

**In the Court of Samar Vishal,
Additional Chief Metropolitan Magistrate – I
Rouse Avenue Court Complex, New Delhi**

**CCC No 52/2019
Atishi Marlana vs Gautam Gambhir
22.10.2019**

ORDER

1. The complainant Ms. Atishi Marlana has filed the present complaint to prosecute Mr. Gautam Gambhir (respondent) for commission of offences under section 17/31 of the Representation of People Act, 1950, section 125-A of the Representation of People Act, 1951 and section 417 of the Indian Penal Code, 1860.

2. Mr. Gautam Gambhir was contesting the 2019 elections of Union Legislature as candidate of Bhartiya Janta Party from East Delhi Constituency, when this complaint was filed. The complainant Ms. Atishi Marlana was also contesting for the same seat. After the submission, scrutiny and publication of his nomination on 23/24.04.2019, the complainant Ms. Atishi

Marlena came to know that Mr. Gautam Gambhir was registered as voter in two different constituencies in violation of law. These constituencies were Karol Bagh and Rajinder Nagar. She procured the physical copies of electoral rolls of both the constituencies to confirm this fact. She has alleged that Mr. Gautam Gambhir is an educated man, candidate for a National Political Party and is aware of all laws relating to election and consequences of flouting those rules. On these allegations, she has approached the Court in order to prosecute Mr. Gautam Gambhir.

3. In order to support her allegations, she has examined herself as a witness and called two other witnesses from the office of Electoral Registration Office of both the constituencies.

4. I have heard the arguments of her counsel on the issue of summoning.

5. Before proceeding further, I wish to make it clear that as far as the fact that Mr. Gautam Gambhir was registered in two different constituencies, I believe what complainant says and

that she is able to prove a prima facie case in this regard. Therefore, factually she is correct. But whether mere registration of a person as a voter, in two different constituencies is an offence and whether to summon Mr. Gautam Gambhir for the commission of offences as alleged, is a question of law, which I now proceed to decide.

6. The complaint states that as per section 17 read with section 31 of the Representation of People Act, 1950, it is an offence for a person to have more than one voter I-cards if the same have been obtained by making false declaration/statement. No person can be enrolled as a voter in more than one constituency and doing so is a criminal offence punishable with a sentence upto one year or with fine or both.

7. To better understand this contention, it is worthwhile to reproduce section 17 and 31 both.

Section 17 - No person to be registered in more than one constituency.—No person shall be entitled to be registered in the electoral roll for more than one

constituency.

8. Section 17 is not a penal provision but a legal mandate that a person cannot be registered as a voter in more than one constituency. The provisions of section 17 are directory in nature and a candidate cannot even be disqualified for its violation. The nomination of a candidate is not void merely because his name appears in two different constituencies. Reliance is placed on the judgment of ***Shanti Swaroop v. Abdul Rehman, AIR 1965 Madh Pra 55(59)***. However, in the case of ***Baburao vs Manikrao And Anr AIR 1999 SC 2028, 1999(3)SCR 547***, Hon'ble Supreme Court has held that the provisions of section 17 are mandatory in nature. But there is nothing to suggest in Section 16 of the Act that if a person's name finds a place in more than one constituency that would automatically entail disqualification from contesting in any one of the constituencies. The question whether the entries of the name of a person in two Assembly Constituencies entail any disqualification and render the election void on that count was answered by Hon'ble Supreme Court in negative holding that a person is not so disqualified if his name finds place in more than two

constituencies.

9. Therefore, if a person cannot be disqualified from contesting elections merely because he is a voter in two different constituencies, his criminal prosecution for having so registered will be completely unauthorised in law. As said earlier, the violation of section 17 does not create any penal liability and therefore merely because a person is registered as a voter in more than one constituency, it does not amount to any criminal offence.

10. Where the elector applies for inclusion of his name in another constituency, the electoral registration officer of the first constituency has to pass an order under Section 23 of that Act about removal of the name from the electoral roll of that constituency and such removal is not an automatic consequence of the entry of the name in the electoral roll of the other constituency, and the failure of the electoral registration office of the first constituency to remove the name of the applicant from the electoral roll of that constituency does not make the entry invalid or liable to be called in question otherwise than by way of

an appeal under Section 24 of the Act. Therefore, the task of deletion of the name of an applicant from his previous constituency is to be done by the Electoral Registration Officer of the previous constituency.

11. Now coming to section 31. Section 31 makes false declarations with respect to electoral roll, an offence. It reads as under -

Section 31 - Making false declarations.—If any person makes in connection with—

(a) the preparation, revision or correction of an electoral roll, or

(b) the inclusion or exclusion of any entry in or from an electoral roll, a statement or declaration in writing which is false and which he either knows or believes to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

12. It is an act of making a statement or declaration by a

person in violation of this provision, which constitute an offence. Therefore, there has to be some substantive statement or declaration by the person who is accused of this offence. That false statement or declaration, then has to be proved on record because that will be the basis of the criminal liability. If such allegedly false statement or declaration is not brought on record and are projected by mere presumptions, it will not be proper to proceed against a person under this provision. The complaint is bereft of the fact that what false statement or declaration was made by Mr. Gautam Gambhir so as to bring him within the preview of this prohibition. The complaint is filed only an information that his name is registered at two difference places without making any further enquiry whether there is any false declaration on his part for his registration in any of those electoral rolls. The complainant made an unsuccessful attempt to summon the record in this regard. She summoned Form-6 of the respondent but the witness from Electoral Registration Office deposed that Mr. Gautam Gambhir was registered as a voter in AC-23 in Karol Bagh in 2002 which at that time was AC-68. In 2002, there were no Form-6. In 2002, the BLOs (Booth Level Officers) used to go door to door. They collect information

regarding the voters and on that basis the voters were registered. EPIC (Electoral Photo Identity Cards) was issued to Mr. Gautam Gambhir in 2012 when he provided his photographs and other details. The name of Mr. Gautam Gambhir has now been deleted from AC-23 Karol Bagh as a voter on the basis of an online application dated 24.06.2019 to this effect. AC-23 Karol Bagh came into existence in 2007 and therefore the documents with respect to the inclusion of the name of Mr. Gautam Gambhir are not available in the office. Any document prior to 2007 is not traceable/found in AC-23, Karol Bagh, New Delhi.

13. The other witness from the office of Electoral Registration Office, Rajinder Nagar has deposed that the Form No. 6 of EPIC of respondent are weeded out. He is registered as a voter in Rajinder Nagar since 2009.

14. Therefore, the only evidence of anything on behalf of the respondent is that he provided the documents and his photographs in the year 2012. There is no detail of what these documents were. Giving a photograph does not amount to false

declaration or statement. There is no evidence on record to show what, if any, false statement or declaration was made by respondent Mr. Gautam Gambhir which may amount to an offence under section 31 of the Representation of People Act. There is another aspect of the matter. If these details were given in 2012, any complaint in this regard in 2019 shall be clearly barred by the law of limitation. The offence under section 31 is punishable with an imprisonment of one year and therefore the limitation period under section 468 Cr.PC to file the complaint shall be one year from the date of offence. The complaint or the evidence does not disclose the commission of offence under section 31 Representation of People Act, 1950. The complainant's counsel only relied on this vague and sketchy evidence of PW-4 J. Anand Kumar unsupported by any document. He further tried to take refuge from the law of limitation by saying that it is a continuing offence which to me is a completely untenable submission in law. It is true that under section 472 Cr.PC, in case of a continuing offence, a fresh period of limitation begins to run at every moment of the time period during which the offence continues. The expression, 'continuing offence' has not been defined in the Cr.P.C. because

it is one of those expressions which does not have a fixed connotation, and therefore, the formula of universal application cannot be formulated in this respect. A continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury. In case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue. If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. The distinction between the two wrongs therefore depends, upon the effect of the injury. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and

an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all. Therefore, in the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue. The offence under section 31 of the Representation of People Act is not a continuing offence.

15. Therefore, not only on merits but for the delay in approaching the Court the complainant has no remedy at all as far as section 31 of the Representation of People Act is concerned.

16. Now coming to the last limb of the allegations. It is alleged that the respondent has given false information in his nomination

form and thereby committed an offence under section 125-A of the Representation of People Act, 1951 and of cheating under section 417 of the Indian Penal Code.

17. In the case of ***A. Abdul Aziz vs. M. Nissam and Anr., 2013 SCC OnLine Ker 24314 : (2013) 2 KLJ 658***, it is held that no complaint for prosecution of an electoral offence with respect to the furnishing of incorrect or false particulars, knowing them to be false, over an affidavit sworn to and submitted with the nomination paper by a candidate can be entertained unless specific and definite allegation revealing such offence are spelt out to take cognizance of such an offence and proceed further. A vague allegation that false particulars were stated in the affidavit cannot form the basis for prosecution of a candidate. There should be specific allegation with particulars imputing that he had failed to furnish information mandatorily required or gave false information which he knew or had reason to believe to be false or concealed any information in his affidavits.

18. In the case of ***Ganesh Kumar vs. P. K. Raju, 2013 (2) KLT 434***, it is held that the Act of 1951 is a self contained code

and in relation to an electoral offence for which specific penalty is provided thereunder the offender is liable to be prosecuted for such offence as covered by that Act. Where a specific penal provision is made under the Act providing a penalty for filing false affidavit under Section 125A of the Act, without anything more, for filing such a false affidavit, that alone, no prosecution under the general penal provision of Section 193 of the Penal Code is entertainable. Furthermore, the penal provision under Section 193 of IPC has to be understood giving significance to the expressions 'intentionally giving or fabricating false evidence', 'in any stage of a judicial proceeding' or 'in any other case'. Giving or fabricating false evidence in the aforesaid Section whether it be in the judicial proceeding or in any other case must have been intended to form an opinion on the evidence erroneously and such forming of opinion should be touching the point material to the result of such proceeding. Viewed in that angle, the declaration to be made by a candidate in his affidavit filed with his nomination paper over the matters prescribed by the Election Commission when he contests an election, it cannot be said that the candidate is giving evidence by affidavit but at best, only a declaration on the particulars

sought for. If the candidate fails to furnish information or gives false information which he knows or has reasons to believe to be false or conceals any information, he is liable to be prosecuted only for the offence under Section 125A of the Act, and not for the penal offence under Section 193 IPC.

19. Filing of false affidavit before the Election Commission of India can be punished only under section 125 A of the Representation of People Act, 1951. Therefore, a person cannot be prosecuted or convicted under section 417 IPC for giving any false information in the election nomination form.

20. Now, it has to be seen whether the offence under section 125-A of the Representation of People Act is made out or not.

21. With respect to the allegations of section 125 A of the Representation of People Act, 1951 is concerned, it is alleged that he has in Form 26 Part A mentioned that he is enrolled in Rajinder Nagar constituency. As far as this information is concerned, there is no issue but according to complainant's counsel, the respondent is also registered in Karol Bagh

constituency. According to complainant, this amount to concealment punishable under section 125-A of the Act.

22. Section 125A of the Representation of the People Act, 1951 reads as under :

“125-A. Penalty for filing false affidavit, etc.

A candidate who himself or through his proposer, with intent to be elected in an election,

(i) fails to furnish information relating to subsection (1) of section 33A; or

(ii) gives false information which he knows or has reason to believe to be false; or

(iii) conceals any information, in his nomination paper delivered under subsection (1) of section 33 or in his affidavit which is required to be delivered under subsection (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.”

23. Therefore, under section 125 A, an act of concealment is an offence if the concealment is of the information in the nomination papers 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 stated earlier, the alleged concealment is in the affidavit(Form 26) by the respondent wherein it is stated “My name is enrolled in AC-39, Rajinder Nagar in PC-04, New Delhi, NCT of Delhi, at Serial No. 285 in Part No. 43”. It deals with that part of the affidavit where a candidate has to disclose his place of enrollment as a voter. It is not the case of the complainant that this information is wrong. The only allegation is that he was registered in Karol Bagh constituency is concealed. It is clear that in this Form, the candidate has to declare the place of his registration which is rightfully declared. There is no other information in any other column which is concealed or wrongly given. Not mentioning the second place of registration as a voter is not a concealment within the meaning of section 125 A of the Act. As discussed earlier, when mere registration at two places is not a disqualification to contest the election, how can a mere fact that one of the place of registration was not mentioned in the

nomination form or affidavit may amount to concealment and a criminal offence. The positive information was already given in the affidavit. The purport of section 125-A is not to punish those concealments which are not required by the law to be given. I am of the view that by giving the information of registration as a voter in Rajinder Nagar constituency, the respondent has complied with the provisions of section 33 (1) and 33A(2) of the Act.

24. Therefore, in the facts and circumstances of the case, the allegations against the respondent are baseless and not legally sustainable. In view of the aforesaid discussion, the complaint is dismissed under section 203 of Cr.PC.

**Announced in the open Court
on 22nd day of October 2019**

**[Samar Vishal]
ACMM-I/RACC/ND
22.10.2019**