

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (O) NO. 1765/2019 AND
ELECTION PETITION NO.07/2019

Manohar @ Sagar s/o Pundlik Dabrase,
 Aged 48 years, Occupation-Business,
 R/o. Plot No. 20, Shende Nagar,
 Near Samta School, Teka Naka,
 Kamthi, Nagpur-440 026

..... **PETITIONER**

...VERSUS...

1] The Election Commission of India,
 Through its Chairman having office at
 Nirvachan Bhavan, Ashoka Bhavan,
 New Delhi.

2] Returning Officer, having his office
 at Collectorate, Nagpur.

3] Mr. Nitin Jairam Gadkari,
 R/o. Gadkari Wada, Mahal,
 Nagpur.

..... **RESPONDENTS**

 Shri Barun Kumar, Advocate for the petitioner/non applicant.

Ms. Neerja Choubey, Advocate for respondent no.1/non applicant.

Shri Sumant Deopujari, Government Pleader for respondent no.2/non-applicant.

Shri Sunil V. Manohar, Senior Advocate with Shri D.V.Chauhan,
 Shri N.B.Kirtane, Shri A.S.Manohar, Advocates for applicant/respondent no.3.

CORAM : A.S.CHANDURKAR, J.

DATE ON WHICH THE ARGUMENTS WERE HEARD : 10.01.2020

DATE ON WHICH THE JUDGMENT WAS PRONOUNCED : 11.02.2020

JUDGMENT

This election petition filed under Section 80 read with Section 100 (1) of the Representation of the People Act, 1951 (for short, 'the said Act') challenges the election of the respondent no.3 who has been declared as the returned candidate in the general elections from Nagpur Lok Sabha Constituency that were held in May 2019. According to the petitioner who was also a candidate at the said election, on account of non-compliance with various statutory provisions, the election of the returned candidate is liable to be declared as null and void.

2] The respondent no.3 has filed an application under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code') seeking dismissal of the election petition on the ground that there is non-disclosure of any cause of action for seeking declaration as to the voidness of his election. It is also stated that there is absence of material facts being pleaded in the election petition to indicate that the result of the election was materially affected insofar as it concerned the returned candidate. According to the returned candidate, the allegations as made in the election petition are not supported by any material facts and therefore the requirement of provisions of Section 83(1)(a) of the said Act has not been satisfied. Accordingly the said application has been taken up for consideration.

3] Shri Sunil V. Manohar, learned Senior Advocate for the applicant-returned candidate submitted that the averments as made in the election petition were highly insufficient to proceed with the trial of the election petition. Referring

to the pleadings in the election petition it was submitted that it could be gathered from the said pleadings that the petitioner sought to rely upon the provisions of Section 100(1)(d)(iv) of the said Act for the purposes of seeking a declaration that the election of the returned candidate was liable to be declared as void. Reference was made to the averments in paragraph 5 of the election petition wherein it was pleaded that out of 19,00,784 registered voters about 11,86,843 had exercised their franchise. The petitioner had polled 26,128 votes while the returned candidate polled 6,60,221 votes. The final tally of the votes did not match and there was a serious discrepancy in the grand total. There was a difference of 786 votes more than the votes polled. The difference between the polled votes and the votes counted was unexplained. The electronic voting machines could not be trusted. Attention was then invited to the averments in paragraph 11 of the election petition wherein reference was made to the Instructions issued to the Returning Officer vide Instruction no. 15.30(d). As the discrepancy was noted in the total votes polled and the votes counted, the Returning Officer ought to have sent a detailed report to the Election Commission. In para 18 it was pleaded that even according to the Election Commission one to two percent electronic voting machines were either defective or non-functional and if such defect went undetected, the same would affect about 36,000 votes. In paragraph 19 it has been pleaded that since there was non-compliance with the provisions of Constitution of India, the provisions of the said Act and the Rules made therein as well as the guidelines issued from time to time by the Election Commission, the election of the returned candidate was liable to be declared as null and void. On the basis of these pleadings in the election petition, it was stated by the learned Senior Advocate for the returned candidate that his

election was sought to be declared as void under Section 100 (1) (d) of the said Act. His election could not be declared to be void unless it was shown that the result of the election insofar as it concerned the returned candidate had been materially affected by the non-compliance of the provisions of the Constitution of India or the statutory provisions as stipulated. Except for pleading that there was non-compliance with the provisions of the statute, there were no material particulars in the election petition to indicate any factual foundation to proceed with the trial of the election petition. Further the manner in which the result of the election insofar as the returned candidate was concerned had been materially affected by such non-compliance was also not pleaded in the entire election petition. Even if the case of the petitioner as pleaded in paragraph 5 of the election petition that there was a difference of 786 votes being shown in excess of the actual votes polled was accepted, it was clear from the votes polled by the petitioner and the respondent no.3 that the margin of difference therein was substantial. The challenge as raised by the petitioner was based on the assumption that there was a mismatch in the number of total votes in question. It was then submitted that in Election Petition No.6/2019 (*Dr.Rameshkumar Bapuraoji Gajbe Vs. The Election Commission of India through its Chairman, New Delhi and others*) similar pleadings had been made for seeking a declaration that the election was void. The returned candidate therein had moved an application seeking dismissal of the election petition under the provisions of Order VII Rule 11 (a) of the Code. Referring to the judgment dated 25.11.2019 in Election Petition No.6/2019, it was submitted that since the pleadings in Election Petition No.6/2019 were identical to the pleadings in the present election petition and that election petition had been dismissed on account of

absence of any cause of action, this election petition should also meet the same fate. It was thus submitted that the election petition was liable to be summarily dismissed without requiring the parties to go to trial.

4] Shri Barun Kumar, learned Advocate for the petitioner opposed the application moved by the returned candidate. He submitted that the pleadings in the election petition were sufficient to indicate that there arose a triable cause of action. Since it was the case of the petitioner that the Returning Officer did not act as he was required to act under various statutory provisions, the election of the returned candidate was liable to be declared as void. It had been pleaded that the election had been vitiated on account of failure to comply with the mandatory provisions. As the mismatch in the total number of votes polled and votes counted had been indicated, there was no reason to summarily reject the election petition. If it was demonstrated that there was non-compliance with various statutory provisions, the same would materially affect the election of the returned candidate. The learned counsel however did not dispute the similarity of pleadings in Election Petition No.6/2019 and in the present election petition. He sought to place reliance on the very same decisions that were relied upon by the learned counsel for the petitioner in Election Petition No.6/2019. It was thus submitted that the application moved by the returned candidate was liable to be rejected and the election petition ought to proceed for trial.

5] The rival contentions give rise to the following issue :

Whether the election petition is liable to be rejected under the provisions of Order VII Rule 11(a) of the Code ?

6] Since the returned candidate seeks rejection of the election petition under the provisions of Order VII Rule 11(a) of the Code, it is only the averments in the election petition that are required to be considered in that context. According to the returned candidate as the election petition does not disclose any cause of action, it is liable to be rejected at the threshold itself. As per provisions of Section 83 (1) (a) an election petition should contain a concise statement of material facts on which the petitioner relies. In ***Samant N. Balkrishna and another Vs. George Fernandes and others, AIR 1969 SC 1201***, it has been held that the provisions of Section 83 of the said Act are mandatory in the sense that as there is a requirement of pleading a concise statement of material facts in the election petition, the omission of a single material fact would lead to an incomplete cause of action and the statement of claim would thus become bad.

7] In the aforesaid backdrop, it would be necessary to refer to the relevant pleadings in the election petition to examine the presence of material facts. In paragraphs 5 to 7 of the election petition, it has been pleaded as under :

“5. In the Loksabha constituency of the Nagpur Loksabha there were 1900784 registered voters. Of which 1186843 polled their votes. Petitioner according to the Respondent No.2 fared 26128 votes, whereas the Respondent No.3 sponsored by Bhartiya Janta Party fared 660221 votes. However the final tally of the votes does not match and there is serious discrepancy in the grand total. There is difference of 786 votes more than the votes polled.

6. In such circumstances, it was mandatory for the Respondent no.2 to match the tally between the votes recorded in accordance with form 17C and votes counted. Only after such tally matches without any error, could the Respondent No.2 have proceeded further. However without following the specific order for the Respondent No.1, Respondent No.2 issued certificate to the

Respondent No.3, leaving behind serious lacunae which makes the whole election redundant and vitiated.

7. That the Respondent no.2 is responsible for the safe custody of the EVM from the end of polling till the beginning counting. The check introduced by the Respondent No.1, is for the reason that Respondent No.2 nor the Respondent No.3 or his agents would be able to rig or change the EVM machine used for electronic recordings of the votes. Despite this, the serious difference that has crept in remains unexplained with regards the difference of polled votes and counted votes, either by Respondent No.1 and Respondent No.2, and therefore have committed serious corrupt practice.”

In paragraph 11 provisions of Instruction 15.30 (d) of the Handbook for Returning Officer has been quoted and it is then pleaded that the Returning Officer had not followed the course prescribed therein. In the entire election petition there are no averments to the effect that the manner in which the election of the returned candidate has been materially affected due to non-compliance of various statutory provisions. On these pleadings it is the case of the election petitioner that since there has been non-compliance with the provisions of the Constitution of India, the provisions of the said Act and the Rules framed thereunder as well as guidelines issued by the Election Commission of India, the election of the returned candidate was liable to be declared as null and void. Disparity in the number of votes polled and votes counted has been taken as a base for seeking voidness of the said election.

8] On a complete reading of the election petition it can be seen that the election petitioner seeks to rely upon the provisions of Section 100 (1)(d)(iv) of the said Act for seeking a declaration that the election of the returned candidate is void. The grievance is with regard to non-compliance with the provisions of the Constitution of India and the provisions of the said Act as well as Rules and Orders

framed under the said Act. Before proceeding further, it would be necessary to refer to certain decisions of the Hon'ble Supreme Court which would have bearing on the present adjudication.

The question whether an election petition which lacked "material facts" as required to be pleaded in the election petition in terms of Section 83 (1) of the said Act could be summarily dismissed without trial was considered by the Hon'ble Supreme Court in ***Ram Sukh Vs. Dinesh Aggarwal AIR 2010 SC 1227***. It was held that by virtue of the provisions of Section 87 of the said Act, the provisions of the Code applied to the trial of an election petition and therefore in absence of anything to the contrary in the said Act, the Court trying the election petition could act in exercise of its power under the Code including Order VI Rule 16 and Order VII Rule 11 of the Code. Since the object of the said provisions was to ensure that meaningless litigation which is otherwise bound to prove abortive should not be permitted to occupy the judicial time of the Courts, that principle would apply with greater vigour in election matters where the pendency of an election petition could inhibit the elected representative of the people in the discharge of his public duty for which the electorate have reposed confidence in him. It was thus held that summary dismissal of the election petition on the aforesaid ground without trial was permissible.

9] On the requirement of the result of the election insofar it concerns a returned candidate being materially affected for it to be set aside as void under Section 100(1)(d) of the said Act, the following observations in paras 19 and 20 of the decision in ***Ram Sukh*** (supra) would be relevant. They are reproduced as

under :

“19. We may now advert to the facts at hand to examine whether the election petition suffered from the vice of non-disclosure of material facts as stipulated in Section 83 (1) (a) of the Act. As already stated the case of the election petitioner is confined to the alleged violation of Section 100 (1)(d)(iv). For the sake of ready reference, the said provision is extracted below:

"100. Grounds for declaring election to be void.--(1) Subject to the provisions of sub-section (2) if the High Court is of opinion--

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected --

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void."

20. It is plain that in order to get an election declared as void under the said provision, the election petitioner must aver that on account of non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under the Act, the result of the election, insofar as it concerned the returned candidate, was materially affected."

Similarly in ***L.R.Shivaramagowda and others Vs. T.M.Chandrashekar (Dead) by LRs and others, (1999) 1 SCC 666*** the Hon'ble Supreme Court in paragraph 10 has been observed thus :

10. "That apart, it is rightly pointed out by the appellant's counsel that in order to declare an election to be void under Section 100 (1)(d)(iv), it is absolutely necessary for the election petitioner to plead that the result of the election insofar as it concerned the returned candidate had been materially affected by the alleged non-compliance with the

provisions of the Act or of the Rules. We have already extracted paragraph 39 of the Election Petition which is the only relevant paragraph. One will search in vain for an averment in that paragraph that the appellant had spent for the election an amount exceeding the prescribed limit or that the result of the election was materially affected by the failure of the appellant to give true and correct accounts of expenditure. In the absence of either averment it was not open to the appellant to adduce evidence to that effect. It cannot be denied that the two matters referred to above are material facts which ought to find a place in an election petition if the election is sought to be set aside on the basis of such facts.”

10] This position has been reiterated by the Hon’ble Supreme Court in ***Mangani Lal Mandal Vs. Bishnu Deo Bhandari 2012 (2) SCALE 363*** by observing that for the purposes of declaring the election of a returned candidate to be void under Section 100 (1)(d)(iv) of the said Act is a proof of the fact that the breach or non-observance of the provisions of Constitution of India or statutory Rules has resulted in materially affecting the result of the returned candidate. In para 9 thereof it has been observed thus :

“9. A reading of the above provision with Section 83 of the 1951 Act leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading material facts that the result of the election insofar as it concerned the returned candidate has been materially affected by such breach or non-observance. If the election petition goes to trial then the election petitioner has also to prove the charge of breach or non-compliance as well as establish that the result of the election has been materially affected. It is only on the basis of such pleading and proof that the Court may be in a position to form opinion and record a finding that breach or non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder has materially affected the result of the election before the election of the returned candidate could be declared void. A

mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring election of a returned candidate to be void on the ground under clause (iv) of Section 100 (1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observance or non-compliance of the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100 (1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100 (1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) Jabar Singh Vs. Genda Lal; (2) L.R. Shivaramagowda and Others Vs. T.M. Chandrashekhar (dead) by LRs. and Others. and (3) Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty (Smt) and others.”

11] As per provisions of Section 83(1)(c) of the said Act, the election petition is required to be verified in the manner laid down in the Code for verification of pleadings. As per the provisions of Order VI Rule 2 of the Code, the pleadings should contain a statement in a concise form of the material facts on which the party relies for his claim or defence. Order VI Rule 15 prescribes the manner in which the pleadings are to be verified and sub-rule (2) of Rule 15 of Order VI requires a person verifying the pleadings to satisfy by reference to the number of paragraphs of the pleadings what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

In the election petition the petitioner has stated on oath that whatever has been stated in paragraphs 1 to 11 of the election petition is true and correct and rest of the contents of the election petition were as per his instructions which he

believed to be true and correct to the best of his knowledge. The affirmation to the writ petition has been done in the following manner :

“I, Manohar @ Sagar s/o Pundlik Dabrase, Aged-48 years, occupation-Business R/o Plot No.20, Shende Nagar Near Samta School, Taka Naka, Kamthi Nagpur 440026 Petitioner do hereby state on oath, that whatever stated in the instant petition in para 1-11 is true and correct, and remaining has been drafted by my counsel as per my instructions which I believe to be true and correct to best of knowledge. I have read and fully understood the same and therefore verified and signed and on this 06th July 2019 at Mumbai.”

In the aforesaid verification there is no statement made as to from where the petitioner got knowledge that there was a difference of 786 votes in the final tally of votes as pleaded in paragraph 5 of the election petition. As can be seen from the verification clause the source from which the petitioner got knowledge of the facts stated in the election petition has not been disclosed. There is also no statement in the election petition that the facts contained in paragraphs 1 to 11 were based on the petitioner’s knowledge. That has been stated only with regard to paragraphs 12 to 40 of the election petition.

12] The importance of proper verification of the averments in an election petition has been considered by the learned Single Judge in ***Bita w/o Ghanshyam Ramteke Vs. Nanaji Sitaram Shamkule, 2010 (5) Mh.L.J. 707.*** In that case the election of the returned candidate was challenged by pleading that there was apprehension that electronic voting machines could be tampered and therefore the said petitioner believed that electronic voting machines were tampered as a result of which she received less votes and the returned candidate received higher votes. Some of the averments in the election petition were stated to be based on the

petitioner's personal knowledge. However there was no pleading with regard to any specific act or omission so as to describe tampering of the electronic voting machines. It was thus observed that merely by stating that the relevant averments in the election petition were based on "personal knowledge" and failure to give the factual matter would amount to failing to give and plead necessary and material facts as regards the grounds on which the declaration of the results was challenged. It was thus held that proper verification analyzing and authenticating the pleadings was a mandatory requirement under Section 83(1)(c) of the said Act and as there was failure to comply with the same, that aspect was fatal. It was further observed that the challenge to an election could not be based on conjunctures and since there were no pleadings to indicate that the result of the returned candidate had been materially affected, the Court proceeded to reject the election petition under the provisions of Order VII Rule 11(a) of the Code.

13] It is true that requirement of proper verification as prescribed by Section 83(1)(c) of the said Act is not mandatory in nature but the same is directory. However such verification as prescribed is necessary to indicate the source of knowledge of material facts received by the election petitioner to enable the returned candidate to defend his election. The verification clause reproduced hereinabove does not indicate that the election petitioner had personal knowledge of the alleged mismatch as pleaded by him in paragraph 5 of the election petition. He merely states that the facts stated in paragraphs 1 to 11 were true and correct. Be that as it may, in the light of the legal position as referred to hereinabove except for stating that there was a mismatch in the number of votes polled and number of votes

counted, nothing further has been stated. It is not sufficient to merely state that there has been non-compliance with the provisions of the said Act and the Rules framed therein. It is also necessary to indicate that as a result of such violation, the election of the returned candidate has been materially affected. The pleadings reproduced hereinabove do not indicate any pleadings whatsoever to atleast indicate that as a result of non-compliance with the provisions of the said Act and the Rules, the election of the returned candidate has been materially affected.

14] As regards the non-compliance with the provisions of the said Act and the Rules framed thereunder, the only averments that can be found are in paragraph 5 of the election petition indicating discrepancy in the final tally of votes on account of there being a difference of 786 votes in excess than the number of votes polled. The breach alleged is in the context of Instruction No. 15.30(d) of the Handbook for Returning Officer as such discrepancy was not referred by the Returning Officer to the Election Commission. Except these averments, there are no other averements in the election petition indicating a specific breach or violation of the provisions of the said Act or the Rules framed thereunder. Under Instruction No. 15.30(d) the Returning Officer and the Observer is also required to send a detailed report to the Election Commission in case the margin of votes between the candidate having the highest votes and the runner-up is more than the votes polled in the control unit. Similar is the position when the margin of votes between the candidate having higher votes and runner-up is less than the votes polled in the control unit. It can be seen from the averments in paragraph 5 of the election petition that the necessary figures to indicate the breach of the latter requirement of Instruction No. 15.30(d)

have not been pleaded. The only pleading is with regard to there being a difference in number of votes polled and the votes counted. However in absence of any averment whatsoever that as a result of such non-compliance with Instruction No.15.30 (d) or the provisions of the said Act or Rules framed thereunder the result of the election insofar as it concerned the returned candidate was materially affected is conspicuous by absent in the election petition. Thus merely on the pleadings that the Returning Officer did not send any report to the Election Commission on the ground that the total votes polled did not tally with the total votes mentioned in Form 17 C, the same does not take the case of the election petitioner any further. It is not the case of the election petitioner that the returned candidate was declared elected with a margin of less than 786 votes and as there was a difference of 786 votes in the total number of votes polled and the votes counted, the election of the returned candidate was materially affected for being declared to be void. According to the election petitioner himself, the returned candidate had polled 6,60,221 votes while the election petitioner had polled 26,128 votes. Thus, seen from any angle it becomes clear that in absence of any pleadings whatsoever that on account of non-compliance of the provisions of the said Act and the Rules framed therein the election of the returned candidate was materially affected, it would have to be held that the election petition is based on an incomplete cause of action. Thus following the law as laid down in *Ram Sukh* (supra) and in view of the failure on the part of the election petitioner to aver non-compliance with the provisions of Constitution of India or the provisions of the said Act or any Rules/Orders framed under the said Act thereby materially affecting the result of the election insofar as it concerned the returned candidate was concerned, the election petition is liable to be summarily

dismissed without trial. No useful purpose would be served by permitting the election petition to proceed for trial in absence of any pleadings whatsoever in the election petition that the election of the returned candidate was required to be declared void under Section 100 (1) (d) (iv) of the said Act. In absence of such basic averments, it would also not be permissible for the election petitioner to lead any evidence in that regard. The observations as made in Election Petition No. 6/2019 also support the aforesaid view.

15] The issue as framed is therefore answered by holding that the election petition is liable to be rejected under the provisions of Order VII Rule 11 (a) of the Code as there is absence of complete cause of action for declaring the election of the returned candidate to be void under Section 100(1)(d)(iv) of the said Act. Accordingly, under Section 98 (a) of the said Act, Election Petition No.7/2019 stands dismissed. In terms of Section 119 of the said Act, the returned candidate is entitled to costs incurred by him in contesting the election petition. The costs be accordingly paid to the returned candidate by adopting the course prescribed by Section 121 of the said Act. Civil Application (O) No. 1765/2019 is accordingly allowed. Other pending Civil Applications are also disposed of.

JUDGE

Andurkar..