

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPLICATION NO.16 OF 2015
IN
ELECTION PETITION NO.17 OF 2014
WITH
ELECTION PETITION NO.17 OF 2014

Shri Subhash Ramkishan Agarwal .. Petitioner

vs.

1. Shri Gautam Sukhdev Chabuskar .. Applicant
(Org.Respondent no.1)
2. Returning Officer .. Respondent no.2

Mr.D.S.Patil along with Mr.B.G.Ligade for the petitioner

Mr.Pramod Nanasaheb Patil along with Mr.Ajit Hon for the applicant in
AEP No.16/2015 and respondent no.1 in Election Petition

Mr.U.S.Upadhyay, A.G.P a/w Ms.Kavita Solunke, A.G.P for the
respondent no.2

CORAM : K. K. TATED, J.
DATE : DECEMBER 23, 2016

P.C.:

1 Heard the learned counsel for the parties.

2 This application is preferred by respondent no.1 Gautam Sukhdev Chabuskar elected candidate of Maharashtra Legislative Assembly.

3 In the present proceedings, the petitioner Subhash Ramkishan Agarwal filed Election Petition No.17 of 2014 for declaration that the nomination of the applicant has been improperly accepted by the Returning Officer of 206 Pimpri (SC) Legislative Assembly Constituency and the election of the applicant is void due to non-compliance of the provisions of the Constitution of India and the Representation of the People Act, 1951 (hereinafter referred to as the “said Act”) and Rules and Orders made under the Act. The petitioner raised several grounds in Election Petition including the election in question was not conducted as per the procedure, rules and regulations as well as mandatory provisions of the said Act and the orders issued by the Election Commission.

4 It is the case of the petitioner that the applicant furnished wrong / incomplete information in the affidavit along with the nomination form. Hence, the said form ought to have been rejected by the Election Commissioner at the threshold only. The petitioner also made grievance about incorrect information in respect of cases pending against the applicant. The applicant made false statement in the affidavit to the effect that he has no government dues which, he was liable to pay. The applicant failed to pay electricity bills issued by Maharashtra State Electricity Distribution Company Ltd. in respect of consumer No.170144270021. The applicant also suppressed innumerable properties belonging to him and his spouse namely his wife Ms.Sandhya Gautam Chabuskar particularly in respect of land being Survey No.11/1/1B/4 situated at Village Pimpri Dist. Pune. The applicant also failed to disclose bank accounts held by his wife in Vijaya Bank and Cosmos Bank respectively. Even the applicant failed to give

correct PAN number of his wife in nomination form. The applicant failed to pay telephone bill which was in the name of his wife being phone number 020 27410172 and same was disconnected for non-payment of bills of Rs.5,875/-. The applicant also suppressed the loan taken by him through his wife of Rs.6,60,000/- from Sidharth Co-operative Bank Ltd., Pune (Dapodi Branch) on land being Survey No.11/1/1B/4. On these and other grounds the petitioner filed Election Petition for declaration that the election of the applicant from 206 Pimpri (SC) Legislative Assembly Constituency is void due to non-compliance of the provisions of the Constitution of India and the said Act.

5 The applicant original respondent no.1 preferred the above mentioned application for dismissal of the Election Petition for non-compliance of the mandatory provisions of the said Act. The applicant contended that the petitioner failed to comply the provisions of section 81(3) of the said Act and therefore, the Election Petition is liable to be dismissed summarily. He also pleaded in his application that the petitioner failed to disclose any cause of action for filing the present Election Petition and therefore, same be dismissed with costs.

6 The learned Counsel for the applicant submits that the Election Petitioner is not filed within the stipulated period of 45 days and copies of Election Petition duly attested by the petitioner under his own signature to be true copies of the petition. He submits that the copy which was filed along with the original petition and which was served on the applicant was not at all attested by the petitioner under his own signature as a true copy of the original petition. He submits that on the

docket of Petition served on the applicant, other than the advocate on record for the petitioner has signed and attested the petition as true copy. None of the pages of the copy of the petition was signed by the petitioner as true copy. Thus, the petitioner has miserably failed to comply with the mandatory provisions of section 81(3) of the said Act as he has not filed true copy of the original petition in the Registry of this court nor has he served as a true copy of the petition on the application as required under section 81(3) of the said Act.

7 The learned Counsel for the applicant submits that the petitioner served incomplete copy of the Election Petition on the applicant. Photocopies of the court fees affixed on the original petition was not in the copies filed in the Registry along with the Election Petition and the copies served on the applicant. He submits that in the index of the original petition there was handwritten entry at Serial No.3A and against the said entry, the words "Concise Statement of Facts" was handwritten. In similar way, at several places, the petitioner carried out amendment but the same was not made in a copy which was served on the applicant. Hence, the petition is liable to be dismissed with costs.

8 The learned Counsel for the applicant submits that on page 27 of the original petition two paragraphs have been added in handwritten namely paragraphs 5A and 6A. In the copy filed along with the original petition with Registry and in the copy served on the applicant, those two paragraphs completely missing. Apart from that whatever correction made by the petitioner at the time of filing Election Petition in the Registry of this court, the same is not reflected in the copy

served on the applicant. Apart from that, the petitioner showed two respondents in the Election Petition; one applicant himself and second Returning Officer. In the entire petition, nowhere it is stated by the petitioner whose election he wants to set aside by the present Election Petition. In prayer clauses (a), (b), (c) and (d) petitioner carried out amendment showing respondent no.1 but the same was not reflected in the copy served on the applicant. He produced and placed on record copy of the Election Petition served by the petitioner. Same is taken on record and marked 'X' for identification. He submits that comparing original petition with the copy served on the applicant shows that petitioner without carrying out any correction in the copy of the petition, served the same on the applicant. On this ground, the Election Petition is liable to be dismissed.

9 The learned Counsel for the applicant further submits that the applicant failed to verify the petition according to law. He submits that in the verification clause on page 30, the petitioner failed to verify the paragraph 5A and 6A. Same was not inserted in the verification clause. On this ground also, the petition is liable to be dismissed.

10 The learned Counsel for the applicant further submits that even the Exhibit-'M' to the copy of petition which was served on applicant is not visible. He submits that petitioner along with the copy of the petition which was served on the applicant annexes the photocopy in Black and White at Exhibit-'M' whereas in the original petition he placed on record coloured photographs. This itself shows that the petitioner failed to serve true copy of the petition on the applicant and hence, he failed to comply the provisions of the said Act and therefore,

petition is liable to be dismissed summarily.

11 The learned Counsel for the applicant submits that even in affidavit in support of the petition on page 175, petitioner failed to disclosed which paragraphs of the petition are true to his knowledge and which are on information and same to be treated as true. Apart from that, affidavit in support of petition is not according to Civil Procedure Code, 1908 and hence, petition is liable to be dismissed with costs for non-filing of appropriate affidavit in support of petition. In support of all these contentions, the learned Counsel for the applicant relies on the following authorities:

- a) *Satya Narain vs. Dhuja Ram and Others, (1974) 4 SCC 237*
- b) *Sharif-Ud-Din vs. Abdul Gani Lone, (1980) 1 SCC 403*
- c) *F.A. Sapa and Others vs. Singora and Others, (1991) 3 SCC 375*
- d) *Manohar Joshi vs. Nitin Bhaurao Patil and Another, (1996) 1 SCC 169*
- e) *Dr.Shipra (Smt.) and Others vs. Shanti Lal Khoiwal and Others, (1996) 5 SCC 181*
- f) *Ajay Maken vs. Adesh Kumar Gupta and another, (2013) 3 SCC 489*

12 The learned Counsel for the applicant submits that the Apex Court in the matter of *Satya Narain vs. Dhuja Ram and Others* (Supra) held that the very object of expeditious trial will be defeated if the presentation of the Election Petition should be treated casually and lightly permitting all kinds of devices to delay the ultimate trial.

Therefore, the first part of section 81(3) of the said Act is a pre-emptory provision and total non-compliance with the same will entail dismissal of the Election Petition under the said Act. He submits that in the case in hand, petitioner failed to provide true copy of the petition filed by him in the Registry. He submits that section 81 (3) of the said Act is mandatory to comply at the time of filing the Election Petition. He submits that as per the said provisions, every Election Petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner in his own signature to be a true copy of the petition. He submits that in the case in hand, neither the petitioner provided true copy as it is filed by him in the Registry of this court nor the copy which was served on the applicant was made as a true copy by the petitioner himself. He submits that on the docket of the said copy of the petition, one Mr.Saranjame made a true copy on behalf of advocate on record Mr.Drupad S. Patil. He submits that this itself shows that neither the petitioner himself nor his advocate made the said copy as a true copy.

13 The learned Counsel for the applicant submits that the Apex Court in the matter of *Sharif-Ud-Din vs. Abdul Gani Lone* (Supra) held that as per the provisions of the said Act, the copies of the petition shall be attested by the petitioner as a true copies under his own signature is mandatory, and failure to comply with the requirement renders the petition liable to be dismissed under the said Act. In support of this contention, he relies on paragraph 17 and 18 of the said judgment which reads thus:

“17. It is seen from the above decision, that this Court held that the second part of Section 81(3) of the Central Act had

been complied with after holding that the copy of the petition and the affidavit filed along with it as required by law constituted one single document and the signature in original of the petitioner at the foot of the affidavit satisfied the requirements of Section 81(3) of the Central Act. In none of the decisions of this Court referred to above it has been held that the absence of the signature of the election petitioner on the copies of the petition was not a material defect.

18. It was argued by the learned Counsel for the appellant that the object of enacting Sub-section (3) of Section of the Act which was merely procedural in character being that the respondents should be able to secure copies of the election petition as early as possible to enable them to file their statement of objections to it early, it would be sufficient compliance with the said provision if the true copies are filed along with it and since in the instant case, there had been no allegation that the copies which were filed were not exact copies of the original election petition, the petition should have been disposed of on its merits instead of dismissing it under Section 94 of the Act. He contended that the attestation made by the advocate on the copies was sufficient to assure the respondent that the copy served on him was in reality a true copy of the election petition. He also contended that if a suit instituted in a civil court was not to be dismissed on the ground that the copy of the plaint was not authenticated to be a true copy by the plaintiff under his own signature, there was no justification for treating the second part of Section 89 of the Act as mandatory. It is true that Section 89(3) of the Act is purely procedural in character and that ordinarily procedural law should not be given that primacy by courts as would defeat the ends of justice. But if a law even though it may be procedural in character insists that an act must be done in a particular manner and farther provides that certain consequences should follow if the act is not done in that manner, courts have no option but to enforce the law as it is. A rule of limitation, for example, which is generally considered as procedural in character is strictly enforced by courts since the rule lays down that no court shall entertain a suit, an appeal or an application which is barred by time.”

14 The learned Counsel for the applicant submits that the Apex court in the matter of *F.A. Sapa and Others vs. Singora and Others* (Supra) held that for non-compliance of section 81(3) of the said Act, Election Petition is required to be dismissed summarily. He relies on paragraph 30 of the said authority which reads thus:

“30. The next objection is based on the language of Section 81 of the R.P. Act. This Section deals with the presentation of an election petition. Sub-section (1) thereof says that an election petition may be presented by any candidate at such election or any elector within 45 days from, but not earlier than, the date of the election of the returned candidate or if there are more than one returned candidate at the election and the dates of their election are different, the later of those dates. This Sub-section specifies on what ground or grounds the election of the returned candidate can be challenged, who can challenge the election and imposes a period of limitation for filing such a petition. Sub-section (2) of this section was omitted by Act 47 of 1966. Then comes Sub-section (3) which stipulates that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. This Sub-section enjoins (i) supply of such number of copies of the petition as are respondents and (ii) every such copy must be attested by the petitioner under his own signature to be a true copy of the petition. There is no controversy regarding the first aspect, the controversy centers round the second part. It must be remembered that non-compliance with the requirement of Sub-section (1) or (3) of Section 81 can prove fatal in view of Section 86(1) of the R.P. Act. See *Satya Narain v. Dhuja Ram*, (1974) 4 SCC 237; *M. Karunanidhi v. Dr. H.V. Hande* (1983) 2 SCC 473; *Mithilesh Kumar Pandey v. Baidyanath Yadav* (1984) 2 SCC 1 : (1984) 2 SCR 278; *Rajender Singh v. Usha Rani* (1984) 3 SCC 339 and *U.S. Sasidharan v. K. Karunakaran* (1989) 4 SCC 482. It is quite obvious from these decisions that the requirements of Section 81(3) are

mandatory and failure to comply with them would render the petition liable to summary dismissal under Section 86(1) of the R.P. Act.”

15 The learned Counsel for the applicant submits that the Apex Court in the matter of *Manohar Joshi vs. Nitin Bhaurao Patil and Another* (Supra) held that if the petitioner failed to comply the provisions of section 81(3) of the said Act then there is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the Election Petition and same is required to be dismissed summarily. He relies on paragraph 20 and 21 of the said authority which reads thus:

“20. Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of Section 81 requires the checking of limitation with reference to the admitted facts and Sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with Rules of the High Court. Thus, the compliance of Section 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.

21. Acceptance of the argument of Shri Jethmalani would amount to reading into Section 86 an additional ground for dismissal of the election petition under Section 86 for non-compliance of Section 83. There is no occasion to do so, particularly when Section 86 being in the nature of a penal provision, has to be construed strictly confined to its plain language.”

16 The learned Counsel for the applicant submits that the Apex Court in the matter of *Dr.Shipra (Smt.) and Others vs. Shanti Lal Khoiwal and Others* (Supra) held that even the Election Petition accepted by the Registry and numbered inspite of the defence under section 83(1) of the said Act then also court should dismiss the same for non-compliance of the mandatory provisions summarily. In support of this contention, he relies on paragraph 12 of the said authority, which reads thus:

“12. The contention that the election petition cannot be dismissed under Section 86 at the threshold on account of the omission on the part of the Registry of the High Court to point out the same as per its procedure, cannot be countenanced. Lapse on the part of the Registry is not an insurance to deny to the returned candidate the plea that the attestation of the affidavit and its certification to be a true copy is an integral part of the pleadings in the election petition. Section 81, 83(1)(c) and 86 read with Rule 94-A of the Rules and form 25 are to be read conjointly as an integral scheme. When so read, if the Court finds on a objection, being raised by the returned candidate, as to the maintainability of the election petition, the Court is required to go into the question and decide the preliminary objection. In case the Court does not uphold the same, the need to conduct trial would arise. If the Court upholds the preliminary objection, the election petition would result in dismissal at the threshold, as the Court is left with no option except to dismiss the same.”

17 The learned Counsel for the applicant submits that the Apex Court in the matter of *Ajay Maken vs. Adesh Kumar Gupta and another* (Supra) held that the purpose of stipulation under section 81(3) of the said Act is to put returned candidate on notice of various allegations made against him in order to enable him to defend himself effectively in the Election Petition. Even failure to attest the copies of Election Petition furnished to the respondent to be true copy of the Election Petition is a ground for dismissal of the Election Petition summarily. He relies on paragraph 7 and 10 of the said authority which reads thus:

“7. Legally there is a distinction between failure to sign and verify the original copy of the election petition filed in the Court and failure to attest the copy served on the Respondent to be a true copy of the election petition. While the latter failure falls within the scope of Section 81(3), the earlier failure falls under Sub-section (1)(c) and Sub-section (2) of Section 83. While the failure to comply with the requirements of Section 81 obligates the High Court to dismiss the election petition, the failure to comply with the requirements of Section 83 is not expressly declared to be fatal to the election petition. The said distinction is explained by this Court in *Manohar Joshi v. Nitin Bhaurao Patil and Anr* (1996) 1 SCC 169 paras 20 and 21.”

10. In the second part of the eighteenth objection (in para 5 of the I.A.), the Appellant herein pleaded vaguely that the Registry of the High Court gave an opportunity "to the Petitioner to rectify the mistakes/remove objections, which could not have been given". The High Court by the impugned judgment records that "the fact that the Registrar of this Court had initially notified some deficiencies which were cured, after which the matter was placed before the Court, which took cognizance of the petition, would mean that the election Petitioner was absolved of any fault".

18 The learned Counsel for the applicant submits that petitioner in his Affidavit in reply of the present application admitted the corrections made by them in the original Election Petition because Registry raised the objection and same were not reflected in true copies filed for service. He submits that petitioner admitted his mistake for supplying true copy of the petition to the applicant and submitted that typographical mistakes can be cured by the petitioner and hence, the same cannot be a ground for dismissal of petition summarily. He submits that the petitioner in his Affidavit in reply in paragraph 9 admitted that due to over sight the changes made by them in the original petition remained to be incorporated in the copies supplied along with the Election Petition. He submits that this admission itself is sufficient to dismiss the Election Petition summarily for non-compliance of provisions of section 81(3) of the said Act. He relies on paragraph 9 of the Affidavit in reply which reads thus:

“9) I say that, as stated above, the clerical/typographical errors were cured subsequently and as directed by the office of this Court, the changes made in the Election Petition are of clerical nature and admittedly, there is no addition or deletion of relevant pleadings or prayers. Due to oversight, the said changes have remained to be incorporated in the copies supplied along with Election Petition. The petitioner is ready to supply a fresh copy to the applicant. A bare perusal of the grounds raised in the application would reveal that objections which were with respect to such clerical changes which have not been done in the copy supplied to the applicant.”

19 On the basis of above mentioned submissions and the authorities,

the learned Counsel for the applicant submits that for non-compliance of the mandatory provisions of the said Act, petition as it is filed by the petitioner under The Representation of People Act, 1951 is required to be dismissed summarily with costs.

20 The learned Counsel for the petitioner vehemently opposed the present application. He submits that applicant has not shown any cause of action in the present application to summarily dismiss the petitioner's Election Petition which was filed by him under the said Act. He submits that after filing the Election Petition in the Registry of this court, Registry raised some objections for numbering. To remove those objections, petitioner carried out some corrections here and there and inserted paragraphs 5A and 6A. He submits that inadvertently, the said paragraphs remained to be incorporated in the true copy supplied along with the Election Petition. He submits that those corrections are not material facts in deciding the Election Petition. Hence, on this ground, Election Petition is not liable to be dismissed summarily.

21 The learned Counsel for the petitioner submits that the concise statement of facts on page 30-A to 30-D of the Election Petition were incorporated because the office has raised objection. He submits that inadvertently it remained on their part to incorporate the same in the true copy supplied to the Registry at the time of filing the petition. He submits that in any case, concise statement of facts is nothing but summary of the entire petition and therefore, non supply of the said along with true copy is not a major defect in the Election Petition on which ground Election Petition cannot be dismissed. In support of all these contentions, the learned Counsel for the petitioner relies on

the judgment of the Apex Court in the matter of *T.M. Jacob vs. C.Poulose and others*, (1999) 4 SCC 274. He submits that in this authority, the Apex Court held that the minor changes in the petition should not be treated a ground for rejection of the entire Election Petition. In support of this contention, he relies on paragraph 35 and 36 of the said authority which reads thus:

“35. The object of serving a 'true copy' of an Election Petition and the affidavit filed in support of the allegations of corrupt practice on the respondent in Election Petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is, thus, of substance and not of form.”

“36. The expression 'copy' in section 81(3) of the Act, in our opinion, means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition. Indeed a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of section 81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation.”

22 On the basis of these submissions and the authority cited above, the learned Counsel for the petitioner submits that there is no substance in the present application and same is required to be dismissed with costs. He submits that the defects pointed out by the applicant in his application do not cause any mandatory defects in the Election Petition. Hence, Election Petition be heard on its own merits by allowing parties to lead evidence in support of their contention.

23 I have heard both the sides at length. It is to be noted that considering the submissions made by both the parties and the authorities, the points which arise for my consideration is “whether petition as it is filed by the petitioner and served true copy on applicant violates provisions of section 81(3) of the said Act?” And “whether the petitioner failed to make out any cause of action for setting aside the applicant's election?”

24 It is to be noted that just by comparing copy of petition served on the applicant and copy of petition filed by the petitioner in the Registry shows that petitioner carried out several amendments in the petition. In index, petitioner added Concise Statement of Facts on page 30-A to 30-D, on page 27 of the petition petitioner added paragraph 5A and 6A and also added 'respondent no.1' in paragraph (9) sub paragraph (a), (b), (c) and (d). All these corrections, amendments were not reflected in the copy served on the applicant. Apart from that on a docket, one Mr.Saranjame made a true copy on behalf of advocate on record. Bare reading of section 81(3) shows that it is mandatory on the part of petitioner to submit as many copies of Election Petition in the Registry and every such copy shall be attested by the petitioner under his own signature to be true copy of the Election Petition. The copy which was served on the applicant was without incorporating the amendment made by the petitioner in the original petition which was filed in the Registry. Even the copy which was served on the applicant was not made true copy by the petitioner himself. The same was made by third person who was neither advocate on record nor authorised person or representative of the petitioner. This is a major defect in the service of

the Election Petition on the applicant / respondent no.1. The Apex Court in the above mentioned authority cited by the applicant clearly shows that if section 81(3) is violated by the petitioner then the petition is required to be dismissed summarily.

25 Bare reading of the verification of the Election Petition on page 30 shows that the same was not done by the petitioner as per Civil Procedure Code, 1908. In that verification, petitioner has not stated anything about paragraph nos.5A and 6A. The said verification reads thus:

“I, Shri. Subhash Ramkishan Agarwal, Petitioner above named presently at Mumbai do hereby solemnly declare that what is stated in paras 1, 3, 5 to 8 is true to my own knowledge and what is stated in para 2 and 3 is stated on the basis of legal advice which I believe to be true and correct. Para 9 contains my respectful prayers.”

26 In similar way, even the affidavit in support of petition is not according to the provisions of Civil Procedure Code, 1908. The said affidavit in support of petition reads thus:

“I, Subhash Ramkishan Agarwal, the petitioner above named, residing at Premhans Park, Near Railway Station, Pimpri, Dist. Pune, presently at Mumbai, do hereby solemnly affirm and state as under:

1. The Petitioner has filed the present Election Petition inter alia for reliefs as more particularly set out in the Petition. I repeat, reiterate, adopt and statements made in the Petition as if the same are incorporated herein and forming part of the present Affidavit. I crave leave to refer to and rely upon the papers and proceedings in the Petition when produced.

2. In the circumstances, I say and submit that the reliefs prayed for to be granted to me. I say and submit that I have reasonable chances of succeeding in the Petition. I say and submit that the Petition be made absolute with costs.”

27 This itself shows that no where it is stated by the petitioner which portion of the petition was stated by him on his own knowledge and which was on the information. On this ground also, application filed by the applicant is required to be allowed.

28 The other contention raised by the applicant about the non-disclosure of cause of action. That cannot be considered in view of above mentioned facts that the petition filed by the petitioner is required to be dismissed for non-compliance of the provisions of section 81(3) of the said Act. Hence, following order is passed:

- a) Application No.16 of 2015 filed by the applicant original respondent no.1 is allowed.
- b) Election Petition No.17 of 2014 is dismissed summarily.
- c) No order as to costs.

JUDGE