

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

220

FAO NO. 8968 of 2014 (O&M)

Date of decision: February 24, 2016

Budhan Singh

...APPELLANT

Versus

Parshottam Singh and others

....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. K.S.Chahal, Advocate,
for the appellant.

Mr. Karamjit Singh, Advocate,
for Mr. P.S.Dhaliwal, Advocate,
for respondent No. 1.

AUGUSTINE GEORGE MASIH, J. (ORAL)

Challenge in this appeal is to the order passed by the Election Tribunal (Deputy Commissioner) Mansa dated 29.08.2014 allowing the election petition preferred by respondent No. 1 challenging the election of the appellant-Budhan Singh for the post of Panch, Gram Panchayat Dhalewan, Tehsil and District Mansa.

2. It is the contention of the learned counsel for the appellant that the election petition itself was not maintainable in the light of Section 76 (1) of the Punjab State Election Commission Act, 1994 (hereinafter referred to

as '1994 Act'), according to which, the election petition could be filed by respondent No. 1-Parshottam Singh in person, whereas nothing has come on record which would indicate that the election petition was presented by him. Referring to the order dated 05.08.2013 passed by the Tribunal, he contends that the election petition was presented by the counsel for the respondents. Even in the examination-in-chief, the respondent has not stated that the election petition was presented by him in person before the Tribunal. He, on this basis, contends that the Tribunal should have rejected the election petition on this ground alone. In support of his contention, he has placed reliance upon a judgment of this Court in **Gurlal Singh vs. Presiding Officer, Election Tribunal, Block Lehra, District Sangrur and others**, 2010 (5) RCR (Civil) 474.

3. On the other hand, learned counsel for respondent No. 1 asserts that although it has not been specifically mentioned in the order dated 29.08.2014 of the Tribunal as also in the affidavit submitted in examination-in-chief, however, in the light of the affidavit, which has been appended along with the election petition, which is of the same date on which the election petition was presented, the presumption arises that respondent No. 1-Parshottam Singh was present at the time of filing of the petition. He further states that the Tribunal has rightly proceeded to decide the election petition by setting aside the election of the appellant on the ground that he was a convict and was released on probation. He contends that his nomination papers should have been rejected as per Section 123 (2) of the Representation of People Act, which is applicable as per Section 11 (k) of the 1994 Act. That apart, he contends that language of Section 76 (1) of the 1994 Act does not indicate that the election petition has to be presented in

person and in support of this contention, he has placed reliance upon Section 38 (1) of 1994 Act, which deals with the presentation of the nomination paper and requirements for a valid nomination where it has specifically been mentioned that the candidate could either present nomination papers in person or by his proposer. Reference has also been made by him to Rule 9 of The Punjab Panchayat Election Rules, 1994, where again dealing with Section 38 of 1994 Act, it has been mentioned that the candidate can submit his nomination papers in person. He, thus, contends that wherever the legislature intended that a particular act was required to be done in a particular manner, the same has been specifically provided for and in the present case, it has not been specified as to how the election petition has to be presented. The assertion of the counsel for the appellant that it has to be presented in person cannot be accepted. He, thus, contends that the present appeal deserves dismissal.

4. I have considered the submissions made by the learned counsel for the parties and with their able assistance, have gone through the records of the case as also the relevant provisions of the Statute and the Rules, referred to above.

5. Section 76 (1) of the 1994 Act, which deals with the contents of the petition reads as follows:

“76. Presentation of petition.-(1) An election petition may be presented on one or more of the grounds specified in sub-section (1) of section 89 to the Election Tribunal by any candidate to such election or by any elector within a period of forty five days from the date of election of the returned candidate or if there are more than one returned candidates at the election and there are different dates of their election, then the later of these dates shall be taken into account for this purpose.”

6. A perusal of the above would show that the election petition has to be submitted by the candidate in person and the contention of the counsel for respondent No. 1 that it is not so, cannot be accepted. Reference to Section 38 (1) of the 1994 Act, which deals with the presentation of the nomination papers and Rule 9, which is relatable to Section 38 specifies as to the nature in which the nomination can be filed. Merely because the mentioning of word 'presented in person' therein would not mean that the legislature intended the presentation of the election petition not in person especially when the provisions of the Statute are clear and non-ambiguous as in Section 76 of the 1994 Act.

7. This Court in Gurlal Singh's case (supra) has dealt with this matter in detail and had culled out two questions for adjudication, which finds mention in para-13 of the said judgment, which reads as follows:-

“13. After hearing both the learned counsel for the parties, two questions have come to fore to be adjudicated by this Court: -

(i) Whether an election petition presented through an Advocate is liable to be dismissed under Section 80 of the Act, being in violation of Section 76 (1) of the Act ?

(ii) Whether non-compliance of mandatory provisions of Section 76 (1) of the Act and its resultant effect as per Section 80 of the Act, could be raised for the first time in appeal or if not raised, whether the said right/ issue is deemed to have been waived by the appellant on the ground of acquiescence ?”

8. After reproducing the relevant provisions of the Statute and the various judgments and the law in relation thereto, the Court concluded, in paras 19 to 25, as follows:-

“19. In the present case, admittedly, the election petition has been presented through an Advocate and not by the candidate (respondent

No.2.). Therefore, it is in violation of Section 76 (1) of the Act which offends Section 80 of the Act wherein it is provided that in case of non-compliance of the provisions of Sections 76,77 and 103 of the Act, election Tribunal has to dismiss the election petition. Thus, the first question is decided in favour of the appellant and it is held that the election petition having been presented by the Advocate is in violation of Section 76 (1) of the Act and the election petition deserves to be dismissed in view of Section 80 of the Act.

20. Insofar as second question is concerned, learned counsel for the respondents has relied upon a Division Bench judgment of this Court in the case of Salig Ram and others (Supra) to contend that since there was no objection either in the written statement or anywhere before the Election Tribunal about the non-compliance of Section 76 (1) of the Act much-less presentation of the election petition in accordance with law, therefore, the said objection was deemed to have been waived. In Salig Ram and others (Supra), the facts were that the appellants in the said case were the plaintiffs who filed a suit that khasra No. 1591 forms part of the area of Mandi Dadri which is owned and possessed by the owners of the Mandi and is in their possession since the time of existence of the Mandi. The owners of the Mandi opened a school for the education of the children and provided a play ground as also some buildings which are well located in this khasra number for the common purposes of the population of the town. They had to file a suit because the defendants in the said case who had started obstructing the owners of the Mandi in the use of that piece of land. One of the defendants had even obtained sanction from the Municipal Committee for construction of a house and a shop on that piece of land and wanted to forcibly build by collecting building materials on the disputed plot. The plaintiff thus, filed a suit for declaration and injunction and in the alternative, it was pleaded that if they are not proved to be the owners, even then members of the public had been continuously using the

said plot as a public way over a period of more than 20 years for going to their respective houses and enjoying other facilities. The suit was decreed but the appeal filed by respondent Nos.1 and 2 in the said case was accepted by the District Judge, Rohtak, who had found that the plaintiffs are not owners of khasra No.1591 and respondent No.1 had made encroachment on the land in dispute which belongs to the govt. In second appeal, the High Court found that the govt. is required to be made a party. The case was thus, remanded back permitting the plaintiffs to file amended plaint and newly added State Government was permitted to file written statement. In the written statement, no objection was raised that the suit is incompetent for want of notice under Section 80 of Code of Civil Procedure, 1908 (for short, 'CPC') . No plea was even taken during the trial about invalidity of the proceedings due to lack of notice as required under Section 80 of CPC. In this back ground, it was held that waiver is a question of law and not of fact. Intention is a purely subjective matter and has to be assumed from the conduct of the parties where the State, fully cognisant of the proceedings, wanted to associate with those proceedings and therefore, did not object to the validity of the notice under Section 80, CPC. either in their written statement or on replication or even in their arguments that would lead to the conclusion that it was a deliberate and intentional act on the part of the State not to raise any objection to the notice under Section 80 of C.P.C. is concerned.

21. In answer to the aforesaid arguments, learned counsel for the appellant has relied upon a judgment of the Apex Court in the case of Udhav Singh (Supra) which pertains to an election petition whereby election of the respondent (Madhav Rao Scindia) to Lok Sabha was challenged but the election petition was dismissed. In that case, six candidates filed their nomination papers for contesting the election to Lok Sabha from Guna Parliamentary Constituency. The appellant (Udhav Singh) filed the election petition on two grounds but he did not implead all

the candidates in the election petition but for the lone respondent. At the fag end, an application was filed at the instance of the respondent therein that necessary parties have not been impleaded which is in violation of the mandatory provisions of Section 82 (b) of the Representation of the People Act, 1951 (for short, 'Act of 1951'). It was objected to by the appellant Udhav Singh that the objection of non-joinder of necessary parties was not taken at the earliest stage, therefore, it should be deemed to have been waived by the respondents. It was held by the Apex Court that Section 82 (b) of the Act of 1951 is peremptory and the respondent cannot by consent, express or tacit, waive these provisions or condone a non-compliance with the imperative of Section 82 (b). Even inaction, laches or delay on the part of the respondent in pointing out the lethal defect of non-joinder cannot relieve the Court of its statutory obligation cast on it by Section 86. As soon as the non-compliance with Section 82 (b) comes or is brought to the notice of the Court, no matter in what manner and at what stage, during the pendency of the petition, it is bound to dismiss the petition in unstinted obedience to the command of Section 86. It is also held that the respondent is not obliged to raise this objection only in his written statement.

22. In Jyoti Basu's Case (Supra), the Apex Court held that a right to elect, fundamental though it is to democracy, is anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to election, no right to be elected and no right to dispute an election. Statutory creations therefore they are, and therefore, subject to statutory Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts

familier to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such manners, as those, relating to the trial of Election disputes, is what the statute lays down. In the trial of election disputes, the Court is put to a straight jacket . Thus, the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member of members right up to the final resolution of the dispute, if any concerning the election is regulated by the Representation of the People Act, 1951, which is a complete and self contained code.

23. Learned counsel for the appellant has also relied upon a decision of the Apex Court in the case of Vijay Narain Thatte (Supra) in support of his arguments that Section 80 is couched in negative language which provides consequences of non-compliance of the provisions of Sections 76, 77 and 103 of the Act. In the aforesaid case, Notification under Section 4 of the Land Acquisition Act, 1894 was issued, followed by a notification issued under Section 6 which was beyond a period of one year. The said notification under Section 6 was challenged and the writ petition was allowed quashing the said notification. Consequently a notification under Section 6 of the said Act was issued and the question raised before the Court was as to whether notification subsequently issued under Section 6 is valid. The Supreme Court held that notification under Section 6 was bad being barred under Section 6 of the Land Acquisition Act, 1894 and Section 115 of the Evidence Act, 1872. It principally observed that when a statute is couched in negative language, it is ordinary regarded as peremptory and mandatory in nature and not directory, In the present case, Section 80 of the Act is couched in negative language which is basically a consequence of non compliance of Section 76 of the Act.

24. Thus, in view of my foregoing discussion, I am of the view that the second question raised by learned counsel for the respondents also

goes against him as there is no question of any waiver in the election petition of a mandatory and peremptory provisions of law which has a consequence of dismissal of the election petition in case of violation.

25. Consequently, in the totality of facts and circumstances of the case, the present appeal is allowed and the impugned order passed by the Election Tribunal, is thus, set aside, however, without any order as to costs.”

9. In view of the above, the contention, as raised by the counsel for respondent No. 1, cannot be accepted.

10. The assertion of the counsel for respondent No. 1 that the affidavit is of the same date, on which the election petition has been filed and, therefore, the presumption has to be drawn that respondent No. 1 was present in the Tribunal when the election petition was presented, cannot be accepted in the light of the fact that the order dated 29.08.2014 of the Tribunal does not reflect his presence nor has he mentioned so in his affidavit submitted in the examination-in-chief. There being no evidence on the record which would indicate that the election petition was presented by respondent No. 1 in person before the Tribunal or was present in the Tribunal at the time of presentation of the election petition, the conclusion, which can be drawn, is only that the election petition was presented by the counsel representing him before the Tribunal.

11. In view of the above, the present appeal is allowed. The impugned order dated 29.08.2014 is hereby set aside.

February 24, 2016

pj

**(AUGUSTINE GEORGE MASIH)
JUDGE**