

In the elections held on 21st February 2017 for the Mumbai Municipal Corporation, the writ petitioner contested. She emerged victorious; the first respondent stood second. Assailing on various grounds the petitioner's election as a municipal counselor, the first respondent filed Election Petition No.48 of 2017.

2. Then, the petitioner entered an appearance and pleaded her defence. Based on the rival pleadings, the Chief Judge of the Small Cause Court has framed these issues:

“1. Whether the election of Respondent No.1 is liable to be set aside on account of improper acceptance of Nomination as contemplated by Section 33 of the Mumbai Municipal Corporation Act, 1888?

2. Whether the nomination of Respondent No.1 ought not to have been accepted in view of express provisions of Section 17 of the Representation of the People Act, 1950 read with the provisions of Section 62(3) of the Representation of the People Act, 1951?

3. Whether the election of Respondent No.1 is liable to be set aside on account of Respondent No.1 indulging in corrupt practice as contemplated by Section 28(F) of the Mumbai Municipal Corporation Act, 1888?

4. Whether the Respondent No.1 is guilty of making a false declaration in view of express provision of Section 31 of Representation of People Act, 1950?

5. Whether the election of Respondent No.1 is liable to be set aside on account of respondent no.1 inducing the voters for voting in her favour through hirelings and agents by distributing money and valuable articles?

6. Whether the election of Respondent No.1 is liable to be set aside on account of Respondent No.1 filing false affidavit thereby suppressing the assets belonging to Respondent No.1 as well as valuation thereof?

7. Whether the petitioner is entitled to be declared as

returning candidate in the event the election of respondent no.1 being set aside?”

3. Dissatisfied with the issues framed, the petitioner filed an application on 1st March 2018. She contended that the issues 2 & 4 should be removed and, instead, these issues must be brought on record:

- (i) Whether this Court has jurisdiction to try and entertain this Petition?
- (ii) Whether the Petition is barred by Law of Limitation?
- (iii) Whether the petition be dismissed for want of cause of action and under order 7 Rule 11 of CPC?

4. The learned Trial Judge, through his order dated 17th April 2018, rejected the petitioner’s contention to have the issues 2 and 4 removed. But he has recorded that the issues raised by the petitioner could be gone into during the trial. Aggrieved, the petitioner, the successful contestant in the election, has now come before this Court.

5. Shri Bharat Joshi, the learned counsel for the petitioner, has strenuously contended that the Representation of the People’s Act, 1951 (“RP Act”), does not affect the dispute on hand. According to him, Section 33 of the Mumbai Municipal Corporation Act, 1888 (“MMC Act”) is a self-contained code, and it alone does. In other words, neither any plea nor any relief could travel beyond Section of MMC Act, which, Shri Joshi asserts, enlists the grounds on which an

election to the position of a municipal counselor could be impugned.

6. After drawing my attention to the pleadings, especially the plaint, and the statutory position as reflected in Section 33 of the MMC Act, Shri Joshi stresses that neither Section 17 nor Section 62 (3) of RP Act can be applied, to obfuscate the trial. Thus, he has urged this Court to set aside the order, dated 17th April 2018, and to direct the learned Trial Judge to recast the issues as the writ petitioner has sought.

7. Shri Akash Rebello, the learned counsel for the first respondent, has submitted that the Trial Court has committed no illegality in rendering the impugned order. To support his contentions, he has drawn my attention to Order XIV, Rules 1 & 2 of Code of Civil Procedure. Shri Rebello contends that issues are to be framed based on the rival pleadings and that the merit of the plea, at that stage, hardly matters. He thus pleads for the dismissal of the writ petition.

8. Heard Shri Bharat Joshi, the learned counsel for the petitioner; Shri Akash Rebello, the learned counsel for the respondent no.1; and Ms. Oorja Dhond, the learned Standing Counsel for Mumbai Municipal Corporation.

9. I may first examine Order XIV Rule 1 of Civil Procedure Code (CPC), which applies to the election petition before the Small Cause Court, under the MMC Act.

“1. Framing of issues.”—(1) *Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) *Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.*

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, *after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders*, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

(italics supplied)

10. To begin with, let us put the issue in perspective by invoking Mogha¹, the acknowledged master of pleadings: [i]t is here that the trial court has to take great care and caution. If the trial Court spends some useful time while framing the issues, a

¹ Mogha's Law of pleadings in India, Eastern Law House, Eighteenth Edition, p-

good deal of unnecessary oral evidence and elaborate arguments may be shut out. Unfortunately, many trial courts never realise the importance of framing issues and very often draft issues furnished by the counsel on both sides are treated as issues framed by the court. This practice has to be deprecated in no uncertain terms. And Mogha's chastisement was in 1926.

11. An issue is a point in dispute between two or more parties. It is a single, certain, and material point affirmed by one side and denied by the other. Such controversy persisting, the matter is then put in issue between the parties. In the appeal, an issue may be a separate and discrete question of law or fact, or a combination of both.

12. On scrutiny, Order 14, Rule 1 reveals these facets: (1) An issue arises when one party affirms a material proposition, but the other party denies it. (2) That material proposition may be factual or legal. (3) If the plaintiff pleads a proposition of law or fact to show he has a right to sue, it is his material proposition. (4) Similarly, if the defendant pleads it as his defence, then it becomes his material proposition. (5) If each party does not agree to the other party's propositions, it becomes an issue in the suit.

13. Thus, issues are of two kinds: (a) issues of fact, and (b) issues of law. In fact, we may add another kind of issue—that is, (c) a mixed issue of law and fact. As Black's Law Dictionary (9th Ed)

defines, an issue of fact is point supported by one party's evidence and controverted by another's. On the other hand, an issue of law is a point on which the evidence is undisputed, the outcome depending on the court's interpretation of the law. And a mixed issue combines both these.

14. Issues are the backbone of a suit. Thus observing, C. K. Thakkar in his multi-volume treatise *Code of Civil Procedure*² notes:

“[f]irstly, it is the issues framed and not the pleadings that guide the parties in the matter of leading evidence. Secondly, the court cannot refuse to decide a point on which an issue has been framed and evidence led by the parties, even if the point involved is not mentioned in the pleadings. Thirdly, the court should not frame an issue which does not arise in the pleadings. Fourthly, the issues must be confined to the material questions of fact or law (*facta probanda*) and not on subordinate facts or evidence by which material questions of fact or law are proved or disproved (*facta probantia*). Fifthly, if the case goes in appeal, it must be dealt with by the appellate court on the issues settled for trial.”

15. Then, what is the material source for the issues? In other words, where do they originate from? They emerge, as Order 14, Rule 1 provides, from (i) plaint and written statement if any, (ii) the parties' examination under Order 10, Rule 2, and (iii) the articulations of the parties or their counsel based on their pleadings. Of course, Order 14, Rule (3) relieves the trial court

² Vol. 3, page 1739-40/1826, EBC Reader

from framing issues if the defendant makes no defence—at the first hearing of the suit. Indeed, the words “first day of hearing” do not mean, in the opinion of the Supreme Court³, the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be when either the issues are determined or evidence is taken.

16. Sometimes the trial court may frame a wrong, improper, or defective issue, or altogether omit to frame an issue, for many a reason. Yet it may not vitiate the trial nor does it prove fatal to the case if the parties go to the trial fully conscious of the controversy.

17. In a case arising out of Maharashtra Municipality Act, the unsuccessful candidate in the civic elections filed an Election Petition. Before the High Court, the appellant took the plea that in the trial the lower court has not framed a separate issue on each corrupt practice. So he argued that the trial was vitiated. The Supreme Court in *Sk. Mohd. Umar Saheb v. Kaleskar Hasham Karimsab*⁴ has held that the trial would not be vitiated merely because the issues were framed unsatisfactorily. As the parties have led evidence on the issue not otherwise explicit, the trial was declared to be proper.

18. On facts, in this case, the first respondent is the unsuccessful contestant. She has specifically pleaded in paras 11,

³ Smt. Badami v Bhali, (2012) 11 SCC 574

⁴ AIR 1970 SC 61

and 13 to 17 of her election petition that the petitioner's election was vitiated under Section 17 and 62(3) & (4) of the Representation of the People Act, 1950. Of course, the petitioner filed her reply traversing those assertions; according to her, the very enactment does not apply to civic polls. Thus, there is an assertion and a counter assertion—and that leads to an issue.

19. A plea may be untenable, false, or downright preposterous, but that is no disqualification. To frame an issue, for the court the merit of plea hardly matters. No one—especially the rival suitor—can dictate what the suitor should plead, so long as he or she has a cause of action to seek a legal remedy. True, Order 6, Rule 16 of CPC empowers a court to strike out pleadings. It can at any stage of the proceedings order to be struck out or amended any matter in any pleading (a) which may be unnecessary, scandalous, frivolous or vexatious; or (b) which may tend to prejudice, embarrass, or delay the fair trial of the suit; or (c) which is otherwise an abuse of the process of the court. But if a plea stays, the rival contender may traverse it. And then, it is a dispute at issue, to be resolved. Thus, the petitioner's first contention fails.

20. Now, I may address the petitioner's second contention. She wanted additional issues incorporated. The Trial Court has not accepted the petitioner's plea on that count. But it has, indeed, placed on record its willingness to try those issues at an appropriate

time. In fact, the order reads:

“So far as other issues, i.e., whether this court has jurisdiction to try and entertain this petition? Whether the petition is barred by law of Limitation? And Whether the petitioner be dismissed for want of cause of action and under Order 7 Rule 11 of CPC are concerned, these are on law points which can be taken into consideration at the time of final hearing of the petition.

21. That apart, as extracted above, the first issue proposed by the petitioner concerns the Trial Court’s jurisdiction to try the Election Petition. The second plea relates to limitation. And the third one concerns Order 7, Rule 11 of CPC. That is, whether the petition can be dismissed for want of cause of action.

22. I reckon both issues 1 and 3 could be brought under the statutory umbrella of Order 7, Rule 11. If at all the petitioner wants to press these two issues, it is for her to apply under Order VII Rule 11, requesting the learned Judge to try these issues as preliminary issues. Indisputably, the petitioner has so far done nothing in that direction. And the second issue concerns limitation, which is a mixed question of fact and law. It cannot be determined as a preliminary issue. On the other hand, even when no party raises that issues, yet the court is cast with the burden of going into the issue of limitation, wherever it is present. So I cannot assume that the learned Trial Judge is oblivious of that fact.

23. As the tenure of a civic post is fixed, avoidable delay benefits, needless to observe, one party and prejudices the other. So I hope the Trial Court will expedite the proceedings subject to the pressure of its Board.

Thus, the writ petition stands dismissed.

(DAMA SESHADRI NAIDU, J)

L.S. Panjwani, P.S.