

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

C.A.O. NO.1036/2017 IN ELECTION PETITION NO. 7/2014

(ASHISH NANDKISHOR JAISWAL VERSUS REDDY DWARAM MALLIKARJUN RAMREDDY & OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri M.P. Khajanchi, Counsel for the appellant.
Shri S.P. Dharmadhikari, Sr. Counsel for the Respondent No.1.

CORAM : S.B. SHUKRE, J.

DATE : NOVEMBER 08, 2017.

This is an application (Exh.19) filed under Order VI Rule 16 of the Code of Civil Procedure urging the Court to strike out the pleadings of the petitioner.

2. The application is strongly opposed by the petitioner submitting that it is devoid of any substance and has been filed belatedly.

3. Shri S.P. Dharmadhikari, learned senior counsel for the respondent, who has filed this application, submits that the pleadings contained in Paragraphs-21, 28 and 23(xvii) do not make out any cause of action and are vexatious, unnecessary and embarrassing for the respondent. Therefore, he submits that these pleadings deserve to be struck out as per settled principles of law.

4. Shri M.P. Khanjanchi, learned counsel for the petitioner, disagreeing with the contentions of the learned senior counsel, submits that these pleadings do disclose cause of action except for the pleadings contained in paragraph-23 (xvii), which have been made only to show the conduct of the respondent in the election process. He further submits that the pleadings contained in paragraphs-21 and 28 are absolutely necessary to enable the petitioner to adduce evidence on the point that if the respondent was not to be in the fray, the voters would have cast their votes in favour of the petitioner, who had won the second highest number of votes at the election, the constituency being traditionally the stronghold of Shivsena. He submits that these pleadings are in consonance with the right of the petitioner under Section 101(a) of the Representation of People Act, 1951 ('R.P. Act' for short). Alternately, he submits that these pleadings could be considered as weak pleadings which by itself would not be a ground for their being struck out. He further submits that the pleadings in paragraph-23(xvii) have been made only to demonstrate that his earlier assertions were false. Lastly, he also submits that this application is not maintainable as in the written statement filed by the respondent no foundation in this regard has been laid.

5. About the last objection taken by the learned counsel for the petitioner that the present application is

not maintainable, I must say that the objection finds no support in the facts of the case. In the written statement, paragraph-24 (page-332), it has been specifically averred by the respondent that Zilla Parishad is not included in the definition of appropriate government given under Section 2(b) of the R.P. Act. It is further contended that even if it is assumed for the sake of argument, though not admitted, that the erstwhile firm of the respondent had entered into contract with the Zilla Parishad, Nagpur, subsisting on the date of filing of his nomination form, that would not incur any disqualification for the respondent, because Zilla Parishad is not the “appropriate government” for the purposes of Section 9-A of the R.P. Act. These averments would show that the objection now taken in the application has its foundation in the written statement and therefore, this would not be a case wherein the respondent could be said to have relinquished his ground of defence or attack or has awoken belatedly as an afterthought action. For this very reason, in my respectful submission, the ratio of the case of **Neena Vikram Verma Vs. Balmukund Singh Gautam & Others**, reported in **(2013)5, Supreme Court Cases, 673**, relied upon by the learned counsel for the petitioner, in which it is laid down that when a contention is not raised earlier, which might and ought to have been made a ground of defence or attack, would have to be called as relinquished by the party concerned, would have no application to the facts of the present

case. Thus, the application as filed by the respondent is maintainable and the objection taken in this regard by the learned counsel for the petitioner is rejected.

6. In the case of Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, 1987 (Supp) Supreme Court Cases, 93, referred to me by the learned senior counsel for the respondent, the Hon'ble Apex Court has set out the principle on the basis of which, discretion under Order VI Rule 16 of the Code of Civil Procedure can be exercised by a court. The principle is that, pleadings not disclosing any cause of action and which are unnecessary, scandalous, frivolous or vexatious or of the kind which may tend to prejudice, embarrass or delay the fair trial of the petition or suit, must be struck off and power to strike out such pleadings can be exercised at any stage of the proceedings.

7. In the case of Mohan Rawale Vs. Damodar Tatyaba @ Dadasaheb & Others, reported in (1994)2 Supreme Court Cases, 392, relied upon by the learned counsel for the petitioner, it is stated that just because a pleading discloses a weak cause of action and there is hardly any chance of succeeding upon such a cause of action, that by itself would not be sufficient for striking out the pleading.

8. In the case of Sathi Vijay Kumar Vs. Tota Singh & Others, (2006)13 Supreme Court Cases, 353, to which my attention has been invited by the learned counsel for the petitioner, a word of caution has been struck by the Hon'ble Apex Court, observing that utmost care must be exercised by the court while exercising its power under Order VI Rule 16, as a matter of general principle. The Hon'ble Supreme Court has further observed in paragraph-33 that normally, court cannot direct parties as to how they should prepare their pleadings and if the parties have not offended the rules of pleadings by making averments and raising arguable issues, the court would not order striking out pleadings for the reason that the power to strike out pleadings is extraordinary in nature, calling for its sparse use.

9. In the light of the above referred principles of law, let us now examine the pleadings about which an objection has been taken by the respondent in the present application. These pleadings are contained in paragraphs-21, 28 and 23(xvii). Since the pleadings contained in paragraphs-21 and 28 are on one aspect of the case and pleadings contained in 23(xvii) are on another, I have given my separate consideration to these two sets of pleadings.

10. I would first take up the averments made in paragraphs-21 and 28 for consideration. Paragraphs-21 and 28 of the petition are reproduced thus;

“21. The aforesaid improper acceptance of Nomination Form of Respondent No.1 has materially affected the result of election, inasmuch as the Respondent No.1, who polled 59343 votes, came to be declared elected, as against which, the petitioner, who polled 47,262 votes i.e. second highest number of votes, was defeated. As such, the Respondent No.1's election deserves to be declared void in view of Section 100 (1)(d)(i) of the Representation of the People Act, 1951.

28. As already submitted, the petitioner represented the same constituency for three terms. He has secured second highest number of votes. But for improper acceptance of nomination paper of Respondent No.1, who is disqualified, the petitioner would have been elected, considering that Ramtek Constituency is traditionally Shivsena stronghold as well as the votes polled by other candidates whose tally was very much low, as is apparent from the following:-

Sr. No	Candidate	Party	Votes
1.	Reddy Dwaram Malilikarjun Ramreddy	Bhartiya Janta Party	59343
2.	Ashish Nandkishore Jaiswal [Vakil]	Shivsena	47262
3.	Mohite Subodh Baburao	Indian National Congress	35546
4.	Dr. Amol Ranjeet Deshmukh	Nationalist Congress Party.	9162

5.	Vishesh Vasanta Futane	Bahujan Samaj Party	8601
6.	Sanjay Vitthalrao Satyekar	Independent	3441
7.	Yogesh Raghunath Wadibhasme	Maharashtra Navnirman Sena	2343
8.	Gajbe Ishwar Chaitram	Independent	550
9.	Dhiman-Bhojraj Shankar Gharde	Ambedkarite Party of India	546
10.	Lonare Prakash Marotrao	Independent	482
11.	Rani Rajashreedevi Bulandshah	Independent	391
12.	Rameshwar Mangal Inwate	Independent	372
13.	Sunil Rambhau Thakare	Bahujan Mukti Party	326
14.	Ashok Namaji Dongare	Independent	275
15.	None of the above	None of the above	1379

11. Averments in paragraph-21 are clear enough to indicate that they make out cause of action, which basically implies a right to sue and which can be proved by leading necessary evidence and therefore, these pleadings would have to be held as material and necessary which cannot be struck off, which I do hold.

12. As regards the pleadings in paragraph-28, I have no doubt in my mind that they do not constitute any cause of action. It is well settled principle of law that a cause of action is every fact and every set of facts, which if controverted would be required to be proved in order to obtain a relief in the petition or the suit. A useful reference in this regard may be made to the

observations of Hon'ble Apex Court in M/s Ingot and Alloys Ltd. Vs. Union of India & Another, (2004)6 Supreme Court Cases, 254. These averments seek to point out a probability that, with the petitioner having received second highest number of votes in the election and the respondent having been disqualified to contest the election, there was a possibility or chance of the voters casting their votes in favour of the petitioner for the reason that Ramtek constituency, in the opinion of the petitioner, was traditionally a Shivsena stronghold, and the petitioner says so with an admission of the fact that at the election, apart from the petitioner and respondent, there were 12 more candidates in the fray. When so many candidates were in the contest and in the reckoning for being elected, the probability of a win indicated by the averments is thrown into realm of uncertainty and no amount of evidence would prove which way the voters would have cast their votes with the removal of the respondent from the scene of election. Exercise of franchise is an expression of will of the voters to choose a candidate as their representative and will of the voters depends upon the conscious decision taken by the voter in his mind, may be with the help of the heart. This play of mind of the voter in tandem with his heart beats is internal to the voter; is abstruse and certainly not amenable to any proof or demonstration through empirical evidence. In such cases, no one can say with any reasonable certainty that absent a particular

candidate at the election, the objecting candidate or any other candidate would draw all or majority of the votes in his favour which otherwise would have gone to the candidate not in the fray. To put it plainly, the averments made in paragraph-28 are the statements of chance and a chance being a matter of many probabilities, there is no way to demonstrate that one of it out of many will come true. When a person speaks of a chance, he also admits of uncertainty which would make it inherently unprovable and unverifiable. It would then follow that such averments would not make out any cause of action.

13. In the case of **Prakash Khandre Vs. Dr. Vijaya Kumar Khandre & Others, AIR 2002 Supreme Court, 2345**, the Hon'ble Apex Court has held, based upon the decision of Constitution Bench of the Hon'ble Apex Court in the case of **Konappa Rudrappa Nadgouda Vs. Vishwanath Reddy, AIR 1969, SC, 447** that the principle of throwing away of votes cast in favour of a person found disqualified for election, if the voters had due notice before the poll of the disqualification of that candidate, has no application in our country. It also held that when for one seat there are number of candidates, it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election and what would have been the voting pattern and therefore,

order passed by the High Court declaring the election petitioner as elected was set aside by it. These observations squarely apply to the facts of the present case, as disclosed by pleadings in paragraph-28.

14. Learned counsel for the petitioner has submitted that the pleadings contained in paragraph-28 are necessary for proving the right of the petitioner under Section 101(a) of the R.P. Act. A plain reading of this provision of law, however, gives an impression that it has no application to the facts of the present case. This provision has been made to grapple with the situation arising after the recount of the votes polled at the election is ordered and High Court is of the opinion that as a matter of fact, it is the petitioner or some other candidate and not the candidate whose election has been called in question, has received majority of the valid votes. This is evident from the use of expression 'that in fact' made in Clause (a) of Section 101 of the R.P. Act. I could not see any ground taken in this petition to the effect that there was error in counting of votes in the present case nor has it been shown to me by learned counsel for the petitioner. Obviously, this provision of law would be of no use in the present case.

15. The discussion made so far in respect of the averments in paragraph-28 would show that they do not make out any cause of action and if that be so, I would

say, they are unnecessary as well, that they are likely to cause delay in disposal of the petition, that, this is not a case wherein these pleadings could be considered to be disclosing a weak cause of action and that, there is also no question of dictating the petitioner as to in what manner he should prepare pleadings. So, in sum and substance, they deserve to be struck off from the pleadings of the petition.

16. Now, the averments made in paragraph-23(xvii) would have to be examined. They read as under;

“23(xvii). The aforesaid firm, M/s Reddy Bros. & Co., has also contracts with Zilla Parishad, Nagpur, and other Govt. and Semi Govt., and Local Authorities. However, intimation of alleged retirement is not given to any of them. Petitioner submits that by letter dated 25th November, 2014, sent by the Information Officer i.e. Deputy Executive Engineer [Construction], Office of the Executive Engineer [Construction], Zilla Parishad, Nagpur, to the petitioner, the petitioner has been supplied information under the Right to Information Act, which demonstrates that in the records of Zilla Parishad, respondent no.1 is recorded as a partner of the Firm, M/s Reddy Bros. & Co., as on 25th November, 2014, who is holding fifty per cent share in the said Firm. The said communication dated 25th November, 2014 also clearly establishes that even on the date of issuance of said letter, the work undertaken by M/s Reddy Bros. & Co., subsists. Along with the said letter, a Registration Certificate issued by the Executive Engineer

[Construction], Zilla Parishad, Nagpur, is also provided to the petitioner, which demonstrates that registration of the Firm, M/s Reddy Bros. & Co., as a Govt. Contractor, is valid with effect from 3rd December, 2012 to 2nd December, 2017, in the records of Rural Development Department of Govt. of Maharashtra. Similarly, on 26th November, 2014, the Information Officer i.e. Deputy Executive Engineer [Construction] of the Office of Zilla Parishad [Construction], Nagpur, has issued a letter dated 26th November, 2014 to the petitioner, which states that respondent no.1 as a partner of M/s Reddy Bros. & Co., submitted an online tender on 4th November, 2014 for the work of construction of Deolapar road.”

17. Upon a careful consideration of the pleadings made in this paragraph, one tends to think that there is a substance in the argument of learned counsel for the petitioner for its greater part, confined to the submission that these pleadings have been made in order to demonstrate conduct of the respondent in the process of election. These pleadings in their substantial part have less to do with the grounds of the petition filed to challenge the election of respondent than to do with the conduct of the petitioner. Therefore, so far as the pleadings necessary for proving the conduct of the respondent are concerned, I am of the opinion that they cannot be struck off, though a smaller portion of them would require their excision, as the averments contained in the smaller portion relate to that submission of the petitioner which is unnecessary, frivolous and has a

tendency to delay the matter. These pleadings are contained in the first four lines, which read as, "The aforesaid Firm, M/s Reddy Bros. & Co., has also contracts with Zilla Parishad, Nagpur, and other Govt. and Semi-Govt., and Local Authorities.", which portion for the sake of identification, is marked as 'Portion-A', Page Nos.29 and 30 of the petition. I must say that it is not the ground specifically taken by the petitioner that the respondent was disqualified to contest the election because he had taken up contracts for supply of goods or completion of work for the local authorities like Zilla Parishad, Nagpur, other government, semi-government and so on. He also could not have taken such a ground in view of the law laid down by the Hon'ble Apex Court in the case of **Shrikant Vs. Vasantrao & Others,** **(2006)2 Supreme Court Cases, 682,** wherein it is clarified that Section 9(a) of the R.P. Act only disqualifies a person having a subsisting contract with the State Government, either for supply of goods or for execution of any work undertaken by that government, but does not disqualify a person, who has such contracts with any local or other authorities. So, the pleadings at portion 'A' would have to be considered as not making out any cause of action and are unnecessary, which are likely to cause delay in the matter. These pleadings would have to be struck out.

In the result, the application is partly allowed.

The pleadings contained in paragraph-28 and also in portion marked 'A' of paragraph-23(xvii) are struck out with immediate effect.

Cost of the application shall be the cost in the cause.

Application stands disposed of.

JUDGE

SHRIPAD