

IN THE HIGH COURT OF JUDICATURE AT PATNA

Election Petition No.3 of 2015

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Avinash Kumar Vidhayarthi @ Mukesh Yadav & Ors

.....petitioners

Versus

Sanjay Prasad

.....Respondent

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Appearance :

For the petitioner : Sri Prakash Srivastava, Advocate
Mr. Rajesh Kumar Verma, Advocate

For the Respondent : Mr. P. K. Verma, Sr. Advocate.
Mr. Suman Kumar Jha, Advocate with him.

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Dated : 18th day of July, 2017

P R E S E N T

CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV O R D E R

1. I have already heard the learned counsel, Mr. Sri Prakash Srivastava on behalf of the petitioner and the learned senior counsel, Mr. P. K. Verma, on behalf of the respondent on I.A. No.2922 of 2017 which has been filed by the petitioner and I.A. No.6672 of 2016 which has been filed by the sole respondent.



2. I.A. No.6672 of 2016 has been filed by the sole respondent under Section 86 of the Representation of People Act, 1951 (hereinafter referred as to the 'R.P. Act') read with Order VII Rule 11 of the Code of Civil Procedure praying for dismissal of the election petition on the ground that the provision of Section 82(a) of the Representation of People Act, 1951 has not been complied with and likewise the provision of Section 81(3) of the R.P. Act has also not been complied with and accordingly, it was prayed for summary dismissal of the election petition.

3. It further appears that the respondent further alleged that according to the provision as contained in Section 83 of the R.P. Act, the election petition does not contain a concise statement of material facts on which the petitioner relied so as to make out and sustain any cause of action under Section 100 of the R.P. Act.

4. The interlocutory application No.2922 of 2017 has been filed by the petitioner under Section 86(5) of the R.P. Act praying for amplifying the prayer in the election petition and only to confine his prayer to declare the election result of sole respondent as void.

5. From perusal of the election petition, it is clear that the petitioner filed the election petition praying the relief to set aside



the election of the respondent as a member of 18 Munger-cum-Jamui-cum-Lakhisarai-cum- Sheihpura local authority constituency for which the election was held on 07.07.2015 and the election result was declared on 10.07.2015 and further to declare the said election of the respondent as void and further prayer was made for recounting of valid votes of the said constituency and to declare the petitioner as returned candidate of the said constituency.

6. On being noticed, written statement was filed by the respondent, Sanjay Prasad, on 5.5.2016 and thereafter, in August, 2016 the I.A. No.6672 of 2016 was filed for summary dismissal of the election petition on the ground stated above. After filing this application by the respondent, the petitioner had filed I.A. No.2922 of 2017 in April, 2017 praying for amendment.

7. Earlier it was directed that after the application filed by the petitioner is disposed of, the application filed by the respondent for summary dismissal shall be heard. However, during hearing of the interlocutory application filed by the petitioner, it was found that both the interlocutory applications are inter-related, therefore, I heard both the learned counsel on both the interlocutory applications and both are disposed of by this common order.

8. The learned senior counsel, Mr. P.K. Verma,



appearing on behalf of the respondent submitted that the provision as contained in Order VI Rule 17 of the Code of Civil Procedure cannot be applied for amendment of the relief portion as CPC is applicable subject to the provision of the R.P. Act and there is no provision in the R.P. Act that the principle which govern Order VI Rule 17 in general suits will apply mutatis mutandis in the election petition. So far the provision as contained in Section 86 sub Section 5 is concerned, it is not applicable in the present case, therefore, the application filed by the petitioner being I.A. No.2922 of 2017 is liable to be dismissed.

9. So far application filed by the respondent is concerned, according to the learned senior counsel, the necessary parties as provided under Section 82 of the R.P. Act are not party in the election petition, therefore, the election petition is liable to be dismissed under Section 86 of the R.P. Act. According to the learned senior counsel, 11 candidates contested the election for the constituency including the petitioner and the respondent and as provided under Section 82, if the prayer is made for declaration that the election petitioner as a returned candidates, all the candidates are required to be made party in the election petition but the candidates are not party.

10. The learned senior counsel further submitted that



at the time of presentation of the election petition as many copies thereof as there are respondent are required to be filed and such copy shall be attested by the petitioner under his own signature to be a true copy of the petition but no such attestation was made nor the copy of the election petition reveals the date, manner and details of officer before whom the so called verification and affidavit has been shown nor it disclosed the name of the identifier, therefore, also the provision as contained in Section 81 (3) R.P. Act has not been complied with.

11. According to the learned senior counsel, the election petition is absolutely vague and not supported by material fact and, therefore, in fact the prayer for recounting is intended to indulge into a roving and fishing inquiry so as to make out a cause of action and that cannot be permitted under law, therefore, also the provision of Section 83 of the R.P. Act is not complied with as such the election petition is liable to be dismissed in limine.

12. On the other hand, the learned counsel, Mr. Sri Prasakash Srivastava, appearing for the petitioner submitted that earlier all the candidates were arrayed as party but subsequently, by mistake, prayer was made for deleting their names and their name have been deleted. It was mistake of the learned counsel for the petitioner. However, now, an application have been filed by the



petitioner who is seeking to amend the prayer and to confine his prayer for declaration of the election as void only and the petitioner is not intending to get himself declared as returned candidate. There is provision for amendment in the R.P. Act and, therefore, this application filed by the petitioner be allowed. If it is allowed then the candidates who contested will not be necessary party.

13. So far the attestation and true copy is concerned, the learned counsel submitted that this defect is curable defect and the petitioner may be permitted to cure the same but on that ground, the election petition cannot be dismissed. The learned counsel relied on a decision of the Jharkhand High Court reported in 2001 Jharkhand page 25. According to the learned counsel, it is defect in verification. So far the concise statement of material facts are concerned, the learned counsel submitted that the petitioner has fully given the concise statement of material fact constituting cause of action and to show this concise statement, the learned counsel in fact at the time of hearing of interlocutory application placed the contents of various paragraphs of election petition. On these grounds, the learned counsel submitted that the application filed by the respondent for dismissal of the election petition be rejected and the petition filed by the petitioner be allowed.



14. Admittedly, at present there is only one respondent in this election petition. Admittedly, the petitioner has prayed for his declaration as returned candidates of 18 Munger-cum-Jamui-cum-Lakhisarai-cum-Skeikhpura local authority constituency. Admittedly, 11 candidates contested the election.

15. Section 82 of the R.P. Act reads as follows :-

“82.....parties of the petition – a petitioner shall joint as respondents to his petition – (a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidates has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates and (b) Any other candidates against whom allegation of any corrupt practices are made in the petition.

16. In view of this provision as contained in Section 82 (a) of the R.P. Act, the election petitioner is required to add all the contesting candidates as party when he claims a declaration that he is duly elected candidates. This provision is not complied with in this election petition.



17. Now, the application has been filed by the petitioner to amend the relief portion, i.e., to delete the claim of declaration that the petitioner is duly elected. The learned counsel submitted that the application be allowed as the provision is there for amendment.

18. Section 86 sub Section 5 of the R.P. Act reads as follows :-

‘The High Court may upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.’

19. Section 87 Sub Section 1 of the R.P. Act reads as follows :-

‘87. Procedure before the High Court :- (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the



discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

20. In view of above provisions of law, CPC is applicable subject to the provisions of R.P. Act and any rules made thereunder. All the provisions of CPC are not applicable. The representation of people Act itself is a self contained Code.

21. The Hon'ble Supreme Court in *AIR 1969 S.C. page 677 Mohan Raj Vs. Surendra Kumar Taparia* has held that 'Section 86 is a peremptory provision and admits of no exception. The Court is to enforce it strictly if there is a non-compliance with the requirement of Section 82 among others. No doubt the power of amendment is preserved to the Court and Order 1 Rule 10 enables the Court to strike out parties but the Court cannot use Order VI Rule 17 or Order I Rule 10 to avoid the consequences of non-joinder. The Court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of



the Representation of the People Act and any rules made thereunder. When the Act enjoins the penalty of dismissal of the petition for non-joinder of party, the provisions of the Civil Procedure Code cannot be used as curative means to save the election petition.’ Same view has been taken again by the Supreme in *AIR 1969 SC 872 K. Venkateshwar Rao Vs. Bekkam Narshimha Reddy*.

22. It appears that the respondent had filed the interlocutory application No.6672 of 2016 for dismissal of the election petition on the ground that all the candidates are not joint as party. Now, to overrich this consequence of dismissal of election petition, I.A. No.2922 of 2017 has been filed by the petitioner and prayer has been made to amend the prayer portion. As has been held by the Hon’ble Supreme Court referred to above, the provision of Code of Civil Procedure (in the present case Order VI Rule 17) cannot be used as a curative means to save the election petition. No doubt in the application, the provision of Section 86 sub Section 5 of the R.P. Act is mentioned but this provision is not applicable in the present case as it relates to amendment elaborating the corrupt practices and the present case is not filed alleging corrupt practices.

23. In view of above discussion, the application filed by the petitioner, i.e., I.A. No.2922 of 2017 is devoid of any merit and



accordingly is liable to be dismissed and thus it is dismissed.

24. Now, the position is that there is violation of Section 82 (a) of the R.P. Act.

25. The other ground raised by the respondent is that every copy of the election petition filed by the petitioner is not attested by the petitioner under his own signature to be a true copy of the petition which is violation of Section 81 sub Section (3) of the R.P. Act. According to the respondent, in fact in the copy of the election petition that manner and details of officer before whom the so called verification and affidavit has been sworn are disclosed whereas in the main election petition, everything is there, therefore, in fact the copy is not true copy of the election petition.

26. In reply to this, the learned counsel for the petitioner relied upon a decision of Jharkhand High Court reported in *AIR 2001 Jharkhand 25* and submitted that the attestation and verification is a defect which is curable. The learned counsel further relied upon paragraph 10 of the said decision wherein it has been held that election petition is not to be dismissed in limine under Section 86 of the Act for alleged non-compliance with provision of Section 83(1) of the Act or of its proviso. What other consequences, if any, may follow from an allegedly defective affidavit is to be judged at the trial



of an election petition but Section 86 (1) of the Act interns cannot be attracted to such a case. Defect in verification of an affidavit is curable and does not merit dismissal of an election petition in limine under Section 86 (1) of the Act.

27. It may be mentioned here that this decision is not applicable in the present case because in that case, the allegation was non-compliance of provision of Section 83(1) of the R.P. Act whereas in the present case, the non-compliance is of Section 81 sub Section 3 of the R.P. Act. From perusal of the copies submitted by the petitioner at the time of filing the election petition, it appears that there is no attestation made by the petitioner as required under Section 81 sub Section 3 CPC. Likewise, it also appears that the copy filed is not a true copy of the original election petition. The verification was done before which Officer and who identified the deponent is available in the election petition in each affidavit filed along with the election petition in support of the election petition and annexures thereof whereas in the copy of the election petition, those are missing. Therefore, there is clear violation of Section 83 of the R.P. Act and on this ground also, the election petition is liable to be dismissed in limine under Section 86(1) of the R.P. Act.

28. The other ground raised by the respondent is that



there is no material fact constituting cause of action and on mere allegation of violation of guideline, no recounting will be made. According to the learned senior counsel, there is general allegation that the guidelines were violated and valid votes of the petitioner were rejected whereas the same type of votes were accepted in favour of the respondent. On the contrary, according to the petitioner, there are concise statement and facts for recounting. The learned counsel placed each and every paragraph of the election petition to substantiate his allegation.

29. From perusal of the election petition at paragraph 1(i), it appears that the allegation is the counting of votes was not properly conducted by the Returning Officer resulting thereof 425 valid votes of the petitioner was rejected, therefore, fresh counting may be done under the supervision of High Court and likewise in paragraph 1(ii), it is alleged that the Returning Officer in complete departure to the guideline counted the vote after ousting the counting agent of the petitioner which is evident from video recording and at paragraph 1(iii), it is alleged that the Returning Officer has not counted the votes of the petitioner which was marked otherwise by the voters but on the other hand, the Returning Officer counted the votes of the respondent which were marked otherwise by the voters. These type of general allegation are made in paragraph 1(iv)(v)(vi) and (vii).



Except these general allegations, there are no specific materials. Annexure '5' is application filed by the petitioner for recounting. In the said application, no such allegations were made. Only allegation is in manner by which 727 votes were rejected, the entire votes be recounted and the illegal votes be rejected. Annexure '6' was filed by the petitioner after result was announced wherein he alleged that in violation of guideline of the election commission, the Election Officer supported the respondent by adopting double standard and rejected his prayer for recounting. These are the general allegation as stated above. There is no specific allegation nor there is any supportive fact thereof. So far recounting of valid paper is concerned, the settled law is that the secrecy of ballot paper should not be allowed to be violated by flimsy allegation. The Court must be satisfied regarding the truth of allegation for recounting. In the present case, as discussed above, the petitioner was present there but then he is not disclosing the facts on what ground which ballot paper was rejected by the election officer as ballot paper are counted in the central table in presence of the candidates and the reasons for rejection are shown to the candidates. There is no case that the reason of which any of the ballot paper was rejected is not tenable or that on that ground, the ballot paper could not have been rejected. Only it is stated that in violation of the guideline, ballot paper were counted and valid votes of petitioner were



rejected. Therefore, on the mere allegation, the petitioner is not entitled for recounting. The Court has to maintain the secrecy of ballot paper and, therefore, unless the election petitioner is able not only to plead and disclose the materials facts but also to substantiate the same by means of material fact, no Court would be justified in directing recounting.

30. Rule 59 A (ii) of the Election Rule empowers the Returning Officer to reject the ballot papers on the ground mentioned therein. In the election petition, nowhere the petitioner specified as to on what ground the Returning Officer rejected the ballot papers. At sub Rule 3, it is provided that before rejecting any ballot papers, the Returning Officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper. In the present case, the petitioner himself was present there. If he had inspected, then he is expected to disclose the ground on which the ballot papers which he claims to be valid were rejected.

31. In view of the above facts, now it becomes clear that mere allegations have been made in the election petition which are either flimsy or ambiguous and so in the present case, there is no adequate statement of material fact and the statement made are not sufficient enough to constitute cause of action for recount of ballot



paper. In my opinion, therefore, on these types of flimsy, ambiguous mere allegation, the Court must not enable the petitioner to indulge in a roving enquiry for setting aside the election result.

32. The Hon'ble Supreme Court in *AIR 1987 SC 1577 Dharpakar Madan Lal Aggrawa Vs. Sri Rajev Gandhi* has held that 'those paras of an election petition which do not disclose any cause of action are liable to be struck off under Order VI Rule 16 CPC. It is the duty of the Court to examine the plaint and it need not wait till the defendants filed written statement and point out the defect.'

33. *In AIR 1987 SC 1926, Summer Singh Vs. Kedar Nath*, the Hon'ble Supreme Court has held that 'if an election petition does not disclose cause of action, it can be dismissed summarily at the threshold of the proceeding. Same view has been taken by the Hon'ble Supreme Court reported in *AIR 1986 SC 1534 Bhagwati Prasad Dixit Gorewala Vs. Rajeev Gandhi*.

34. From the above discussion, I find that mere allegations cannot be said to constitute cause of action and in the present case all the allegation are without supporting facts. On this ground also, the election petition is liable to be dismissed.

35. In the result, the interlocutory application No.2922 of 2017 filed by the petitioner is hereby rejected. The



interlocutory application filed by the respondent being I.A. No.6672 of 2016 is allowed. Accordingly, this Election Petition is dismissed under Section of 86 of the Representation of People Act, 1951.

(Mungeshwar Sahoo, J)

Sanjeev/-

AFR/NAFR	NAFR
CAV DATE	05.07.2017
Uploading Date	19.07.2017
Transmission Date	19.07.2017

