

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ELECTION PETITION NO. 2 OF 2019
WITH EPAP/8/2024 IN EP/2/2019 AND EPAP/9/2024 IN EP/2/2019

Dr. Sharadchandra s/o Ganpatrao Wankhede
Age : 65 years, Occu : Professor,
R/o : "Saiprasad" 32, Maharana Pratap,
Housing Society, CIDCO, N-7.
Aurangabad, Dist. Aurangabad.

...Petitioner

Versus

- 1) Raosaheb S/o. Dadarao Danve,
Age: 65 years, Occu:
R/o: Shivaji Nagar, Jalna Road,
Bhokardan, Tq. Bhokardan, Dia. Jalna.
- 2) Vilas S/o. Keshavrao Autade,
Age: 55 years, Occu:
R/o: At Post Palashi,
Tq, and Dist. Aurangabad.
- 3) Mahendra S/o. Kachru Sonavane
Age: Major, Occu: Social Worric,
R/o: Ambedkar Nagar, CIDCO N-7,
Aurangabad, Tq. and Dist. Aurangabad.
- 4) Uttam S/o. Dhanu Rathod,
Age: Major, Occu: Social Work,
R/o: Gurudatt Residency, House No.9.
Gat No.175, Satara Parisar, Aurangabad.
- 5) Ganesh S/o. Shankar Chandode,
Age: Major, Occu: Social Work,
R/o: Rohilla Galli Infront of S.B. School,
Smarat Ashok Nagar, Jalna,
Tq. and District: Jalna.
- 6) Pramod S/o. Baburao Kharat,
Age: Major, Occu: Social Work,
R/o: At Post Ahankar Deoolgaon,
Tq. and Dist. Jalna – 431203.
- 7) Feroz Ali Shabbir Ali Shaikh,

Age : Major, Occu : Social Work,
R/o: Rahim Nagar, infront of Railway Station,
Jalna, Tq. and Dist. Jalna.

8) Trimbak S/o. Baburao Jadhav,
Age: Major, Occu: Social Work,
R/o: Gat No.215/1, Near Bhonai Mandir,
At Mharola, Tq. Paithan, Dist. Aurangabad.

9) Annasaheb Devidasrao Ugale,
Age: Major, Occu: Social Work,
R/o: Near Palang Bawadi, Indira Nagar,
Old Jalna, Tq. and Dist. Jalna.

10) Anita Lalchand Khandade (Rajput)
Age: Major, Occu: Social Work,
R/o: Row House No.12, Sakir Shrushti,
Gat No.70, Satara Parisar, Aurangabad.

11) Arun S/o. Chintaman Chavan
Age: Major, Occu: Social Work,
R/o: Deshmukh Galli, Ajintha Gaon,
Tq. Sillod, Dist. Aurangabad.

12) Ahemad Rahim Shaikh,
Age: Major, Occu: Social Work,
R/o: Yusuf Colony, Dukhi Nagar,
Old Jalna, Jalna, Tq. and Dist. Jalna

13) Dnyaneshwar S/o. Dagaduji Nade,
Age: Major, Occu: Social Work,
R/o. Priyadarshini Colony, Sambhaji Nagar,
Tq. and Dist. Jalna.

14) Yogesh S/o. Dattu Gullpelli,
Age: Major, Occu: Social Work,
R/o: Suvarnakarnagar, in front of
Ganpati Mandir, Jalna.

15) Ratan S/o. Asaram Landge,
Age: Major, Occu: Social Work,
R/o. Morandi Mohalla,
Old Jalna, Tq. and Dist. Jalna.

16) Raju S/o. Ashok Gawali,
Age: Major, Occu: Social Work,

R/o. At Post Walsawangi,
Tq. Bhokardan, Dist. Jalna.

17) Shahadeo S/o. Mahadeo Palve,
Age: Major, Occu: Social Work,
R/o. At Sultanpur, Post. Khadgaon,
Tq. Paithan, Dist. Aurangabad
Presently R/o. Plot No. 18,
Vivek Housing Society, Viveknagar,
N-2, CIDCO, Aurangabad.

18) Lilabai Dharma Sapkal,
Age: Major, Occu: Social Work,
R/o. Sangram Nagar,
Jalna-Aurangabad Road,
Jalna, Tq. and Dist. Jalna.

19) Sham S/o. Rustamrao Sirsath,
Age: Major, Occu: Social Work,
R/o. Behind Priyanka Motors,
Old Jalna, Shantinath Nagar,
Jalna, Tq. And Dist. Jalna.

20 to 22) Deleted

...Respondents

**ELECTION PETITION NO. 5 OF 2019
WITH EPAP/10/2024 IN EP/5/2019 AND EPAP/11/2024 IN
EP/5/2019**

Vishnu s/o Tulshiram Jadhav,
Age : 62 years, Occu : Retired,
R/o : Adarsh Colony, Kolher Road,
Basweshwar Colony, Georai,
Tq. Georai, Dist. Beed.

...Petitioner

Versus

1) Smt. Pritam D/o. Gopinathrao Munde,
Age: 45 years, Occu: Social Work,
R/o: At Post Nathra, Post. Kothali,
Tq. Parli Vaijanath, Dist. Beed.

2 to 38) Deleted

...Respondents

...

Advocate for Petitioners : Mrs. Priyendra G. Sontakke & Mr. Gajanan
K. Sontakke

Advocate for Respondent No.1 in EP/2/2019 : Mr. Girish V. Wani &
Mr. Sachin S. Randive
Advocate for Respondent No.1 in EP/5/2019 : Mr. Yogesh Bolkar h/f
Mr. A.B. Girase
Advocate for Applicant in EPAP/10/2024 : Mr. Alok M. Sharma
...

CORAM : S.G. MEHARE, J.

RESERVED ON : JUNE 18, 2024

PRONOUNCED ON : JULY 05, 2024

ORDER :-

1. Similar applications under Order VII Rule 11 of the Civil Procedure Code have been filed in both petitions. Hence, they were heard and decided by a common order.
2. The common contentions of the petitioners were that the election petition does not disclose any cause of action as provided under Section 100 of the Representation of People Act, 1951 ('Act of 1951' for short). The petition does not specify any prayer clause as to under which provisions the said election petition has been tendered. Therefore, the petitioner is unable to file the written statement.
3. In Election Petition No.5 of 2019, it has been contended that the election petition suffers from compliance with Section 100 (1)(d)(iii) of the Act of 1951. The Conduct of Election Rules, 1961, have also not been properly followed. The election has not been materially affected on the grounds of valid votes. The concise statement of material facts required under Section 83(1)(a) of the Act of 1951 has not been complied with. The petition does not disclose

the material facts, including the positive statement of facts and the positive averments of negative facts. The pleading of the petition is based on vague ballot votes and disclosing without stating the material facts, more particularly the material facts in support of the ground enshrined under Section 100 (1)(d)(iii) of the Act of 1951. There was no pleading, how many improper votes were received in favour of respondent no.1 and other respondents and how many refused or rejected votes were in favour of the petitioner. There is no account of invalid votes in favour of the petitioner and how that materially affected the result of the election petition. Objections were not raised either by the petitioner or his agent about tampering with voting machines at the time of election or during counting. The petition is without grounds mentioned under sub-section (1) of Section 100 of the Act of 1951. The pleadings are vague. The affidavit under Form 25 of the Rules 1961 is compulsory as required by the proviso to clause (c) of sub-section (1) of Section 83 of the Act of 1951. The mandatory provisions of the law have not been complied with. Therefore, the petition deserves to be dismissed under Order VII Rule 11 of the Civil Procedure Code.

4. Both counsels argued and referred to the grounds raised in their objections mentioned above. Learned counsel Mr. Girase has relied on the case of Ram Sukh Vs. Dinesh Aggarwal, (2009) 10 SCC 541, Hari Shanker Jain Vs. Sonia Gandhi, (2001) 8 SCC 233, Dr.

Aruna Mohan Mali Vs. Election Commission of India and Others, 2022 SCC Online Bom. 6299 and Manohar @ Sagar s/o Pundlik Dabrase Vs. Election Commission of India, 2020 (3) Mh.L.J 72.

5. Per contra, learned counsel Ms. Sontakke has strongly opposed the petitions. She would argue that the material facts have been specifically pleaded. The special statement required under Section 83 of the Act of 1951 has been attached on Page Nos.89 to 92. Referring to Section 100 of the Act of 1951, she would submit that the case does not fall under that section. The affidavit under Section 83(1)(2) is not mandatory. It is a curable defect. Therefore, an opportunity may be granted to file the necessary affidavit. She referred to Section 123 of the Act of 1951 and argued that it is about the corrupt practice. But the petitioner has no case of corrupt practices. She further argued that the necessary provisions have been strictly followed. She would submit that it is a case of receipt of invalid votes that materially affected the election. To bolster her arguments, she relied on the case of Thangjam Arunkumar Vs. Yumkham Erabot Singh and Others, 2023 DGLS (SC) 912, A. Manju Vs. Prajwal Revanna @ Prajwal R and Others, 2022 AIR (SC) 196, Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh, 2005 AIR (SC) 22 and Saritha S. Nair Vs. Hibi Eden, 2021 AIR (SC) 483.

6. In Election Petition No.2 of 2019, the petitioner has a case that after 27th round, the total number of votes were 11,97,349.

However, in Form 20, the valid votes were shown as 12,08,139. There was a difference in these two countings. The Returning Officer failed to maintain the proper record of the total number of valid votes. After deducting the postal votes from the total votes, the total votes were 12,03,821. However, as per the record of respondent no.20, the total number of votes polled were 12,02,958. So, there was a difference of 863 votes. Respondent no.1, in connivance with respondents nos.20 to 22, indulged in tampering with the machines and due to the tampering of the EVM, there was a difference in the number of valid votes. There was prima facie evidence of tampering with the EVM machines. In view of these facts, the election has been materially affected and deserves to be declared void under Section 100(d)(iii) of the Act of 1951. The cause of action arose when the notification of the election program was published, and the authorities violated the relevant Rules of 1961 and the guidelines issued from time to time.

7. In Election Petition No.5 of 2019, similar were the pleadings. In this case, there was a difference of 665 votes in the total number of votes counted, as shown in Form 20. Similar allegations of tampering with the machines in connivance with respondent nos. 36 to 38, and benefits to respondent no.1 have been alleged. Since a similar case has been put forth, the pleadings have not been reproduced in detail.

8. The first question to be considered is whether the result of election has been materially affected due to the difference in votes.

9. In the case of Sanjay Sadashivrao Mandlik (In the matter between Dr. Aruna Mohan Mali) Vs. The Election Commission of India and others, Application (Lodging) No.6 of 2020 in Election Petition No.15 of 2019 decided on 26.02.2022, it has been held in para 18 that in Sub Clause (d) of Section 100, the important wording therein is the result having been "materially" affected. Therefore, it has to be pleaded that such non-compliance had materially affected the result of the election. It has also been observed that there was a vast difference between the votes polled for respondent No.3 and those for the petitioners. Therefore, it cannot be said that such violation, if any, has materially affected the result of the election.

10. In the case of Harkirat Singh Vs. Amrinder Singh, 2006 AIR (SC) 713, it has been observed that the expression 'material facts' is neither defined in the Act nor in the Code. It may be stated that the material facts are those facts upon which the parties relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case, and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts that must be proved at the trial by the parties to

establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the parties.

11. Learned counsel for the petitioners has advanced the arguments that the respondents have misread the plaint and believed that the petitions were filed under Section 123 of the Act of 1951. She would submit that the petitioner has no case of corrupt practice. Her case falls under Section 100 of the Act of 1951. She referred to clause (d)(1) of Section 100. She has vehemently argued that since there was mishandling of EVM machines, respondent no.1 has improperly received the votes, which has materially affected the elections. In simple words, she wanted to point out that since there was a variance in the counting of votes, and given in Form 20, the election has been materially affected. Therefore, it is liable to be declared illegal. However, this Court, in the case of Sanjay Mandlik (*supra*) held that a vast difference between the votes polled, it cannot be said that such violation, if any, has materially affected the result of the election. Herein the case, there was a vast difference between the votes polled to the petitioner and respondent no.1.

12. Learned counsel for the petitioner relying on the case of A. Manju (*supra*), has correctly pointed out a defect in the verification of an affidavit cannot be sufficient ground for dismissal of the petitioner's petition summarily, and such an affidavit can be permitted to be filed later. She has also pointed out on the basis of the ratio laid

down in the case of Sardar Harcharan Singh (*supra*) that failure to comply with the requirement as to the filing of an affidavit cannot be a ground for dismissal of an election petition in limine under subsection (1) of Section 86 of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. The defect in the verification and the affidavit is a curable defect.

13. She has vehemently argued that the affidavit has already been on record disclosing the cause of action. She has also pointed out the observations recorded in the case of Saritha S. Nair (*supra*) that the defect in the prayer made by the petitioner was also a curable defect.

14. Learned counsel for the petitioner emphasized that there are no allegations of corrupt practices. However, the petitioner is not exempted from making a concise statement of allegations seeking a declaration of respondent no.1 void and null.

15. The cause of action is a bundle of facts. The allegations were of doing something wrong. Collusion with someone requires pleading to believe that the Returning Officer was working under the influence of respondent no.1. Reading the pleadings of both the complaint, direct allegations were made against the Returning Officer that he was working under the influence of the winning candidate i.e. respondent no.1. If the applicant noticed any such mistake, immediate

action had to be taken. Reading the plaint as a whole, the Court believes that the pleading is insufficient to prove the charges of securing improper votes. It does not constitute the cause of action.

16. On scrutinizing the facts of the case and the provisions of law referred to by the respective counsels, the Court is of the view that the concise statement made in the plaint is not on material facts and it does not have any material effect on the election of respondent no.1. As due to the vast difference between the votes polled to the petitioner and respondent no.1, it is hard to accept the case of the petitioner that the election has materially affected the result.

17. For the above reason, the Court is of the view that the applications deserve to be allowed. Hence, the following order :

ORDER

- (i) Application in EP Nos.9 of 2024 and 11 of 2024 are allowed.
- (ii) The plaints in both suits stands rejected under Order VII Rule 11 of the Civil Procedure Code.
- (iii) Application in EP Nos.8 of 2024 and 10 of 2024 stand disposed of as infructuous.

(S.G. MEHARE, J.)