

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

APPLICATION NO.6 OF 2016
IN
ELECTION PETITION NO.28 OF 2014

...

Smt. Jyoti Suresh Kalani	... Applicant
IN THE MATTER BETWEEN	
Kamal Sunderdas Bathija	... Petitioner
vs.	
Election Commission of India & Ors.	... Respondents

WITH
ELECTION PETITION NO.28 OF 2014

Kamal Sunderdas Bathija	... Petitioner
vs.	
Election Commission of India & Ors.	... Respondents

...

Mr.Harekrishna Mishra i/b Law Global for the Petitioner.
Mr. Sidheshwar N. Biradar for the Applicant (Original Respondent No.3 in Election Petition).
Mr. U.S. Upadhyay, AGP for the State.

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**CORAM : A.A. SAYED, J.
DATED : 04 MAY 2018.**

JUDGMENT:

1 This is an Application filed by the Applicant (original Respondent No.3 in the Election Petition) who is the returned candidate, for summarily dismissal of the Election Petition No.28 of 2014, under section 86(i) of the Representative of the People Act, 1951 ('RP Act' for short) and Order VII Rule 11(a) of the Code of Civil Procedure, 1908.

2. Election to 141, Ulhasnagar Constituency of the Maharashtra Legislative Assembly was held in October 2014. The Applicant, who contested the election as a candidate for National Congress Party (NCP), was declared elected. The Petitioner, who has filed the Election Petition, had also contested the election as an independent candidate.

3. The Election Petition has been filed by the Petitioner for a declaration that the election of the Applicant is illegal and bad in law, inter alia, on the ground that the Applicant has committed acts of furnishing false and misleading information and suppressing and distorting material evidence and/or facts which the Applicant was duty bound to disclose while filing her nomination form. According to the Petitioner the acts of the Applicant constitute corrupt practice and therefore the election of the Applicant to the Maharashtra State Legislative Assembly-October 2014 election is required to be set aside.

4. The grounds mentioned in the Application by the Applicant seeking summary dismissal of the Election Petition are as follows:

- (i) The Petitioner has not complied with the provisions of sections 81 and 83 of the RP Act, and the Election Petition suffers from various defects specified hereinbelow -

(ii) The copy of the Petition served on the Applicant is not attested by the Petitioner as true copy in his 'own signature' which is a mandatory requirement under section 81(3) of the RP Act.

(iii) The Affidavit in Form 25 under Rule 94-A of Conduct of Election Rules, 1961, as stipulated under proviso to section 83(1) of the RP Act has not been filed by the Petitioner.

(iv) The Petitioner has not personally presented the Petition as there is no endorsement on the Petition by the Prothonotary and Senior Master that the Petitioner was present at the time of presentation of the Petition.

(v) Copies of the Petition are not filed alongwith the Petition and the Prothonotary's endorsement of filing copy is absent.

(vi) Copy is filed and served on the Respondents are not true copies because payment of Court fee and costs u/s 117 added in handwriting in original Petition and not in the copies.

(vii) Concise statement not verified by the Petitioner.

(viii) Verification of Schedules/Annexure in the copy served on the Applicant shows the date as 3.12.2014 and endorsements, stamps, seal, signature and name of Oath Officer and also signature of the Petitioner are missing in the copy.

- (ix) Handwriting corrections in the original Petition are not attested.
- (x) Paragraph 5A in handwriting is added in the original Petition and the same is missing in the copies of the Petition.
- (xi) Averment regarding payment of costs under section 117 missing in the Petition and therefore there was non-compliance of section 117.
- (xii) The Annexures and Schedules are not tested as true copies of original.
- (xiii) Original colour photographs annexed to the Petition, but in the copy illegible and indiscernible photographs annexed.
- (xiv) The Annexures and Schedules which form integral part of the Petition are verified after the prescribed period of limitation and therefore the Petition is barred by limitation.
- (xv) That costs under section 117 have not been paid within the prescribed period of limitation and therefore the Petition is barred by limitation.
- (xvi) The Concise Statement of facts appears to be filed beyond the period of limitation because the Petition was lodged on the last day of limitation and the office had raised objections about the Concise Statement and it appears that the Concise Statement was inserted subsequently after the period of limitation.

(xvii) No steps taken for issuance of summons for one year therefore the Petition is liable to be rejected under order VII Rule 11 (f) of CPC r/w Rule 9.

(xviii) The allegations regarding corrupt practices are very vague.

(xix) The Petition does not disclose the cause of action and there is no whisper about the grounds provided under section 100 or 101 of RP Act.

(xx) The Petition does not disclose the source of information with regard to the allegations of corrupt practice.

(xxi) The Petition is hit by non-joinder of necessary parties.

(xxii) The pleadings are vexatious, scandalous and irrelevant and therefore liable to be struck off.

5. An Affidavit in Reply has been filed by the Petitioner opposing the Application. The sum and substance of the case of the Petitioner in the Affidavit in Reply is as under:

- (a) That the Application filed by the Applicant is misconceived and devoid of merit and substance and the same has been filed with oblique and ulterior motive of prolonging and protracting the hearing of the Petition.

- (b) That the issues raised in the Application are frivolous and vexatious in nature which do not render the Petition liable to be dismissed on the grounds urged in the Application.
- (c) That frivolous and vexatious issues are sought to be raked up by the Applicant which even otherwise are triable in nature and cannot be adjudicated upon in the Application.
- (d) That the Petitioner has complied with the provisions of Sections 81 and 83 of the RP Act in the matter of filing of the Petition. The defects, if any, are curable and that they do not warrant dismissal of the Petition at the threshold.

6. Learned Counsel for the Applicant submitted that the defects as specified in the grounds in paragraph 4 hereinabove are substantial in nature and cannot be allowed to be cured or rectified and the Petition is required to be dismissed at the threshold under Section 86 of the RP Act read with Order VII Rule 11(a) of the Code of Civil Procedure. The learned Counsel has laid particular emphasis on grounds (ii) and (iii) of paragraph 4 hereinabove.

7. So far as ground (ii) in paragraph 4 hereinabove, the learned Counsel has produced the copy of the Election Petition, which was served on the

Applicant. He submitted that the signature on the true copy of the Election Petition served upon the Applicant is not that of the Petitioner and the copy of the Election Petition is thus not attested by the Petitioner under his 'own signature', which is a mandatory requirement under section 81(3) of the RP Act and the Election Petition deserves to be dismissed on this count and at this stage itself under section 86 of the RP Act. Learned Counsel submitted that this fact is not denied in the Affidavit-in-Reply. He has drawn my attention to the averments in paragraph 4(b) of the Application, which reads as follows:

“4(b) That the copy of election petition that was served on the Applicant herein is not signed by the Petitioner in his own hand as true copy on the original petition and this again is a non-compliance of the provisions of Section 81(3) of the said Act of 1951 and therefore the Petition is liable to be dismissed/rejected as stipulated under section 86 of the said Act of 1951.”

The learned Counsel then pointed out paragraph 3(v) of the Affidavit-in-Reply, which deals with the aforesaid paragraph 4(b) of the Application. Paragraph 3(v) of the Affidavit-in-Reply reads as under:

“3(v) With reference to para 4(b), I say that I deny that the election petition is liable for dismissal only on the ground that the petition served upon the Respondent No.3 was not signed by me in my own hand as true copy of the original petition and therefore

noncompliance thereof would tantamount to noncompliance of section 81(3) of the Act and which would entail dismissal/rejection of the petition u/s. 86 of the Act.”

8. Insofar as ground (iii) in paragraph 4 hereinabove is concerned, the learned Counsel submitted that the Affidavit in Form-25 under Rule 94A of the Conduct of Election Rules, 1961 as stipulated under the proviso to section 83(1) of the RP Act has not been filed, despite the fact that the Election Petition contains allegations of corrupt practices. He submitted that though this has been denied in the Affidavit-in-Reply, the records would show that no such Affidavit in Form-25 has been filed by the Petitioner.

9 The learned Counsel iterated the other grounds specified in paragraph 4 hereinabove and tendered written submissions.

10. In support of his contentions, learned Counsel for the Applicant has relied upon the following judgments:

- (i) **G.V.Sreerama Reddy and anr. v/s. Returning Officer and ors,** (2009) 8 SCC 736;
- (ii) **Sharif-Ud-Din v/s. Abdul Gani Lone,** (1980) 1 SCC 403;
- (iii) **Ravinder Singh v/s. Janmeja Singh and ors.,** (2000) 8 SCC 191;
- (iv) **Ram Sukh v/s. Dinesh Aggarwal,** (2009) 10 SCC 541;
- (v) **Om Prakash Srivastava v/s. Union of India and anr.,** (2006) 6 SCC 207;

- (vi) **Hari Shanker Jain v/s Sonia Gandhi**, (2001) 8 SCC 233;
- (vii) **Jaipal Singh v/s. Sumitra Mahajan (Smt.) and anr.** (2004) 4 SCC 522;
- (viii) Judgment of learned Single Judge of this Court in Application No.17 of 2015 in Election Petition No.27 of 2014 decided on 9 December 2016 (**Mr.Subhash Jaising Borkar v/s. Gautam Sukhdev Chabukswar and ors.**);
- (ix) Judgment of learned Single Judge of this Court in Application No.16 of 2015 in Election Petition No.17 of 2014 decided on 23 December 2016 (**Shri Subhash Ramkrishan Agarwal v/s. Shri Gautam Sukhdev Chabuskar & ors.**);
- (x) Judgment of learned Single Judge of this Court in Application No.5 of 2016 in Election Petition No.4 of 2014 decided on 21 September 2016 (**Narayan Govindrao Patil v/s. Rashmi Digambar Bagar and ors.**)
- (xi) Judgment of Learned Single Judge of this Court in **Ganesh Dadu Shendge v/s. Dilip Dnyandeo Kamble**, 2016 SCC OnLine Bom 3577.

11. I have heard the learned Counsel for the Applicant. I have also perused the judgments cited by the learned Counsel. The Petitioner and his Counsel have not remained present to advance arguments. Section 81, 83, 86 of the RP Act, 1951 and Rule 94A of the Conduct of Elections Rules, 1961 are relevant for our purposes and are reproduced hereunder:

81. *Presentation of petitions* :-

- (1) An election petition calling in question any

election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.—In this sub-section, “elector” means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(3) 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.

83. Contents of petition.—

- (1) An election petition—
 - (a) shall contain a concise statement of the material facts on which the petitioner relies;
 - (b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
 - (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be

accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

86. Trial of election petitions.—

(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

...

Rule 94A – Form of affidavit to be filed with election petition – The affidavit referred to in the proviso to sub-section (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be Form 25.”

Form 25 prescribed by aforementioned Rule 94A is extracted hereunder:

**“Form 25
(see Rule 94A)
AFFIDAVIT**

I,, the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati (respondent No..... in the said petition) make solemn affirmation/oath and say-

a) that the statements made in paragraphs of the accompanying election petition about the commission of the corrupt practice of* and the particulars of such corrupt practice mentioned in paragraphs of the same petition and in paragraphs of the Schedule annexed thereto are true to my knowledge;

b) that the statements made in paragraphs of the said petition about the commission of the corrupt practice of* and the particulars of such corrupt practice given in paragraphs of the said petition and in paragraphs of the Schedule annexed thereto are true to my information:

(c) – (d), etc.

Signature of deponent

Solemnly affirmed/sworn by Shri/Smt before me,atthis..... day of 20.....

Magistrate of the First Class/Notary/Commissioner of Oaths.”

(emphasis supplied)

CONSIDERATION

12. In so far as ground (ii) specified in paragraph 4 - that the copy of the Election Petition served on the Applicant is not attested by the Petitioner as

true copy in his 'own signature' - it would be apposite to refer to the judgment of the Apex Court in **Sharif-Ud-Din vs. Abdul Gani Lone (supra)**. This was a case under the Jammu and Kashmir Representative of the People Act. It was held that the requirement under section 89(3) [corresponding to section 81(3) of the RP Act] that the Election Petition should be attested by the Petitioner under his 'own signature' to be a true copy of the Petition is mandatory and non-compliance with it must result in the dismissal of the Election Petition as contemplated under section 94(1) of the Act [corresponding to section 86(1) of the RP Act]. Paragraphs 1, 3, 4, 5 and 20 of the said judgment are relevant and are extracted below:

“1. This appeal is filed under Section 123 of the Jammu and Kashmir Representation of the People Act, 1957 (hereinafter referred to as 'the Act') by the appellant against the judgment of the High Court of Jammu & Kashmir in Election Petition No.3 of 1977 dismissing an election petition filed by him on the ground that he had not complied with Section 89(3) of the Act.

3 Section 89(3) of the Act reads: "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 true copy of the petition."

4. Section 94(1) of the Act provides: "The High Court shall dismiss an election petition which does not comply with the provisions of Section 89 or Section 90 or Section 125".

5. Section 89(3) and Section 94(1) of the Act correspond to Section 81(3) and Section 86(1) respectively of the Representation of the People Act, 1951 (Act No. 43 of 1951) (hereinafter referred to as 'the Central Act'). There is no difference between the language of Section 89(3) of the Act and the language of Section 81(3) of the Central Act. The language of Section 94(1) of the Act and the language of Section 86(1) of the Central Act are similar except with regard to the numbers of sections referred to therein.

20. We are, therefore, of the view that the requirement that every copy of the election petition which is intended for service on the respondent should be attested by the petitioner under his own signature is a mandatory requirement and the non-compliance with that requirement should result in the dismissal of the petition as provided in Section 94 of the Act. The High Court was, therefore, right in dismissing the petition on the above ground."

13 On comparing the signature of the Petitioner in the Election Petition and the signature appearing on the true copy of the Election Petition which is served on the Applicant, it does appear that the signature is not that of the Petitioner. Moreover, while dealing with the averment in 4(b) of the Application - that the copy of Election Petition that was served on the

Applicant is not signed by the Petitioner in his own hand as true copy - this fact has not been denied by the Petitioner in paragraph 3(v) of the Affidavit-in-Reply. The denial in paragraph 3(v) is only to the extent that the Election Petition is liable to be dismissed on the ground that the Petition served upon the Applicant was not signed by in his own hand as true copy which would entail dismissal of the Petition under section 86 of the RP Act.

14 In the circumstances, it is apparent that in the present case, there is non-compliance of section 81(3) which stipulates that every copy of the Election Petition shall be attested by the Petitioner under his 'own signature' to be a true copy of the Petition. The said Election Petition is thus liable to be dismissed on this count alone, having regard to section 86(1) of the Act which states that the High Court shall dismiss an Election Petition which does not comply with the provisions of section 81 (or section 82 or section 117).

15 In so far as ground (iii) in paragraph 4 hereinabove - that the Affidavit in Form 25 under Rule 94A of Conduct of Election Rules, 1961, as stipulated under proviso to section 83(1) of the RP Act has not been filed by the Petitioner - reference may be made to the judgment of the Bench of three Hon'ble Judges of the Supreme Court in the case of **GM**

Siddheshwar vs. Prasanna Kumar, (2013) 4 SCC 776. In para 29 the Supreme Court held that except in cases when allegations of corrupt practices have been made, there is no requirement of the Election Petitioner 'also' filing an Affidavit in support of the averments made in the Election Petition. In the present case, the Election Petition is filed inter alia on the ground of corrupt practices. In the circumstances, the Affidavit in terms of Section 83 (1) was mandatory. The 3-Judge Bench of the Supreme Court after surveying the earlier judgments including the Constitution Bench judgments which dealt with the doctrine of substantial compliance as well as doctrine of curability, held in para 52 as follows:

52. The principles emerging from these decisions are that although non-compliance with the provisions of section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold.

(emphasis supplied)

16 In **Ravinder Singh v/s. Janmeja Singh and ors.**, (supra) in paragraph 11, the Supreme Court held as follows:

“11. Section 83 of the Act is mandatory in character and requires not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to

present a full and complete picture of the action to be detailed in the election petition but under the proviso to Section 83(1) of the Act, the election petition levelling a charge of corrupt practice is required, by law, to be supported by an affidavit in which the election petitioner is obliged to disclose his source of information in respect of the commission of that corrupt practice. The reason for this insistence is obvious. It is necessary for an election petitioner to make such a charge with full responsibility and to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise, in the absence of proper affidavit, in the prescribed form, filed in support of the corrupt practice of bribery, the allegation pertaining thereto, could not be put to trial - the defect being of a fatal nature."

(emphasis supplied)

17 In the present case there is no Affidavit in Form 25 filed at all by the Petitioner. Thus, the present case is not a case of defective Affidavit, which defect can be cured. This is the case of total and complete non-compliance and therefore the doctrine of substantial compliance or the doctrine of curability would not come into play. In the circumstances, applying the principle of law laid down in the aforesaid judgments, the Election Petition is liable to be dismissed at the threshold on this count also.

18 So far as ground (iv) in paragraph 4 - that the Petitioner has not personally presented the Election Petition as there is no endorsement made by the Prothonotary & Senior Master to that effect - I find no merit in the same. The said ground is based on assumption and cannot be accepted. The other grounds viz - alleged failure to disclose cause of action or source of information, alleged non-joinder of parties, etc. mentioned in paragraph 4 hereinabove also cannot be accepted at this stage and do not merit dismissal of the election petition at this juncture. In my view, the 'defects' mentioned in the other grounds in paragraph 4 hereinabove are curable defects and cannot be said to be so vital in nature which would entail the dismissal of the Election Petition at the threshold. It is well-settled that substantial compliance with the requirements of section 83 of the RP Act is enough.

19 Before concluding, I am constrained to observe that the Petitioner does not appear to be really serious about prosecuting the Election Petition. It is seen that no steps have been taken by the Petitioner for issuance of the summons for a year after filing of the Election Petition. On 28 April 2017, the following order was passed:

"1. This Application has been adjourned from time to time on several occasions. Today again, request was made to adjourn the matter on the ground that Learned Counsel for the Original

Petitioner is in Hon'ble Supreme Court.

2. Stand over to 12th June, 2017 subject to cost of Rs.3000/- be paid by original Petitioner to the High Court Legal Services Authority, within two weeks from today.”

Despite the aforesaid order, the costs of Rs.3,000/- have not been paid by the Petitioner. Though on some occasion time was sought on the ground that the learned Counsel Mr. Jha is to appear and argue the matter, he never appeared before the Court to advance any argument and the junior Advocates, whenever they have chosen to appear, merely sought time.

20. In light of the above discussion, I pass the following order:

ORDER

The Application is allowed. The Election Petition No.28 of 2014 is summarily dismissed.

(A.A. SAYED, J.)