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

**APPLICATION NO.13 OF 2015
IN
ELECTION PETITION NO.6 OF 2014**

Khan Md. Arif Lalan
D-2, A-301, Rani Plaza, Shansuddin Nagar,
Jari Mari, Kurla Andheri Road,
Saki Naka,
Taluka Kurla,
District : Mumbai – 400 072.

...Applicant

IN THE MATTER BETWEEN

Sitaram Shivnaresh Tiwari,
Aged 58 years, residing at Shivnaresh Tiwari
Chawl, Netaji Palkar Marg, (N.S.S. Road),
Asalfa village, Ghatkopar (West),
Mumbai – 400 084.

...Petitioner

Versus

1. Khan Md. Arif Lalan
D-2, A-301, Rani Plaza, Shansuddin Nagar,
Jari Mari, Kurla Andheri Road,
Saki Naka,
Taluka Kurla,
District : Mumbai – 400 072.

2. Dattaprasad Nade,
Returning Officer,
168, Chandiwali Assembly,
Constituency Industrial Training Institute,
(New Building), Kirol Road,
Vidyavihar (W),
Mumbai.

...Respondents

Mr.R.D.Soni i/b Mr.Bipin Joshi, for the Applicant.

Mr.Ram Apte, Senior Counsel, i/b Ms.Anjali Helekar, for the Petitioner.

***CORAM : REVATI MOHITE DERE, J.
(IN CHAMBERS)***

RESERVED ON: 2nd SEPTEMBER, 2016

PRONOUNCED ON : 17th JANUARY, 2017

ORDER :

1. The short question that arises for consideration in this case is, whether the averments in the Election Petition disclose a cause of action, as required under Order 7 Rule 11(a) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C').

2. By this application preferred in the aforesaid Election Petition, the applicant has essentially prayed as under:-

- (a) this Honourable Court be pleased to dismiss the above Election Petition in limine at threshold under Order 7 Rule 11 of the Civil Procedure Code, 1908 for want of cause of action.
- (b) in the alternate prayer (a) this Honourable Court be pleased to direct the Petitioner to delete the paragraphs Nos.9 to 13 from

the aforesaid Election Petition for want of material particulars under Order 6 Rule 16 of the Civil Procedure Code, 1908.

3. At the outset, it may be noted that prayer clause (b) was not pressed and hence the same is not considered.

4. The applicant, who is the original Respondent in the Election Petition, has preferred the aforesaid application under Order 7 Rule 11 of the Code of Civil Procedure, praying therein, that the Election Petition be dismissed at the threshold, on the basis of the averments and admitted facts in the petition.

5. Mr.Soni, learned counsel for the applicant contended that the averments in the Election Petition as well as the admitted facts necessitate dismissal of the Election Petition under Order 7 Rule 11 of the C.P.C. He submitted that admittedly the nomination paper submitted by the petitioner was incomplete and devoid of the mandatory particulars required to be mentioned, as prescribed in Form No.26. According to him, the impugned order of rejection of the nomination form on the basis of the record, was

legal and proper and as such the provisions of Section 100(1)(c) of the Representation of the People Act, 1951, has no application to the facts of the present case. He submitted that it was evident from the averments as disclosed in para 7 of the Election Petition, that the nomination paper of the petitioner was rejected prior to his attending the office for scrutiny purpose as certain columns were left blank.

He submitted that the said averment clearly indicates that the petitioner had reached the venue, for scrutiny and had appeared before the Returning Officer only after his nomination paper was rejected, and the said fact, was mentioned by the Returning Officer in his order dated 29th September, 2014. He submitted that since the nomination paper had already been rejected, the Returning Officer had no power to review his decision. He submitted that the Apex Court in the case ***Kisan Shankar Kathore v/s Arun Dattatray Sawant and Others***, has held, that filing of an affidavit with all particulars of the candidate was mandatory, and if the mandatory requirements were not fulfilled, the Returning Officer had the power to reject the nomination there and then.

6. Mr.Soni, also relied on the circular of the Election Commission of India. He further submitted that the petitioner's contention that he was not given an opportunity to complete the particulars in the affidavit, is also false, inasmuch as, from the petitioner's own documents, it is evident that he had full notice of the same. He submitted that the petitioner has raised much hue and cry, in respect of the correction/alteration in the 'pohoch pavati', annexed at Exhibit – D in the Election Petition, and has contended that in column 5, the word 'nahi' (No) was struck off and the word 'hoy' (Yes) was mentioned, however, a perusal of the 'pohoch pavati' in its entirety shows that in item no.12 of Exhibit – D, the document mentioned in the checklist to the nomination papers, the remark in the said column is, that the said checklist was given and it was mentioned as 'hoy' (Yes). He submitted that from the checklist at Exhibit – 'C' of the Election Petition, it is clearly evident that column nos.7, 16, 8 and 9 had not been filled up and were blank. Mr.Soni submitted that there is no dispute that the petitioner had received the checklist at Exhibit – C and hence the alleged alteration made from 'nahi' (No) to 'hoy' (Yes) in column 5 of Exhibit – D, was irrelevant, immaterial and inconsequential. He submitted that although the petitioner had contended, that he was not given an opportunity to rectify the mistake,

firstly, by not providing the checklist and secondly, by not giving an opportunity to rectify the same at the time of scrutiny, is bereft of any substance, inasmuch as, the checklist was admittedly provided and admittedly neither, the petitioner nor his representative or his agent were present at the time of scrutiny. He submitted that the Election Petition ought to be dismissed on this very ground. He submitted that the admitted absence of the petitioner, his agent and/or representative at the time of scrutiny amounts to waiver of his right, to rectify the error and as such there is no merit to the challenge raised by the petitioner in the Election Petition.

7. Mr.Soni further urged that admittedly, the petitioner had reached the venue at 12.20 p.m. for scrutiny, when he was informed that the scrutiny was over and his nomination form had been rejected. He submitted that the said fact has been recorded in the impugned order, on the basis of which the Election Petition is filed. Mr.Soni submitted that though the time for scrutiny was up to 3.00 p.m., the Returning Officer was not expected to wait till 3.00 p.m. He submitted that when the petitioner's name was called out and his nomination paper was taken up for

scrutiny, it was the duty of the candidate and/or his representative and/or his Agent to remain present and rectify the errors, if any. According to him, once the decision of rejection was taken, the Returning Officer was not expected to keep the said issue pending till 3.00 p.m. i.e. till the closure of the scrutiny time. He submitted that if the contention of the petitioner is accepted that the Returning Officer ought to have waited till 3.00 p.m., it would lead to utter chaos and every candidate will come at his own will, at any time, prior to the closure. He submitted that it was the duty of the petitioner/his representative/his agent to remain present when the petitioner's nomination paper was taken up for scrutiny. He further submitted that there is no substance in the petitioner's contention that he presented himself before the Returning Officer, prior to the closure time of 3.00 p.m. and as such ought to have been given an opportunity to rectify his affidavit, more particularly, when the other candidates had left the venue by that time. He submitted that the Representation of the People Act and the Rules of conduct of election, including the Guidelines issued to the Returning Officer are such, so as to give an opportunity to all the candidates to examine and raise their objection to the nomination of all the candidates. According to Mr.Soni, the petitioner's submission that he was not given an

opportunity to rectify the errors in his nomination paper is thus without substance, as the candidate cannot choose to remain absent when his form was scrutinized and then make a grievance/complain about the same. He submitted that no complaint/FIR has been lodged as against one Jyoti Wagh, one of the staff member of the Returning Officer, inspite of making serious allegations against her. He submitted that the petitioner is admittedly an experienced candidate having been elected as a Corporator twice, in the Municipal Corporation Election earlier, and as such, was well aware of the procedure and requirements of filling up the nomination papers. He further submitted that the allegation of the petitioner that his signatures were obtained on atleast 5 printed forms in a chaotic situation, in a crowd and in a hurry, is without substance inasmuch as, the fact remains that his signature appears on the acknowledgments received which has not been denied by him.

8. Mr.Soni, learned counsel submitted that taking the Election Petition as it stands and the admissions made therein, no ground i.e. no cause of action is disclosed for proceeding with the said election petition for trial and as such, the same ought to be dismissed at the threshold, under

Order 7 Rule 11 of the C.P.C.

9. Learned Counsel for the applicant relied on the Judgments *in the case of Resurgence of India v/s Election Commission of India and Another*¹; *Arun Dattatray Sawant v/s Kisan Shankar Kathore*²; *Kisan Shankar Kathore v/s Arun Dattatray Sawant and Ors*³; *Dhartipakar Madan Lal Agrawal v/s Rajiv Gandhi*⁴; *Azhar Hussain v/s Rajiv Gandhi*⁵; *Ram Sukh v/s Dinesh Aggarwal*⁶; *Sambhaji s/o Laxmanrao Pawar v/s Bhaskarrao s/o Bapurao Khatgaonkar and Others*⁷; and *Madhavrao s/o Bhujangrao Kinhalkar v/s Ashok s/o Shankarrao Chavan and Others*⁸, to buttress his submission.

10. Mr. Ram Apte, learned senior counsel for the petitioner opposed the application. He submitted that the petitioner has in the Election petition narrated each and every incident in minute detail, starting from the distribution of nomination forms, non-supply of the required documents,

1 (2014) 14 SCC 189

2 Bombay High Court Election Petition No.10 of 2004, decided on 16th August, 2007.

3 Supreme Court Civil Appeal No.4261 of 2007, decided on 9th May, 2014

4 AIR 1987 SC 1557

5 AIR 1977 SC 2421

6 AIR 2010 SC 1227

7 2011(4) Mh.L.J.

8 2013(1) Mh.L.J.

difference in 'pohoch pavati' issued to the petitioner and the respondent (applicant), though both had filed the nomination in the same office, etc. He submitted that the petitioner has also averred in the petition, how he was not given an opportunity to rebut the objections and how the petitioner and the other candidates, were given biased treatment by the Returning Officer, only with the intention to give the applicant, an advantage. He submitted that all the necessary material facts and material particulars, giving rise to cause of action, have been disclosed in the election petition. According to Mr.Apte, the Election Petition would have to be read as a whole, in order to come to a conclusion, whether any cause of action has been disclosed or not. He further submitted that the scope of enquiry in an application under Order 7 Rule 11 C.P.C, is very narrow, inasmuch as, the Courts are only required to see whether the petition discloses a cause of action or not, and that the Court cannot pick and choose a few sentences, out of context. He submitted that in the present case, the Election Petition cannot be dismissed at the threshold, for want of cause of action under Order 7 Rule 11 of the CPC, without giving an opportunity to the petitioner to prove his case, regarding illegal rejection of the nomination paper by leading evidence. Mr.Apte further submitted that the 'pohoch pavatis' given to the petitioner

and the applicant were clearly different and that in the 'pohoch pavati' given to the petitioner certain columns were conspicuously absent. He relied on the Judgments in the case of *Ashraf Kokkur v/s K.V.Abdul Khader and Others*⁹; *Resurgence India v/s Election Commission of India and Another*¹⁰; *Dilip Kumar Gon v/s Durga Prasad Singh*¹¹; *Vivekanand Giri v/s Nawal Kishor Sahi*¹²; and *Nandiesha Reddy v/s Kavitha Mahesh*¹³, in support of his submission.

11. Perused the papers. The Election Commission of India had declared General Elections for the 288 Assembly Constituencies in the State of Maharashtra, vide notification dated 20th September, 2014. The last date of filing the nomination paper for the said election was 27th September, 2014; the date of scrutiny of the nomination papers was declared as 29th September, 2014 and the elections were to be held on 15th October, 2014. The petitioner was a candidate of Bharatiya Janata Party in the election to the State Legislative Assembly from 168, Chandiwali Constitutency, Mumbai Suburban District, whereas, the applicant was a candidate of the

9 (2015) 1 SCC 129

10 (2014) 14 SCC 189

11 (1975) 1 SCC 401

12 (1984) 3 SCC 10

13 (2011) 7 SCC 721

Indian National Congress. The petitioner had submitted his nomination paper on 27th September, 2014. After the submission of the nomination form, on the day of scrutiny i.e. on 29th September, 2014, the petitioner arrived at about 12.20 p.m. and appeared before the Returning Officer, who informed him, that his nomination paper had been rejected, as he had left certain columns blank in the affidavit. The petitioner rebutted the said claim and asked for time to submit a fresh affidavit or revise the affidavit by filling in the blank columns. The said prayer was refused by the Returning Officer, as his nomination form was already rejected by then. Pursuant to the alleged improper rejection of his nomination paper, the petitioner filed the aforesaid Election Petition under Section 100(1)(c) of the Representation of the People Act, 1951. The substantive prayers sought for by the petitioner are as under:-

- (a) that it be declared that the nomination paper of the petitioner was improperly rejected by the Returning officer in the Election of Maharashtra State Legislative Assembly from 168, Chandiwali Constituency, District – Mumbai held on 15.10.2014;
- (b) that it be declared that the election of the Respondent No.1 as a member of Maharashtra State Legislative Assembly from

Constituency No.168, Chandiwali Constituency, Mumbai Suburban District in the election held on 15.10.2014 is null and void and be further pleased to order Re-election in the said constituency.

The applicant – original respondent in the Election Petition filed the present application under Order 7 Rule 11 of the C.P.C, praying therein, that the Election Petition be dismissed on the ground of want of cause of action.

12. Before I proceed to decide, whether the Election Petition discloses a cause of action or not and whether the petition ought to be dismissed under Order 7 Rule 11 of CPC, it would be necessary to consider the law in this regard. Needless to state, that the law with regard to rejection of a plaint under Order 7 Rule 11 of CPC, on the ground that it does not disclose a cause of action is well settled and is no longer *res integra*. The Apex Court in the case of **Ashraf Kokkur v/s K.V.Abdul Khader and Others**¹⁴, has in detail, considered several Judgments and has observed in paras 22 to 29 as under:-

“22. After all, the inquiry under Order 7 Rule 11(a) CPC is only as to whether the facts as pleaded disclose a cause of action and not

14 (2015) 1 SCC 129

complete cause of action. The limited inquiry is only to see whether the petition should be thrown out at the threshold. In an election petition, the requirement Under Section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression "material facts" plainly means facts pertaining to the subject-matter and which are relied on by the election petitioner. If the party does not prove those facts, he fails at the trial (see Philipps v. Philipps (1878) LR 4 QBD 127 (CA), (QBD p. 133); Mohan Rawale v. Damodar Tatyaba (1994) 2 SCC 392, (SCC p.399, para 16)].

23. *This Court in Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315 at para 11, has held that: (SCC p. 324)*

11.... Whether in an election petition a particular fact is material or not and as such required to be pleaded is dependent on the nature of the charge levelled and the circumstances of the case."

The charge levelled in the present case is that the respondent holds an office of profit as the Chairperson of the Kerala State Wakf Board and in that capacity he enjoys the profits attached to that office from the Government of Kerala.

24. *In V.S. Achuthanandan v. P.J. Francis: (1999) 3 SCC 737, a three-Judge Bench of this Court has taken the view that only because full particulars are not given, an election petitioner is not to be thrown out at the threshold. To quote para 15: SCC p. 747):*

"15.... An election petition was not liable to be dismissed in limine merely because full particulars of corrupt practice alleged were not set out. It is,

therefore, evident that material facts are such primary facts which must be proved at the trial by a party to establish existence of a cause of action. Whether in an election petition a particular fact is a material fact or not, and as such, required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon, and in the light of the special circumstances of the case.”

Again at para 16 of V.S. Achuthanandan case (supra), it was held that:(SCC p. 748)

“16.... So long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The implications of the liability of the pleadings to be struck out on the ground that it discloses no reasonable cause of action are generally more known than clearly understood. ... the failure of the pleadings to disclose a reasonable cause of action is distinct from the absence of full particulars.”

(emphasis supplied)

25. *In Hari Shanker Jain v. Sonia Gandhi : (2001) 8 SCC 233, a three-Judge Bench of this Court held that the expression 'cause of action' would mean facts to be proved, if traversed, in order to support his right to the judgment of the court and that the function of the party is to present a full picture of the cause of action with such further information so as to make opposite party understand the case he will have to meet. To quote para 23 :(SCC p.251):*

“23.... The expression 'cause of action' has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to

support his right to the judgment of court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. (See *Samant N. Balkrishna v. George Fernandez* (1969) 3 SCC 238) and *Jitendra Bahadur Singh v. Kirshna Behari* (1969) 2 SCC 433. Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In *V.S. Achuthanandan v. P.J. Francis* this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead 'material facts' is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition."

26. In ***Syed Dastagir v. T.R. Gopalakrishna Setty*** : (1999) 6 SCC 337, while referring to the pleadings, it has been held at para 9 that: (SCC p.341)

"9.... In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. ... So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

27. *In Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express* : (2006) 3 SCC 100, this Court at para 12 held that: (SCC p.115)

“12.... The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.”

28. *In a recent decision in Ponnala Lakshmaiah v. Kommuri Pratap Reddy* : (2012) 7 SCC 788, this Court had held at paras 17 and 29 that: (SCC pp.798 & 802)

“17.... The courts need to be cautious in dealing with requests for dismissal of the petitions at the threshold and exercise their powers of dismissal only in cases where even on a plain reading of the petition no cause of action is disclosed.

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29. ... An election which is vitiated by reason of corrupt practices, illegalities and irregularities enumerated in

Sections 100 and 123 of the Act cannot obviously be recognised and respected as the decision of the majority of the electorate. The courts are, therefore, duty-bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hypertechnical in their approach and without being oblivious of the ground realities.”

(emphasis supplied)

29. Finally, as cautioned by this Court in **Raj Narain v. Indira Nehru Gandhi**, : (1972) 3 SCC 850, it was held that: (SCC p. 858, para 19)

“19. Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the court to ascertain that principle and implement it.”

(emphasis supplied)

13. Guided by the aforesaid principles of law, I am of the opinion, having regard to the averments in the election petition, that the petition discloses a cause of action and cannot be thrown out at the threshold.

14. A perusal of the Election Petition in particular paras 5 to 11 show, that the petitioner has narrated each and every incident with minute

detail, starting from the distribution of nomination forms, non-supply of the required documents, difference in 'pohoch pavati' issued to the petitioner and the applicant (original respondent), though both had filed their nominations in the same office. The petitioner has averred that he was not given an opportunity to remove the objection; that his proposer Mr. Harish Bhandirge reached the venue where scrutiny was to take place, however, the police prevented him from going in, which fact was immediately informed to the petitioner, who then rushed to the venue at 12.20 p.m., to be informed that his nomination paper was rejected as some columns were left blank. The petitioner has averred that when his nomination form was checked on 27th September, 2014, on 5 tables, no such lacuna was pointed out. He has further averred that when the Returning Officer showed him a copy of the checklist (with some columns blank), he was shocked to see the same, as no such checklist was ever given to him. The petitioner has also averred that the word 'nahi' (No) was cancelled and the word 'hoy' (Yes) was written in a different ink; that the 'pohoch pavati' given to the petitioner was different from the 'pohoch pavati' given to the applicant etc.

15. A perusal of the Election Petition shows that the Petitioner has disclosed a cause of action. The Election Petition will have to be read and considered as a whole. The cause of action shown in the Election Petition is a bundle of facts which will have to be proved and determined by the Court, after evidence is led. It cannot be said that on a plain reading of the petition, no cause of action is disclosed. The petitioner has in great detail set out every incidence, starting from distribution of the nomination forms, non-supply of required documents, difference in 'pohoch pavati', issued to the petitioner and the applicant (respondent), by the same office, how the petitioner was not given any opportunity to rebut the objection etc. The facts as disclosed set out all material facts and gives material particulars giving rise to the cause of action, pursuant to which, the election petition was filed. Only on the basis of certain admissions relied on by the applicant, the election petition cannot be dismissed at the threshold.

16. Considering the aforesaid, the Application being devoid of merit is rejected and disposed of as such.

REVATI MOHITE DERE, J.