

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

**APPLICATION (LODGING) NO.6 OF 2020
IN
ELECTION PETITION NO.15 OF 2019**

Sanjay Sadashivrao Mandlik .. Applicant/
Org. Respondent No.3

In the matter between:

Dr. Aruna Mohan Mali ..Petitioner

Versus

The Election Commission of India & Ors. ..Respondents

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**WITH
ELECTION PETITION NO.15 OF 2019**

Dr. Aruna Mohan Mali ..Petitioner

Versus

The Election Commission of India & Ors. ..Respondents

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**WITH
APPLICATION (LODGING) NO.9 OF 2020
IN
ELECTION PETITION NO.15 OF 2019**

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**WITH
APPLICATION (LODGING) NO.2111 OF 2020
IN
ELECTION PETITION NO.15 OF 2019**

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Mr. S. R. Ganbavale a/w. Mr. Shubham K. Kanade and Mr. Kush
Lahankar for Applicant in AEP(L)/6/2020.

Mr. Prakash Ambedkar a/w. Mr. Sandeep D. Rankhambe a/w. Ms.
Anita Sonawane Sachdev for petitioner in EP/15/2019.

Mr. Rajgopal a/w. Ms. Drishti Shah i/b. Rekha Rajgopal for
Respondent No.1 in EP/15/2019.

Mr. Kedar Dighe, AGP for Original Respondent No.2 – State.

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CORAM :SARANG V. KOTWAL, J.

RESERVED ON : 15th FEBRUARY, 2022

PRONOUNCED ON : 26th FEBRUARY, 2022

ORDER :

1. This Election Petition is filed under Section 65, 66 read with 100 of the Representation of the People Act, 1951 (hereinafter referred to as “the Act”) in respect of the Loksabha Constituency of ‘47-Kolhapur’ in the General Elections held on 29.4.2019. The Petitioner contested that election on behalf of a political party, namely, “Vanchit Bahujan Aghadi”. The Respondent No.1 is the Election Commission of India, the Respondent No.2 is the Returning Officer appointed by the Respondent No.1 for that Constituency and the Respondent No.3 is the candidate of a political party ‘Shivsena’ declared elected in that election.

2. The parties are referred to hereinafter by their original status in the election petition.

3. It is mentioned in the Petition that there were 18,74,345 registered voters. Out of them, 13,25,231 voters polled their votes. The Petitioner got 63,251 votes and the

Respondent No.3 got 7,45,675 votes. The counted votes were 13,25,408. This figure does not match with the votes that were polled; and there were 177 additional votes which are more than the votes polled.

4. It is mentioned in the petition that the Respondent No.1 has framed directions to the Returning Officers in the form of “Handbook for Returning Officer”. In sub-clause 15.30 the rules say that in case of difference of votes between polled votes and counted votes, the matter should be referred to the Respondent No.1 and after receipt of direction from the Respondent No.1 the result be declared as per the direction of the Respondent No.1 given to the Respondent No.2.

5. The Petition then states regarding the Petitioner’s stand in respect of the electronic voting machines. From paragraphs-11 to 17 there are averments about the possible defect, malfunctioning, tampering, hacking, manipulation etc. regarding those machines. There are various prayers made in the petition from prayers (a) to prayer (o). As far as the election of the Respondent No.3 is concerned, there are two prayers i.e. prayers (l) and (m), as follows :

- “l. It be declared that declaration by respondent 2 of election of respondent 3 is illegal and void and without powers.
- m. In absence of any tangible declare election of the respondent no.3 to be null and void, for non compliances with the laws, and therefore also declare that the certificate issued to the respondent no.3 in form 22 u/s 66 to be null and void.”

The other prayers are for directions to the Respondent Nos.1 and 2 to explain the difference in polled and counted votes and for directions to produce various details and for declaration that the result should be withdrawn.

6. Respondent No.3 has filed this application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, “Code”) and the Act. By this application, the Respondent No.3 has sought dismissal of the Election Petition for non-compliance with the provisions of Section 81 of the Act and for summary rejection of election petition under Order VII Rule 11 of the Code. The main grounds taken in this application are as follows:

- i. The copies supplied to the Respondent No.3 of the Election Petition are not attested by the Petitioner under her own

signature to be a true copy of the petition. According to the Respondent No.3 this is violation of Section 81(3) of the Act.

- ii. Non-disclosure of cause of action or triable issue. According to the Respondent No.3 perusal of Election Petition in its entirety shows that the Petitioner has failed to plead any material facts or particulars pertaining to the allegations of non-compliance with provisions of Section 65 of the Act and that the Respondent Nos.1 and 2 have committed grave serious corrupt practice thereby benefitting the Respondent No.3.
- iii. The Petitioner has carried out amendment in the petition by adding paragraphs Nos.31-(A) to 31-(D). According to the Respondent No.3 there was no order passed by this Court granting leave to the Petitioner for carrying out the amendment in the election petition and, therefore, this illegality was fatal to the petition.
- iv. It was emphasized that even if the entire election petition is taken as it is, it does not disclose any cause of action or raises any triable issue.

7. Heard Shri S. R. Ganbavale, learned counsel for the Respondent No.3, Shri Prakash Ambedkar, learned counsel for the Petitioner, Shri Pradeep Rajgopal, learned counsel for the Respondent No.1 and Shri Kedar Dighe, learned AGP for the Respondent No.2.

8. **Submissions of Shri Ganbavale on behalf of the Respondent No.3:**

[i] Shri Ganbavale invited my attention to a photo-copy of the election petition annexed to the present application. According to Shri Ganbavale this copy is not signed by the Petitioner as a true copy. This copy is supplied to the Respondent No.3 under a covering letter dated 14.8.2019 sent by the Advocate on record for the Petitioner. According to Shri Ganbavale this is violation of provisions of Section 81(3) of the Act. Section 81(3) reads thus:

“81. Presentation of petitions.

XXXX

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(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.”

Shri Ganbavale submitted that this provision is mandatory and its violation is fatal for the maintainability of the Petition.

[ii] The affidavit affirmed by the Petitioner under Rule 94-A of the Conduct of Elections Rules, 1961 (for short, “said Rules”) is not in conformity with Form-25. The affidavit reads thus:

“I, DR. ARUNA MOHAN MALI, Age 37, Occupation : Research Scollar, At Post Yelur, Tal : Valva, Dist. Sangali, Maharashtra : 415411, presently at Mumbai, the petitioner in the accompanying election petitioner calling in question the election of Sanjay Sadashivrao Mandlik i.e. respondent No.3 in the said petition make solemn affirmation/oath and say that the statement made in the paragraph 5, 6 and of the accompanying election petition about commission of the corrupt practice and the particulars of such corrupt practice mentioned in paragraphs 5, 6 and 7 of same petition are true to my knowledge, belief and information”

The Form-25 under Rule 94-A of the said Rules requires a specific statement about the commission of the corrupt practice of the person who must be named and there should be mention in which paragraphs the particulars of such corrupt practice are mentioned. The affidavit sworn by the

Petitioner under Rule 94-A of the said Rules does not even mention that the corrupt practices were committed by a particular person or by the Respondent No.3.

[iii] Paragraph Nos.4 to 10 of the Petition are about the statement of facts, but, they do not plead material facts warranting adjudication by this Court. There are no allegations of corrupt practices committed by the Respondent No.3.

[iv] Section 84 of the Act provides for the relief that may be claimed by the Petitioner.

[v] The prayers made in this petition are beyond the scope of Section 84 of the Act; and only the prayers (l) & (m) may be slightly touching upon the reliefs under Section 84 of the Act. Therefore, for want of proper reliefs, the Petition is liable to be dismissed.

[vi] There is no pleading in respect of Section 100(1)(b). Similarly Section 100(1)(d) requires that the election should be materially affected by the contingencies mentioned in clauses (i) to (iv) of Section 100(1)(d) of the Act.

[vii] There is vast difference between the votes polled in favour

of the Respondent No.3 and the Petitioner. The difference of 177 votes does not materially affect the election result.

[viii] The instructions mentioned in the Handbook for the Respondent No.2 cannot be brought within the meaning of Section 100(1)(d)(iv) of the Act.

[ix] Section 123 of the Act defines 'corrupt practices'; and no pleadings are made against the Respondent No.3 of any acts falling within the meaning of Section 123. The other pleadings and the grounds taken in the Petition are beyond the scope of Election Petition and this petition cannot be used as a roving enquiry regarding efficacy of the electronic voting machines.

[x] The amendment carried out at paragraphs 31-(A) to 31-(D) are not pursuant to any leave granted by this Court and, therefore, it was not permissible and hence was also fatal to the maintainability of the petition.

9. Learned counsel for the Respondent No.3 relied on a few judgments as follows :

- i. **Dr. Rameshkumar Bapuraoji Gajbe Vs. Election Commission of India, New Delhi and others**¹

1 2019 SCC OnLine Bom 4950

- ii. **Manohar @ Sagar Pundlik Dabrase Vs. Election Commission of India, New Delhi and others²**
- iii. **Samant N. Balkrishna and another Vs. George Fernandez and others³**

10. **Submissions on behalf of the Petitioner :**

[i] As far as the first challenge made by the Respondent No.3 in respect of not serving a copy of the Petition duly verified by the Petitioner is concerned; learned counsel for the Petitioner submitted that the copies attached to the application under Order VII Rule 11 of the Code i.e. AEP (L) No.6/2020 are the copies sent under the covering letter of the Advocate for the Petitioner. The Petitioner has tendered the copies duly verified as 'true copy' by the Petitioner to the office of this Court; which were to be used in effecting service on the Respondent No.3. Therefore, this ground taken by the Respondent No.3 is wholly irrelevant. There are no complaints that the copies supplied by the Petitioner to the office of this Court for service on the Respondent No.3 were not duly verified as 'true copy' by the Petitioner.

² 2020 SCC OnLine Bom 230

³ (1969) 3 SCC 238

- [ii] In respect of the second submission that there was no cause of action pleaded by the Petitioner in accordance with Section 100 of the Act is concerned; the submission on behalf of the Respondent No.3 is not correct. Section 100(1)(d)(iv) of the Act considers a situation which concerns the result of the election having been materially affected by any non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act.

In this respect, learned counsel for the Petitioner has relied on the 'Handbook for Returning Officer' which is annexed at Exhibit-C to the petition. In Clause 15.30 it was mentioned that, in case of total polled votes and the total votes polled in Form-17C not tallying, the matter should be referred by the Respondent No.2 to the Respondent No.1 and the action may be taken as per the direction of the Commission.

- [iii] According to Shri Ambedkar, the case of the Petitioner in the Petition is that the result of the election was declared by the Respondent No.2 without waiting for the directions

from the Respondent No.1 and, therefore, there is clear violation of Section 100(1)(d)(iv) of the Act. According to learned counsel this amounts to corrupt practice committed by the Respondents No.1 & 2 benefiting the Respondent No.3 and, therefore, the Election Petition is maintainable.

[iv] Respondents No.1 & 2 have to explain the difference between these votes.

[v] Section 61-A of the Act referred to voting machines at elections. Shri Ambedkar made various submissions regarding the possible defects arising out of use of these electronic voting machines. Section 61-A itself does not give details or specifications of the machines. There is a possibility that the electronic voting machines can malfunction due to electronic fault, but, this malfunctioning is not envisaged or taken care of by the Respondent No.1. Shri Ambedkar vehemently attacked the use of EVM machines during the elections and supported the grounds mentioned in the Petition.

[vi] As far as the last objection taken by the Respondent No.3 in respect of adding riders in the Petition is concerned, Shri Ambedkar submitted that those riders are formal in nature and were introduced to remove the office objections taken by the office; and that was permissible under the Bombay High Court (Original Side) Rules.

11. 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.

Reasons :

12. As far as the amendment in the form of riders is concerned, under Appendix II of the Bombay High Court (Original Side) Rules, the Rules are framed in regard to election petition. Under Rule 8, the office is required to examine the Petition and the office can raise objections if certain rules are not followed and these objections can be removed by the party or the advocate concerned. The riders are added in the present Election Petition pursuant to the objections raised by the office and, therefore, the Petitioner could have made those averments in compliance of the objections raised by the office.

13. Shri Ambedkar is right in submitting that the copies attached to the application are sent to the Respondent No.3 under the covering letter of the Petitioner's advocate. It is not the case of the Respondent No.3 that the copies given by the Petitioner to the office of this Court for service on the Respondent No.3 were not verified as true copies by the Petitioner.

14. For deciding application under Order VII Rule 11(a) of the Code, only the averments in the Election Petition are required to be considered. As per Section 83(1)(a) of the Act, Election Petition has to contain a concise statement of the material facts on which the Petitioner relies. Therefore, it is necessary to refer to the exact pleadings of the Petitioner in the Petition.

15. The paragraphs-5 to 8 of the Petition are important in that behalf. It has been pleaded in these paragraphs as under :

“5. In the loksabha constituency of the 47 Kolhapur Parlmentary Constituency there are 18,74,345. of registered voters of which 13,25,231 polled their votes. The copy of the polled votes given by respondent 2 is enclosed as EXHIBIT "A". In normal circumstances the number of polled votes should tally with

the counted votes. Petitioner fared 63,251 votes, whereas the Respondent No.3 sponsored by Shivsena fared 7,45,675 votes. However the counted are votes 13,25,408 A copy of the counted votes 23/05/2019 as provided by respondent no 2 is enclosed as EXHIBIT "B". The petitioner says that the counted voted does not match and 177 additional votes, this is serious discrepancy in the grand total. There are 177 votes which are more than the votes polled.

6. That the certificate u/r 66 in form 22 came to be issued illegally in favour of the Respondent No.3 without complying with the mandatory requirements under the law which is absolutely illegal and is void.
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 in the conduct of polling is once the presiding officer of each polling both has sealed and submitted the necessary document to respondent no. 2 and has transported the EVM at the designated place then respondent 2 is the sole responsible authority for the safe custody till it is produced at the designated place of counting. As this court and the supreme court has already held that EVM is neither hackable nor manipulatable then it is respondent 1 or respondent no. 2 or his agent to explain whether as to why the difference as arisen in the EVM the machine used for electronic

recordings of the votes. As no explanation is coming forward regarding the difference of polled votes and counted votes either from respondent no 1 and responded no. 2, and therefore has committed serious corrupt practice and therefore also the certificate deserves to be declared as illegal and void and issued without jurisdiction even the name of respondent no 3 be deleted from the gazettee no published showing that respondent 3 is elected as the members of the Lok Sabha.

8. The petitioner says that section 65 of the act mentioned the procedure to be followed by respondent no 2 in case of equality of votes. The petitioner say that that the act and rules are both silent in case of difference of polled votes and counted votes. The petition says that the election commission respondent no 1 has on its own has framed direction to the returning officer in the hand book for officer. At chapter sub-clause 15.30 the respondent 1 has framed rules which say that in case of difference of vote between polled votes and counted votes, the matter should be referred to respondent no 1 and after receipt of direction from respondent 1 the result be declared as per the direction of respondent 1 by respondent no 2. A copy of the said direction is enclosed as EXHIBIT "C".

16. Reliance is placed on sub-clause 15.30 of the Handbook referred to hereinabove. The other averments are in respect of criticism of the electronic voting machines. The grounds mentioned in paragraphs-21 and 22 mentioned that unless the discrepancy in the votes is sorted out the Returning Officer is refrained from signing form-21 and issuance of certificate under 22 and, therefore, the result declared in contravention of this provision is bad in law.

17. As far as the criticism in respect of EVM machines and the grounds taken in that behalf as pleaded in the petition are concerned; those are not covered under Section 100 of the Act. Paragraph-16 of the petition mentions that since no explanation is coming forward regarding and either from the Respondent No.1 and the Respondent No.2, this amounts to serious corrupt practice. If Section 100 is read in its entirety it provides no such ground for declaring election to be void. Section 100 reads thus :

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

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat

under the Constitution or this Act or the Government of Union Territories Act, 1963; or

- (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
- (c) that any nomination has been improperly rejected; or
- (d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected--
 - (i) by the improper acceptance or any nomination, or
 - (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or
 - (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
 - (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.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied--

- (a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;
- (c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and
- (d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the High Court may decide that the election

of the returned candidate is not void.”

At every place where ‘corrupt practice’ is mentioned, it is mentioned in reference to such practice having been committed by a returned candidate or his election agent or by any other person with consent of a returned candidate or his election agent or is committed in the interests of the returned candidate by an agent other than his election agent. Thus, at every place, the active involvement of either the returned candidate himself or his election agent or any other person with the consent of the returned candidate or his election agent or by other agent other than his election agent, is mentioned. Respondents No.1 and 2 do not fall in any of these category of persons.

18. The other pleading of the Petitioner is regarding non-compliance with the rules or orders made under this Act. It is the contention of the Petitioner that Clause 15.30 is violated as mentioned earlier. Even reference is made to Section 100(1)(d) (iv). However, this sub-clause is governed by clause (d) and the important wording therein is result having been “materially” affected. The opening of clause (d) of sub-section (1) of Section 100 governs the next sub-clauses including (iv). Therefore, it has

to be pleaded that such non-compliance had materially affected the result of the election.

19. In the present case such pleading is lacking. The difference of votes is only 177 between the polled and counted votes. There is vast difference between the votes polled for the Respondent No.3 and those for the Petitioner. Therefore it cannot be said that such violation, if any, has materially affected the result of the election.

20. The heading of Rule 15.30 is thus :

“15.30 ACTION TO BE TAKEN DURING COUNTING OF VOTES IN CASE PRESIDING OFFICER DOES NOT PRESS CLOSE BUTTON OF CU AT THE END OF POLL.”

Clauses relied by the Petitioner are as under :

“d) In case, total votes pooled in the machine (s) does not tally with the total votes polled mentioned in the Form-17C, the matter should be referred by the Returning Officers to the Commission for its decision and action may be taken as per the direction of the Commission. In such a case, the Returning Officer and Observe should also send a detailed report to the Commission in the format mentioned at Annexure-8 below, where the margin of votes between the candidates having highest vote and the runner up is more than the votes polled in the Control Unit in question. The Returning Officer and Observe should also send a detailed

report to the Commission in the format at Annexure C below, where the margin of vote between the candidates having highest vote and the runner up is less than the votes polled in the Control Unit in question.

- e) After completion of counting, all such Control Unit whether result has been retrieved from it or not, the Control Unit should be kept back inside its carrying case. The carrying cases should then be sealed once again. The Returning Officers and Observe should put their signatures on the seal. All candidates and their electing agents should also be allowed to put then signature on the seal. The Control Unit should be then kept in the strong room (s).”

21. As is indicated in the heading the objection raised by the Petitioner is not in respect of this situation, where Presiding Officer does not press close button of CU at the end of poll. Form 17C is in respect of a particular polling station. It is not pleaded how there was difference in votes at a particular polling station. No other violation was specifically pleaded. Therefore, no cause of action as required under Section 100 of the Act is pleaded in the petition.

22. In this context the judgment of Manohar (supra) can be relied on because the facts and pleadings are strikingly similar. In that case, the difference between the polled votes and the counted votes was 786 votes and the margin of difference

between the elected candidate and the Petitioner was sufficiently big, because the Respondent No.3 in that petition had got 6,60,221 votes and the Petitioner had secured 26,128 votes. The pleadings were almost similar.

After considering the law on the subject the learned Single Judge of this Court at Nagpur Bench has held in paragraph-14, after referring to instruction No.15.30(d), that 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 17C, the same does not take the case of the election Petitioner any further. It was not the case of the election Petitioner that the returned candidate was declared elected with a margin of less than 786 votes 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.

It was further held that 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 Act or

any Rules/Orders framed under the Act thereby materially affecting the result of the election insofar as it concerned the returned candidate was concerned, the election petition was liable to be summarily dismissed without trial.

23. In the present case the same observations are applicable. Those required pleadings are absent and, therefore, no useful purpose would be served by permitting the Election Petition to proceed for trial. In the absence of such basic averments it would not be permissible for the election Petitioner to lead any evidence in that regard.

24. As far as the corrupt practice is concerned, as rightly submitted by Shri Ganbavale it is defined under Section 123 of the Act and there are no pleadings that any of the acts committed by either the Respondents No.1, 2 and 3 fall within the meaning of the corrupt practice as defined under Section 123 of the Act. Even otherwise in the verification in accordance with Form-25 of the Conduct of Election Rules, 1961, the crucial aspect of the name of the person committing corrupt practice is not mentioned.

25. The issue as framed, therefore, is 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 Respondent No.3 to be void under Section 100(1)(d)(iv) of the Act. Application (Lodging) No.6/2020 is allowed. Accordingly, under Section 98(a) of the Act, Election Petition No.15/2019 stands dismissed. In terms of Section 119 of the Act, the Respondent No.3 is entitled to costs incurred by him in contesting the election petition. The costs be accordingly paid to the Respondent No.3-returned candidate by adopting the course prescribed under Section 121 of the Act. Other pending applications in the election petition do not survive and are disposed of as such.

PRADIPKUMAR
PRAKASHRAO
DESHMANE

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(SARANG V. KOTWAL, J.)

Deshmane (PS)