi are liable to be quashed as such and the entire proceeding initiated by the District Election Officer, Kaushambi at his own ends and on the direction of the Chief Electoral Officer, U.P. are liable to set aside.

Reliance is placed on the decisions of this Court in **Kamlesh vs. Mukhya Nirwahan Ayukt**¹ and **Shambhu Singh vs. State**² to substantiate the above submissions.

Sri Rakesh Pande learned Senior Advocate assisted by Sri Ashutosh Mishra learned Advocate, has put in appearance on behalf of the Election Commission of India, the respondent no. 1. The State respondent nos. 2 to 4 are represented by Sri J.N. Maurya learned Chief Standing Counsel.

Both the counsels for the respondents are in sync in their arguments that the notices were issued by respondent no. 4 in light of the directions issued by the Election Commission of India to make an enquiry in accordance with its circular/letter dated 24.8.2021. The allegations in the complaints are of concealment/non-disclosure of the criminal antecedents of the petitioner in Form-26 prescribed under the Rule 4A of the Conduct of Elections Rules, 1961, the Form of affidavit to be filed at the time of delivering nomination paper in accordance with sub-section (1) of Section 33 of the R. P. Act, 1951. It is urged that it is mandatory for the candidate to provide correct and complete information in Form-26 while filling the details in all relevant columns including the details of pending criminal cases against the candidate. Any column of Form-26, if left blank, would result in rejection of the nomination paper by the Returning Officer.

In order to address the dispute with regard to the jurisdiction of the Returning Officer, the District Election Officer and the Chief Electoral Officer, U.P. in the matter of entertaining complaint, it is argued by the learned Senior Counsel for the Election Commission of India that the Election Commission of India had issued a circular dated 24th August, 2021 to the Chief Electoral Officers of all States, with reference of its

1 2006 (3) ILR (All) 1157

2 AIR 2001 Allahabad 39

earlier letter dated 26.4.2014 that the complaints of false declaration or concealment in the affidavit in Form-26 by a candidate shall be entertained by the Returning Officer and enquiry on case-to-case basis shall be conducted. The reference has been given to the Press Note dated 16.6.2020 issued by the Election Commission of India in the aforesaid circular dated 24th August, 2021 that in the matter of lodging of complaint under Section 125A of the R.P. Act, 1951, equal opportunity should be provided to all concerned and each complaint of the elector shall be examined and the case would be referred to the concerned Investigating Officer on case-to-case basis. It is argued that the said circular dated 24th August, 2021 also referred to the order dated 14.7.2021 passed by the Division Bench of the Madras High Court in **B. Ramamoorthy vs. the Chief Election Commission of India and others**³, wherein it was directed that all complaints of violation of Section 33-A of the Act shall be examined by the Election Commission of India and the notice to the relevant candidate is to be issued before closing the matter by a reasoned order, if the explanation is found suitable or satisfactory.

The observations in paragraph '13' of the judgment and order dated 14.7.2021 passed by the Madras High Court in **B. Ramamoorthy** (supra) has been placed before us to argue that the Election Commission of India is bound to pursue the matter for lodging complaint under Section 125A of the R.P. Act, 1951 against the candidate, if the explanation of the relevant candidate is not found satisfactory.

The submission, thus, is that the impugned notices were issued by the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi under the directions issued by the Election Commission of India to make an enquiry in accordance with the circular dated 24th August, 2021. No exception, therefore, can be taken to the jurisdiction of respondent no. 4, the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi to issue notice to the petitioner calling her explanation in the enquiry to be

conducted, under the direction of the District Election Officer/the District Magistrate, Kaushambi, who in turn, was directed by the Chief Electoral Officer to submit a report in light of the directions issued by the Election Commission of India by the letter dated 17.5.2022 forwarding the complaint.

It is further vehemently argued by the learned Senior Counsel for the Election Commission of India that Section 33A and Section 125A were introduced by the Act No. 72 of 2002 w.e.f. 24.8.2002 in light of the decision of the Apex Court in **Union of India vs. Association for Democratic Reforms and another**⁴, wherein it was held by the Apex Court that to maintain the purity of elections and in particular to bring transparency in the process of election, the Commission has to ask for a disclosure by a candidate with regard to his criminal antecedents, assets, liabilities and educational qualification, in order to strengthen the voters in taking appropriate decision of casting their votes. It is argued that it was held therein that the citizen's right to know about the candidate who represent him in Parliament/Assembly will constitute a fundamental right under the Constitution of India. The voter's right to know about the antecedents of his candidate has been held to be a fundamental right under Article 19(1)(a) of the Constitution, akin to the right to freedom of speech and expression. It was held therein that release of the information about the candidate to be selected is must as casting of vote by misinformed and non-informed voter or a voter having one-sided information only, is bound to affect the democracy seriously.

The decision of the Apex Court in **Resurgence India vs. Election Commission of India and another**⁵ has been placed before us to argue that the ultimate purpose of filing of the affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution. The citizens are supposed to have the necessary information at the time of filing of nomination paper

4 (2002) 5 SCC 294

5 (2014) 14 SCC 189

and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information. Filing of affidavit with blank particulars, by concealment of material particulars, will render the affidavit nugatory. It is, therefore, the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the “right to know” of the citizens. It was held therein that if a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. The Apex Court in the said case has held that filing of the affidavit with blanks will be directly hit by Section 125A(i) of the R.P. Act, 1951.

Section 125A(i) of the R.P. Act, 1951 was then placed before us to vehemently argue that failure to furnish information relating to her criminal antecedents by the petitioner as mandated by Section 33A of the R.P. Act, 1951 would entail the punishment provided therein, the penalty of filing false affidavit, an imprisonment for a term extended to six months or with fine or with both.

The decision of the Andhra Pradesh High Court in **Dubbaka Narsimha Reddy vs. Election Commission of India & others (Writ Petition No. 12066 of 2014)** dated 9.7.2014 has been placed before us to argue that it is the duty of the Election Officer to take steps for initiating criminal proceeding under Section 125A on the complaint received by him while disposing of the same in light of the circular issued by the Election Commission of India to all the Chief Electoral Officer of all States and Union Territories in the matter of filing of false affidavit in Form-26.

12. With the aid of the said decision, it is argued by Sri Rakesh Pande learned Senior Counsel for the Election Commission of India that the guidelines issued by the Election Commission of India have got statutory force and have to be followed by all concerned officials as the statute does

not require expressly, an officer appointed thereunder, as to who has duty or power coupled with duty to take action and the Court has no power to mandate as to who can do so.

It is vehemently argued by the learned Senior Counsel for the Election Commission of India that Section 125A clearly provides penal measure for filing affidavit giving false information or concealing information. The circular dated 24th August, 2021 issued by the Election Commission of India providing procedure to deal with the complaint of violation of Section 33-A, shall, therefore, prevail and the concerned officer of the district concerned namely the Sub-Divisional Magistrate, Sirathu, Kaushambi would be justified in making enquiry.

The contention is that the District Election Officer of the District concerned and the Chief Electoral Officer of the State are the officers designated or nominated by the Election Commission India in accordance with Section 13A and Section 13AA of the Representation of People Act, 1950 (In short as "the R.P. Act, 1950") and they are the officers permanently deputed by the Election Commission of India to coordinate and supervise all work in connection with the preparation, revision and correction of all electoral rolls in the State, all parliamentary, assembly and council constituencies within the district; respectively. Sub-section (4) of Section 13AA has been placed before us to argue that the District Election Officer is authorized to perform such other functions as entrusted to him by the Election Commission and the Chief Electoral Officer. It is urged that the Returning Officer/the Sub-Divisional Officer, Sirathu, Kaushambi had initiated enquiry by issuance of the notices under challenge, calling upon the petitioner to submit his explanation under the directions issued by the District Election Officer. No plausible objection with regard to the jurisdiction of the Returning Officer/the Sub-Divisional Magistrate, Sirathu, the respondent no. 4 can be taken in view of the circular dated 24th August, 2021 issued by the Election Commission of India.

13. It is argued by the learned counsels for the respondents that in view of the direction issued by the Madras High Court in **B. Ramamoorthy** (supra), the explanation of the candidate/petitioner herein against whom the complaint was filed was required to be called, in order to complete the enquiry, to decide as to whether the criminal complaint under Section 125A of the R.P. Act, 1951 is to be lodged against the candidate/petitioner herein.

It is further argued that the notices under challenge are merely show cause notices which do not threaten or contemplate any penal action. They are the notice simplicitor calling for the explanation of the petitioner failing which ex-parte action will be taken. No prejudice has been caused to the petitioner nor any legal right of the petitioner has been violated by issuance of the notices. Nothing has been stated by the petitioner in the writ petition about the merits of the allegations made in the complaint. In view of the decision of the Apex Court on the subject, the disclosure on affidavit was important and needed to be there. It was made important to see that no person having criminal antecedents escape the notice of the voters who have a right to take an informed decision having knowledge of the background of the candidate. It is argued that in the enquiry instituted by the Election Commission, the petitioner was called upon to submit her explanation with a view to avoid harassment and prejudice to her because of any exparte decision. The mode of enquiry adopted by the Election Commission of India, in any case, cannot be challenged.

14. The submissions made by Sri Rakesh Pande learned Senior Counsel for the Election Commission of India about the power and jurisdiction of the Sub-Divisional Magistrate, Sirathu, Kaushambi as also the District Election Officer and the Chief Electoral Officer to conduct enquiry in the matter have been adopted by the learned Chief Standing Counsel appearing on their behalf.

15. In sum and substance, the arguments of both the learned counsel for the respondents are that the impugned notices cannot be quashed for the

reason that it is mandated by the R.P. Act, 1951 that in case of any false affidavit within the meaning of Section 125A(i) to (iii), penal action has to be initiated against the candidate concerned.

16. Considering the submissions of the learned counsel for the parties and perused the record, we find that the controversy revolves around Section 33A and Section 125A of the R.P. Act, 1951 which had been introduced by Act No. 72 of 2002 w.e.f. 24.8.2002. Sub-section (1) of Section 33A casts an obligation upon a candidate to furnish the information as required under Clause (i) and (ii), as the case may be, in his nomination paper delivered under sub-section (1) of Section 33, about his criminal antecedents, if any. Section 125A provides for penal action for failure on the part of the candidate in furnishing information relating to sub-section (1) of Section 33-A, for giving a false information which he knows or has a reason to believe to be false; or concealment of any information, in his nomination paper delivered under sub-section (1) of Section 33 or in his affidavit which is required to be delivered under sub-section (2) of Section 33-A, as the case may be.

17. Before proceeding further, we would like to go, in brief, to the legislative history for insertion of the aforesaid two provisions in the Representation of People Act, 1951.

A question arose before the Apex Court in **Union of India vs. Association for Democratic Reforms** (supra) as to whether, before casting votes, voters have a right to know relevant particulars of their candidates. While deliberating on the issue, it was held therein that the right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes, that is to say that voter speaks out or expresses by casting his vote. For this purpose, information about the candidate to be selected is a must. Voter's right to know antecedents including criminal past of his

candidate contesting election for representation of people in the Parliament or Legislative Assembly is much more fundamental and basic for survival of democracy.

18. Considering the legal and constitutional position with regard to elections and the role of the Election Commission of India, it was held therein that the jurisdiction of the Election Commission of India is wide enough to include all powers necessary for smooth conduct of elections and the word “elections” is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in its infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject.

The Election Commission of India was directed therein to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein information on the following aspects:-

“(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past, if any, whether he is punished with imprisonment or fine.

(2) Prior to six months of filing of nomination, whether the

candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.

(3) The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.

(5) The educational qualifications of the candidate.”

It was concluded that the Election Commission of India has from time to time issued instructions/orders to meet the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible.

After the said decision of the Apex Court dated 2nd May, 2022, the Act No. 72 of 2002 for insertion of Section 33A and Section 125A of the R.P. Act, 1951 was promulgated.

19. The validity of the Representation of the People (Amendment) Ordinance, 2002 promulgated by the President of India on 24.8.2002 was subjected to challenge before the Apex Court in **People's Union For Civil Liberties (PUCL) and another vs. Union of India and another**⁶. It was observed therein that the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. In any case, for having free and fair election,

information to voters is a necessity. It was further held that the right to information provided for by Parliament under Section 33A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voters/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.

It was finally held that the Apex in the case of **Union of India vs. Association for Democratic Reforms** (supra) has determined the ambit of fundamental right of information to a voter.

In **Resurgence India vs. Election Commission of India and another** (supra), the prayer was to issue specific directions to effectuate meaningful implementation of the judgments rendered by this Court in **Union of India vs. Association for Democratic Reforms** (supra) and **People's Union for Civil Liberties (PUCL)** (supra) by issuing directions to the respondents/Commission to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blank particulars.

While deliberating, the Apex Court had noted the observations made in its earlier judgment in **Union of India vs. Association for Democratic Reforms** (supra) about the right of voter and information which could be asked by the Commission from the candidates to maintain the purity of elections and in particular to bring transparency in the process of election. It was noted that in order to recognize the ultimate right of the voter to know full particulars of a candidate who is to represent him in the Parliament or the State Legislature, Section 33A of the R.P. Act was enacted by Act no. 72 of 2002 with effect from 24.08.2002. The purpose of the Act no. 72 of 2002 was to effectuate the right contemplated in **Union of India vs. Association for Democratic Reforms** (supra). It was mandated for all the candidates to disclose their criminal antecedents under Section 33A by filing an affidavit as

prescribed along with the nomination paper filed under Section 33(1) of the R.P. Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at present, every candidate is obligated to file an affidavit with relevant information with regard to his criminal antecedents, assets and liabilities and educational qualifications. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. It was held that when a candidate files affidavit with blank particulars, it renders the affidavit itself nugatory.

While dealing with the power of the Returning Officer to reject the nomination paper at the time of scrutiny, it was held that paragraph '73' of the decision in the judgment of **People's Union For Civil Liberties (PUCL)** (supra) nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. It was clarified that the observations made in the said paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. Noticing Section 125A of the R.P. Act, it was further held that filing of affidavit with blank space will be directly hit by Section 125A(i) of the R.P. Act. It was finally held that it is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the right to know of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. It was further observed that the power of the Returning Officer to reject the nomination papers must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

20. Noticing the above decisions, we may record that the

Representation of People Act, 1951 is a complete Code for the conduct of elections by the Election Commission of India in accordance with Article 324 of the Constitution which provides for superintendence, direction, control of the Commission for conduct of elections to Parliament and to the Legislature of every State. The jurisdiction of the Election Commission of India is wide enough to issue directions/orders/circulars, whether by specific or a general order, for smooth conduct of elections, in its plenary character of power under Article 324 of the Constitution of India for the avowed purpose of having free and fair election. There is no limitation on the power of the Election Commission of India except in case of a valid law in relation to or in connection with election made by the Parliament or the State Legislature where in such cases, the Commission is required to act in conformity with the said provisions. The Commission in its own right as a creature of the Constitution may issue orders/directions to deal with variety of situations that may emerge from time to time in the conduct of elections as every contingency cannot be foreseen or anticipated by the enacted law or the Rules.

21. In its own right and having jurisdiction to deal with the complaint relating to filing of false affidavit in Form-26, the Election Commission of India had issued the Circular dated 24th August, 2021 addressed to the Chief Electoral Officers of all States/Union Territories reiterating the Press Note dated 16.6.2020 that each complaint received for filing a false affidavit by the candidate in Form-26, shall be dealt with on case-to-case basis and the matter be referred to the competent Investigating Officer for further action after taking cognizance of the said complaint.

Paragraph '3' of the said circular extracts para 6.6.1 of the Returning Officer handbook, which contains the directions as to how the Returning Officer would deal with the objections/complaints while making scrutiny of the nomination paper.

Paragraph '4' of the circular extracts Paragraph '13' of the decision of the Madras High Court dated 14.7.2021 (**B. Ramamoorthy vs. the**

Chief Election Commission of India), as relied by the learned Senior Counsel for the Election Commission of India.

Paragraph '5', however, deals with the situation where the complaint of false affidavit has been received after completion of the nomination exercise.

Relevant paragraph '5' of the circular dated 24th August, 2021 is to be extracted hereunder:-

“5. नाम-निर्देशन प्रक्रिया के बाद गलत शपथ-पत्र की किसी शिकायत पर निम्नलिखित तरीके से कार्रवाई की जानी चाहिए:-

(1) किसी पर्याप्त दस्तावेज/साक्ष्य के बिना गलत शपथ-पत्र की शिकायत उचित आदेश के साथ उपयुक्त रूप से निपटाई जानी चाहिए तथा यह सुझाव भी दिया जाना चाहिए कि यदि जरूरत हो तो वे सक्षम न्यायालय से स्वयं सम्पर्क कर सकते हैं/ सकती हैं।

(II) समर्थक दस्तावेज/साक्ष्य के साथ प्रस्तुत गलत शपथ-पत्र की शिकायत राज्य/संघ राज्य क्षेत्र के सीईओ को संदर्भित की जाएगी, जो जांच के उपरांत मामले में आयोग के निर्देशों के अनुसार कार्य करेगा।

(III) समर्थक दस्तावेज की जांच के बाद, सीईओ गंभीर चूक या कृत्य वाले ऐसे मामलों को मामला-दर-मामला आधार पर आयोग को भेजेंगे जिनमें वे आयोग के निदेश प्राप्त करना उचित समझेंगे।

(IV) 5(ii) और 5(iii) के मामला में, शिकायतकर्ता से यह सुस्पष्ट रूप से कहते हुए एक शपथ-पत्र दायर करने के लिए कहा जाएगा कि उसकी शिकायत और उसके साथ संलग्न किए गए समर्थक दस्तावेजों में किए गए सभी प्रकथन सही और वास्तविक हैं।

(V) सीईओ द्वारा इस तरह अग्रेषित किए गए संदर्भों को मामला-दर-मामला आधार पर कार्रवाई की जाएगी और आयोग उन मामलों को पूछताछ/टिप्पणियों के लिए उपयुक्त प्राधिकारी को भेज सकता है।”

22. In the last para of the circular, the direction is that the Chief Election Officers shall bring the aforesaid guidelines to the notice of the District Election Officers and Returning Officers for their guidance. There cannot be a dispute that the circular having statutory flavour was required strict compliance by all these officers.

23. A careful reading of Clause '5' extracted above, indicates that after completion of the Nomination exercise, on receipt of the complaint of filing false affidavit, if filed with the supporting documents/evidence, the said complaint shall be forwarded to the Chief Electoral Officer of the State who after making an enquiry into the documentary evidences shall

send the matter to the Election Commission on case-to-case basis and the direction of the Commission be sought in such cases. It also states that on the complaint filed with the supporting documents/evidence, the complainant shall be asked to file his affidavit deposing therein that all the averments in the complaint and the enclosed supporting documents were true and correct. It further provides that in all such cases forwarded to the Commission by the Chief Electoral Officer, the proceeding shall be conducted on case-to-case basis and the Commission may send the matter to call for the report/comment of the appropriate officer.

24. Having noted the directions contained in Clause 5 of the circular dated 24th August, 2021, it seems to us that the said circular had been issued as a guideline to the District Election Officers and the Returning Officers to deal with the complaints of filing false affidavit in Form-26 received by them during the nomination exercise and after the nomination exercise is over, but during the course of the election.

25. Insistence of the learned Senior Counsel for the Election Commission of India, however, is that the said guideline will operate even in case of any complaint received after the elections are over, as Section 125-A merely provides penal measures for filing affidavit giving false information or concealing information and it nowhere confers duty or power to a particular authority/officer to take any action.

26. The submission is that the above noted circular issued by the Election Commission of India to all the Chief Electoral Officers of all States and Union Territories, being the guidelines issued by the Election Commission of India has got statutory force and has to be followed by all the concerned officials, in absence of any other statutory provision holding the field. It was further argued that while making enquiry, it was incumbent upon the concerned officer to issue notice to the candidate against whom the complaint is made, in view of the directions issued by the Madras High Court in its judgment and order dated 14.7.2021, as extracted in paragraph '4' of the said circular.

The contention, thus, is that the action of the Sub-Divisional Magistrate, Sirathu, Kaushambi in issuing notices to the petitioner to call for his explanation cannot be said to suffer from any error of law.

27. Before deliberating on the action of the officers in the present case, certain statutory provisions laying down the powers and duty of three officers, relevant for us, are to be taken note of. The Chief Electoral Officer is an officer appointed under Section 13A of the R.P. Act, 1950, who is an officer of the Government, designated or nominated by the Election Commission in consultation with the Government concerned. He acts under the superintendence, direction and control of the Election Commission and the work and duty assigned to him under sub-section (2) of Section 13-A is to supervise the preparation, revision and correction of all electoral rolls in the State under the R.P. Act, 1950. As per Section 20 of the R.P. Act, 1951, the general duties of the Chief Electoral Officer is to supervise the conduct of all elections in the State. The District Election Officer is a designated or nominated officer of the Government of the State in accordance with the Section 13-AA of the R.P. Act, 1950, who acts under the superintendence, direction and control of the Chief Electoral Officer to coordinate and supervise all work in the District or in the area within his jurisdiction in connection with the preparation and revision of the electoral rolls.

28. As per the R.P. Act, 1951, the general duties of the District Election Officer is to coordinate and supervise all work in connection with the conduct of all elections to Parliament and the Legislature of the State, in the district or in the area within his jurisdiction. The District Election Officer shall also perform such other functions as may be entrusted to him by the Election Commission and the Chief Electoral Officer.

29. The Returning Officer as per Section 21 of the R.P. Act, 1951 is an officer of Government or of a local authority, designated or nominated by the Election Commission in consultation with the Government of the State. The general duty of the Returning Officer at any election is to do all

such acts and things as may be necessary for effectually conducting the election in the manner provided by the Act and Rules or Orders made thereunder.

30. Section 28A of the R.P. Act, 1951 provides that the Returning Officer including the Assistant Returning Officer appointed under Part IV for the conduct of elections shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officer shall, during that period, be subject to the control, superintendence and discipline of the Election Commission.

31. From the above provisions, it is evident that though the Chief Electoral Officer and the District Election Officers are designated or nominated officers for preparation, revision and correction of electoral rolls and their work as per their designation or nomination is perpetual in nature but the appointment of the Returning Officer under Section 21 of the R.P. Act, 1951 Act has a shelf-life, as he is on deputation to the Election Commission for the period of election from the date of notification for election till the date of declaration of the result. It is settled that the “election” commences from the initial notification and culminates in the declaration of the return of a candidate, Section 28A of the Representation of the People Act provides that the Returning Officer is an officer appointed under the said Act on deputation for the conduct of election during the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election. In view of the clear language of the aforesaid provisions, with the declaration of the result, the Returning Officer becomes *functus officio* and cannot act in any of the matter relating to or concerning the elections.

It seems that for this reason, in the circular dated 24th August, 2021, the direction to make inquiry in the matter of filing of false affidavit

during the nomination process though was given to the Returning Officer, but once the nomination exercise is over, such complaints are directed to be referred to the Chief Electoral Officer, who is required to seek instructions from the Election Commission. The District Election Officer, who acts under the superintendence, direction and control of the Chief Electoral Officer is also required to refer/forward the complaint to the Chief Electoral Officer in view of Clause 5 of the Circular.

32. Though there is no clarity in the circular dated 24th August, 2021 as to whether the procedure provided therein for dealing with such complaints of filing false affidavit in Form-26, in para '5', would also apply to the complaints received even after conclusion of the election, i.e. after the declaration of the result, but in view of the stand of the Commission as asserted by the learned Senior Counsel appearing on its behalf, it is evident that any complaint of false affidavit received by any other officer after the nomination exercise is over, is required to be referred to the Chief Electoral Officer, if such a complaint is supported by some document/evidence. The Chief Electoral Officer further shall be required to make a scrutiny of the supporting evidence/documents and shall ask for the affidavit of the complainant before forwarding the complaint to the Election Commission. Clause 5(v) of the circular dated 24th August, 2021 (which is statutory in character), clearly provides that such forwarded complaints shall be dealt by the Election Commission on case-to-case basis and the Commission may seek comments of the appropriate officer while dealing with the complaint.

33. In the instant case, as against the procedure laid down by the Election Commission in the above noted circular itself, on receipt of the complaint of a person named as Dileep Patel, whose identity cannot be ascertained from the description in the complaint, in the office of the District Election Officer, the Sub-Divisional Magistrate, Sirathu, Kaushambi had issued the notice dated 18.5.2022. Another complaint of Omkar Nath Gautam dated 20.5.2022 was also addressed to the District

Election Officer, Kaushambi. The second notice dated 25th May, 2022 though does not refer to the second complaint but the third notice dated 3rd June, 2022 issued by the Sub-Divisional Magistrate, Sirathu, Kaushambi shows that the second complaint dated 20.5.2022 was also forwarded to the Sub-Divisional Magistrate, Sirathu, Kaushambi by the District Magistrate/District Election Officer, Kaushambi. The Sub-Divisional Magistrate, who was the Returning Officer in the elections to the Member of Legislative Assembly held in February and March, 2022, had no jurisdiction to deal with the complaints after the nomination exercise much less after the election was over. The action of the District Election Officer/the District Magistrate, Kaushambi in forwarding the complaints to the Returning Officer/the Sub-Divisional Magistrate, Sirathu, Kaushambi instead of referring the complaints to the Chief Electoral Officer, U.P., is in clear violation of Clause 5(ii) of the circular dated 24th August, 2021 issued by the Election Commission of India. Both the notices dated 18th May, 2022 and 25th May, 2022 are, thus, liable to be set aside being outcome of an illegal action of the District Election Officer/the District Magistrate, Kaushambi.

34. As regards the third notice dated 3rd June, 2022, we find that the said notice was issued as a reminder to the two previous notices dated 18.5.2022 and 25.5.2022 issued by the Returning Officer namely the Sub-Divisional Magistrate, Sirathu, Kaushambi who had no jurisdiction to make any enquiry in the matter. It was argued by the learned counsels for the respondents that the third notice dated 3rd June, 2022 was issued pursuant to the letter dated 17th May, 2022 of the Election Commission of India directing the Chief Electoral Officer to initiate proceeding in accordance with the circular dated 24.8.2021. The Chief Electoral Officer, as such, cannot be said to have committed any mistake in forwarding the complaint to the District Election Officer, his subordinate officer to make the enquiry. The District Election Officer in his own administrative capacity directed the Sub-Divisional Magistrate, who was the Returning

Officer to make enquiry into the complaint following the circular dated 24.8.2021.

35. The arguments of the learned counsels for the respondents suffer from inherent fallacy. The letter dated 17th May, 2022 of the Election Commission addressed to the Chief Electoral Officer, U.P. simply says that the complaint was to be examined and the proceeding be conducted in accordance with the directions contained in the circular dated 24.8.2021. Meaning thereby, once the complaint was sent to the Chief Electoral Officer, U.P., he was required to follow the procedure prescribed in Clause '5' of the aforesaid circular, the first step as per Clause 5(ii) to examine was as to whether the complaint was supported by documents/evidence so as to entertain it. The second step was to examine the supporting documents and third to summon the complainant to file his affidavit in support of the complaint and the supporting documents deposing that the contents thereof are true and correct. Only after completion of these three steps in the scrutiny of the genuineness of the complaint, at the ends of the Chief Electoral Officer, the matter was required to be forwarded to the Election Commission with his report in accordance with Clause 5(iv). While making such enquiry/scrutiny, it was, however, open for the Chief Electoral Officer, U.P. to delegate the matter to the District Election Officer to make the necessary enquiry at the District Level and to submit his report. In any case, in the process of scrutiny of the complaint in accordance with Clause '5' of the circular issued by the Election Commission, the Sub-Divisional Magistrate, Sirathu, Kaushambi or the Returning Officer had no role to play.

36. In light of the above, a perusal of the letter dated 26th May, 2022 of the Chief Electoral Officer shows that he had directed the District Election Officer, Kaushambi to make an enquiry in accordance with the directions contained in the circular dated 24.8.2021 and submit his report. The appropriate action of the District Magistrate, Kaushambi/the District Election Officer, Kaushambi should have been to go through the circular

and make an enquiry on three points as per Clause 5(ii), (iii), (iv) of the circular and submit his report to the Chief Electoral Officer. Instead of making enquiry/scrutiny in accordance with the directions contained in the Circular issued by the Election Commission, the District Magistrate, Kaushambi/the District Election Officer had forwarded the complaint to the Returning Officer, in a casual manner, by misreading the directions contained in the Circular dated 24th August, 2021. The District Magistrate/the District Election Officer has, thus, committed a glaring illegality in directing the Returning Officer/the Sub-Divisional Officer, Sirathu, Kaushambi to deal with the complaint. The notice dated 3rd June, 2022 issued by the Sub-Divisional Officer, Sirathu, Kausuambi being the result of illegal action of the District Magistrate/the District Election Officer, Kaushambi is liable to be set aside.

The contention of the learned counsels for the respondents that the said notice had been issued under the directions of the Election Commission of India by the letter dated 17th May, 2022 is found misconceived and hence liable to be rejected.

37. It is, however, kept open for the Election Commission of India to make an enquiry so as to satisfy itself as to whether the allegations in the two complaints make out a case for institution of the proceedings for imposing penalty for filing false affidavit under Section 125A of the R. P. Act, 1951. The said enquiry, in the instant case, has to be conducted by an officer not below the rank of the Deputy Election Commissioner.

38. As from the undated complaint filed by one Dileep Patel, it is not possible to ascertain the identity of the complainant and the allegation in the writ petition is that three persons named as Dileep Patel, the electors of the constituency, had given affidavits to the District Election Officer, Kaushambi that they did not file any complaint against the petitioner, an enquiry into the genuineness of both the complaints allegedly filed by one Dileep Patel and another Omkar Nath Gautam is to be conducted so as to first ascertain the genuineness/veracity of the complaints, before initiating

any further action upon the complaints. It goes without saying that once the identity of the complainants is determined, the complainants be asked to file their own affidavits in support of their complaints and only after completing the procedure as prescribed in Clause '5' of the circular dated 24th August, 2021, the matter be proceeded with by the Deputy Election Commissioner.

39. In the said enquiry into the genuineness of the complaints, it would be open for the Deputy Election Commissioner to ask for the assistance of the Chief Electoral Officer, who in turn, in his administrative capacity, may ask the District Election Officer to make enquiry into the identity of the complainants and submit his report. In that case, the Chief Electoral Officer shall forward his report to the Deputy Election Commission, without making any further efforts to enquire on the merits of the complaints.

40. In case, the Deputy Election Commissioner reaches at the conclusion that there is substance in the complaints, he may call for the relevant records to record his prima facie satisfaction on the merits of the complaints, to propose penal action against the petitioner and in that eventuality, the petitioner be given an opportunity to show cause through a notice and action for lodging of the complaint under Section 125A of the R.P. Act, 1951 can only be taken after consideration of the explanation of the petitioner. A reasoned and speaking order in accordance with law shall be passed for bringing the matter to its logical conclusion.

With the above observations and directions, the writ petition is **disposed of**.

(Vikram D. Chauhan,J.) (Sunita Agarwal,J.)

Order Date :- 16.7.2022

Brijesh