

GAHC010161522021



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

Case No. : I.A.(Civil)/1609/2021

NIJAM UDDIN CHOUDHURY
S/O LATE ISHUB ALI CHOUDHURY RESIDENT OF VILLAGE
PANCHAGRAM, PS PANCHAGRAM, PO PANCHAGRAM, DIST HAILAKANDI,
ASSAM 788802

VERSUS

MOON SWARNAKAR
W/O ASHOK VERMA AND D/O LATE BIJOY BAHADUR SWARNAKAR,
RESIDENT OF VILLAGE VIDYANAGAR (CHUNATIGOOL CHA BAGAN) PO
BIDYANAGAR, PO RAMKRISHNA NAGAR, DIST KARIMGANJ, ASSAM
788734

Advocate for the Petitioner : MR K P PATHAK

Advocate for the Respondent : MR P NAYAK

Linked Case : I.A.(Civil)/190/2022

NIJAM UDDIN CHOUDHURY
S/O LATE ISHUB ALI CHOUDHURY
RESIDENT OF VILLAGE PANCHAGRAM
PS PANCHAGRAM
PO PANCHAGRAM
DIST HAILAKANDI
ASSAM 788802

VERSUS

MOON SWARNAKAR
- W/O ASHOK VERMA AND D/O LATE BIJOY BAHADUR SWARNAKAR
RESIDENT OF VILLAGE VIDYANAGAR (CHUNATIGOOOL CHA BAGAN) PO
BIDYANAGAR
PO RAMKRISHNA NAGAR
DIST KARIMGANJ
ASSAM 788734

Advocate for : Mr. A Baruah
Advocate for : MR. P NAYAK appearing for MOON SWARNAKAR

Linked Case : El.Pet./4/2021

MOON SWARNAKAR
W/O ASHOK VERMA AND D/O LATE BIJOY BAHADUR SWARNAKAR
RESIDENT OF VILLAGE VIDYANAGAR (CHUNATIGOOOL CHA BAGAN) PO
BIDYANAGAR
PO RAMKRISHNA NAGAR
DIST KARIMGANJ
ASSAM 788734

VERSUS

NIJAM UDDIN CHOUDHURY
S/O LATE ISHUB ALI CHOUDHURY
RESIDENT OF VILLAGE PANCHAGRAM
PS PANCHAGRAM
PO PANCHAGRAM
DIST HAILAKANDI
ASSAM 788802

Advocate for : MR P NAYAK
Advocate for : MR B CHOUDHURY appearing for NIJAM UDDIN CHOUDHURY

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the applicant : Mr. K.P. Pathak, Senior Advocate,
: Mr. A. Baruah, Advocate.
For the opposite party : Mr. D. Sakia, Senior Advocate
: Mr. P. Nayak, Advocate.
Date of hearing : 01.02.2022.
Date of order : 11.02.2022.

ORDER
(C.A.V.)

Heard Mr. D. Saikia, learned senior counsel, assisted by Mr. P. Nayak, learned counsel for the opposite party/ petitioner as well as Mr. K.P. Pathak, learned senior counsel, assisted by Mr. A. Baruah, learned counsel for the applicant/ respondent.

2. The Opposite Party herein, as the election petitioner, has assailed the election of the applicant, who is the returned candidate from 8 No. Algapur Legislative Assembly Constitution of Assam Legislative Assembly and arrayed as the respondent in the election petition. In this order, for the sake of convenience, the parties are arrayed as per their position in the election petition.

3. The respondent (i.e. the returned candidate) has filed an interlocutory application for rejection of election petition, which has been registered and numbered as I.A.(C) 1609/2021. In the written objection filed by the petitioner, amongst others, has taken a plea that the interlocutory application is not maintainable. Hence, the learned senior counsel for the

respondent had submitted that the issue of maintainability be heard first. However, vide order dated 25.01.2022 in I.A.(C) 1609/2021, the Court ordered that the maintainability of the application shall be taken up along with the merit of the application and not as a preliminary issue. The said order led to filing of an interlocutory application, being I.A.(C) 190/2022, by which the respondent had, *inter alia*, prayed that the preliminary issue be decided first. Thereupon, by order dated 27.01.2022, the Court had proposed to hear the preliminary issue of maintainability first. Thus, as the preliminary objection was from the petitioner, the learned counsel for the petitioner was asked to open his argument first.

4. The learned senior counsel for the petitioner has referred to Rule 10 of Chapter-VIII-A of Part-II of the Gauhati High Court Rules ("GHC Rules" for short), which reads as follows:-

"10. All interlocutory petitions should bear a Court fee stamp of Rs.6.00 thereon and may be filed before the Judge with permission of his Lordship."

5. Accordingly, the learned senior counsel for the petitioner has submitted that both the interlocutory applications having neither been filed before this Bench assigned to take up the connected election petition, nor filed after obtaining prior permission of the Bench, both these interlocutory petitions were liable to be dismissed at the threshold. It has been urged that an Election Petition is required to be filed before this High Court under the provisions of The Representation of the People Act, 1951 (hereinafter referred to as "1951 Act" for short). It is submitted that as per Section 87 of the said 1951 Act read with the note appended to Rule 4 of Chapter-VIII-A of Part-II of the GHC Rules, it is envisaged that every election petition shall be tried by the High Court, as nearly

as may be, in accordance with the CPC. It has also been submitted that in the case of overlapping provisions contained in CPC and GHC Rules, the GHC Rules shall prevail. In support of the said submissions, reliance is placed on the following cases, viz., (i) *Chandra Kishore Jha v. Mahavir Prasad*, (1999) 8 SCC 266 (para-17), (ii) *Kailash v. Nankhu*, (2005) 4 SCC 480 (paras 5 to 10), (iii) *Maya Mathew v. State of Kerala*, (2010) 4 SCC 498 (paras 12 & 13), (iv) *Sajjan Sikaria v. Shakuntala Devi Mishra*, (2005) 13 SCC 687 (para 3, 4), (v) *Paul Roy Paske v. State of Nagaland*, 2014 (2) GLT 834 (para 12 & 13).

6. Per contra, the learned senior counsel for the respondent has submitted that the language of the Rule 10 of Chapter-VIII-A of Part-II of the GHC Rules ought to be interpreted as if the filing is to be done before the Registry of the High Court, but with permission of the assigned Bench taking up a particular election petition. It is submitted that the Judge of the Court cannot be expected to carry out ministerial work of registering an interlocutory application, which must be left to be done by the Filing Section of this Court. It is also submitted that the language of the Rule does not prohibit filing of interlocutory application without prior permission. In support of his submissions, the learned senior counsel for the respondent has placed reliance on the following cases, viz., (i) *Jamal Uddin Ahmed v. Abu Saleh Najimuddin & Anr.*, (2003) 4 SCC 257, (ii) *Abdul Jabbar v. Syeda Anwara Taimur & Ors.*, (1986) 1 GLR 257 (para 3, 4, 6, 7), (iii) *Melhupra Vero v. Vamuzo*, (1990) 1 GLR 290.

7. It would be relevant to refer to the provisions of Section 80A of the 1951 Act, which reads as follows:-

“80A. **High Court to try election petitions.** (1) *The Court having jurisdiction to try an election petition shall be the High Court.*

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose:

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

(3) The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court."

8. The Court is of the considered opinion that from the plain reading of the provisions of Section 80A of the 1951 Act, there is no room for doubt that the High Court shall have the jurisdiction to try election petition and that such jurisdiction shall be exercised ordinarily by a single Judge. The proviso to Sub-Section (2) makes it more clear that election petitions can be presented to the High Court. However, if the High Court has only one Judge, he shall try all election petitions. From the conjoint reading of Section 80A(2) and the proviso appended thereto, it is clear that if the High Court has more than one Judge, then it would be the prerogative of the Chief Justice to assign one or more Judges for the purpose of trying election petitions.

9. In this case, the issue is whether these two interlocutory applications filed before the Filing Section of the High Court and not before this Bench makes the filing of the interlocutory bad so as to entail dismissal of the interlocutory application. In this regard, although the cases of *Abdul Jabbar (supra)* and *Melhupra Vero (supra)* are on the issue of presentation of election petition, it would be relevant to extract below para 8 of the case of *Abdul Jabbar (supra)*, which was referred to in the case of *Melhupra Vero (supra)*. The said para is as follows:-

“8. The High Court is a legal entity. It consists of not only the Chief Justice and other Judges but also Officers of various departments. When the Stamp Reporter receives the election petition or the election petition is presented to the Stamp Reporter he does not do it as a delegate of the High Court. The Stamp Reporter is a limb of the High Court and not a delegate as the Stamp Reporter is entrusted to perform his duties under the rules. By framing the Rules, the High Court has not parted itself with the power to act under the Act. The Chief Justice is the Head of the body. The Judges and other Officers are limbs or parts of the body (High Court). It is therefore concluded that the said Rules are not inconsistent with the Article 329 (b) and the provisions of Section 81 or any other provisions of the Act.”

10. Coming back to the provisions of Rule 10 of Chapter-VIII-A of the GHC Rules, the said Rules consists of two parts. The first part relates to payment of prescribed court fee stamps of Rs.6.00 (Rupees six only). The second part provides that all interlocutory petitions *“may be filed before the Judge with permission of his Lordship.”* It is too well settled proposition of law that for payment of inadequate court fee stamps, no case can be dismissed and no election petition can be rejected. On a determination that the Court fee stamps was under-paid, at least one opportunity is granted to the concerned party to pay the deficit court fee stamps. Hence, the first part of Rule 10 must be held to be directory. Therefore, if one part of the Rule is directory, the other part requiring interlocutory application in an election petition *“may be filed before the Judge with permission from his Lordship”* cannot be held to be mandatory as the said part contains the word “may”. In this regard, for more reasons assigned herein after, the Court is unable to read the word “may” as appearing in Rule 10 as “shall”.

11. Firstly, it would be a too hyper-technical approach to expect that a Judge of this Court, assigned to try an election petition, should start doing ministerial work of receiving the filing of an interlocutory applications, do other associated ministerial work associated with filing, like scrutinizing of applications to find out whether it complies with other relevant rules for filing interlocutory applications, then give a report and do other works related to filing and then take up the matter on judicial side.

12. Secondly, as the Court had issued notice, it would mean that the filing of the two interlocutory applications before the Filing Section was ratified and permission was implicit. In this regard, it may be mentioned that the I.A.(C) 1609/2021 was listed before the Court on 04.10.2021 and on the said date, the Court had issued notice in the presence of the learned counsel for the petitioner. The issuance of such notice demonstrates that the permission of the Bench assigned to take up the connected election petition was implicit.

13. Thirdly, *qua* this case, the Court is of the considered opinion that the language of Rule 10 of Chapter-VIII-A of the GHC Rules does not contain any non-obstante clause by which filing of an interlocutory application in an election petition before the Registry i.e. Filing Section is prohibited. The said Rule does not prescribe that all ministerial work of accepting filing of interlocutory application has to be personally done by the Judge assigned to take up a particular election petition because in the considered opinion of the Court the Filing Section is one of the limb of the High Court which includes the Chief Justice as well the other pusine Judges of the Court. Moreover, it appears to be absurd that while an election petition can be presented before the Filing Section and the objection to an interlocutory application, as done by the

petitioner in this case, can be filed before the Filing Section, the interlocutory application itself must be filed before none other than the assigned Judge. Under the facts of this case, the issuance of notice in respect of I.A.(C) 1609/2021 constitutes implied and/or implicit permission of this Bench assigned to take up El.P. 4/2021, wherein these two interlocutory applications have been filed.

14. Fourthly, there is another way to look into this issue. Let us assume for the time being that the Filing Section of this Court is a wrong forum to file these two interlocutory applications in connection with El.P. 4/2021. Yet, these two interlocutory applications cannot be dismissed and/or rejected under the provisions of Order VII, Rule 11 CPC merely because it was filed before the Filing Section, not competent to receive it. As the connected election petition is assigned to this Bench, any interlocutory applications that may be filed in connection with El.P. 4/2021 would always be listed before this Bench. Therefore, even if the interlocutory application is filed before this High Court having jurisdiction, but before a purported wrong authority, but still, as notice has been issued by the assigned Judge, the said order dated 04.10.2021, cannot be said to be a nullity. Therefore, even if the contention of the learned senior counsel for the petitioner is accepted, at best, the consequences would be to return these two interlocutory applications to the respondent under Order VII, Rule 10 CPC read with the provisions of Section 141 CPC for filing it before this Bench, which would only cause delay in the adjudication of the matter and thus, be an act of futility. The reason why such a course would be an exercise in futility is because irrespective of the fact whether these applications are filed before the Filing Section or before the Bench, it can be taken up only by the Bench assigned to try the election petition.

15. Fifthly, it is not the case of the petitioner that the present interlocutory is barred by any law in force as envisaged under the provisions of Order VII, Rule 11(d) CPC. But, the submission of the learned senior counsel for the petitioner is that the filing was not made before the Judge. Therefore, no case has been made out for rejection of these two interlocutory applications and therefore, at best, the provisions of Order VII, Rule 10 CPC would be attracted and not the provisions of Order VII, Rule 11 CPC.

16. Sixthly, unlike an election petition, no time limit has been prescribed for presenting an interlocutory application under Order VII, Rule 11 CPC for rejection of election petition. In this regard, as indicated above, at the time when notice was issued in I.A.(C) 1609/2021, the petitioner was represented by his learned counsel, but no objection was raised at that time. If such objection had been raised then, the Court could have passed appropriate orders by formally accepting the presentation of the said interlocutory application before the Filing Section by condoning the act of filing of the application before the Filing Section.

17. Seventhly, procedural law is handmaid of justice, and Courts should be slow to dismiss an interlocutory application merely because it was filed before Filing Section instead of filing before the Judge. In this regard, It may be mentioned that in the case of *Utpal Dutta v. Indra Gogoi, M.C. 13/2001 in E.P. 7/2001*, this Court had struck down Rule 1 of Chapter VIII-A of the GHC Rules as ultra vires of Section 80, 80A and 81 of the 1951 Act read with Article 329(b) of the Constitution of India, which would have the effect of rendering as *non est* all the election petitions filed before the Registry. The said decision was

noted by their Lordships in the case of *Jamal Uddin Ahmed* and it was observed that going into the vires of the rules is an intellectual exercise in futility.

18. Somewhat similar is the situation in this case. The present order is also an exercise in futility because as indicated above, an interlocutory application is not liable to be dismissed even if it is not in consonance with Rule 10 of Chapter-VIII-A of the GHC Rules. At best it would be a case of return of the interlocutory application as envisaged in Order VII, Rule 10 CPC and would not entail its rejection within the meaning of Order VII, Rule 11 CPC. However, if the contention of the learned senior counsel for the petitioner is accepted, then a Judge assigned with a case would have to perform ministerial work of accepting filing of interlocutory applications filed by the parties from time to time and end up doing clerical work which is hitherto assigned to the Filing Section, instead of judicial work. Therefore, the contention of the petitioner raised in form of preliminary objection as to maintainability of these two interlocutory applications deserves to be and is accordingly rejected.

19. In view of the discussions above, the Court finds no point to burden this order in discussion on the cases cited by the learned senior counsel for the petitioner as those decisions are not the authority on the point that filing of interlocutory applications before the Registry would entail dismissal and/or rejection of such interlocutory applications. Nonetheless, it may be mentioned that in the case of *Chandra Kishore Jha (supra)*, as per the Patna High Court Rules, an election petition was required to be presented before the open Court. The election petition was presented on 17.05.1995 in the open Court. However, the limitation had expired on 16.05.1995. However, it was not in dispute that

the petitioner was ready for presentation of the election petition on 16.05.1995, but at 3.15 pm, an Obituary Reference was held and thereafter the Chief Justice had declared that the Court would not sit for the rest of the day. Thus, in the context of presentation of election petition, the Supreme Court of India had opined that in the Patna High Court, election petition can only be made in the manner prescribed by Rule 6 of Chapter XXI-E, and it was further observed that no other mode of presentation of election petition is envisaged under the Act or the Rules framed thereunder and accordingly, it was held that under no circumstances an election petition could be filed before the Registrar to save the period of limitation and in this regard, reference was made to the salutary principles laid down in the case of *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. Nonetheless, on finding that in the said case Section 10 of the General Clauses Act, 1897 was attracted, the appeal was allowed and the election petition was ordered to be tried. The ratio of the case of *Nazir Ahmad (supra)* is not in conflict in this case. It is reiterated at the cost of repetition that period of limitation is prescribed in the statute for presentation of the election petition, but no limitation is prescribed for presentation of an interlocutory application. Therefore a mere aberration of the procedural rules, which is nothing but a handmaid of justice, would not entail dismissal and/or rejection of the interlocutory application. Whereas if an election petition is presented in aberration of the Rules, it would be fatal as there is every likelihood that the consequences of Order VII, Rule 11 CPC, in a given case may be attracted.

20. Resultantly, in view of the discussions above, the preliminary

issue of maintainability of these two interlocutory applications is decided in the negative and against the petitioner who has raised the issue. As the preliminary issue of maintainability has been taken up and decided, nothing survives for any further hearing in I.A.(C) 190/2022. Hence, the said interlocutory application stands disposed of.

21. It is clarified that the observations made herein is qua the issue raised in these two interlocutory applications and that the observations made herein are not intended to constitute a binding precedent as to the interpretation of the Rule 10 of Chapter VIII-A of Part-II of the GHC Rules, which is left open to be decided in an appropriate case.

22. Let I.A.(C) 1609/2021 be listed on 24.02.2022 for consideration on merit.

JUDGE

Comparing Assistant