

Sharif-Ud-Din

Vs

Abdul Gani Lone

Civil Appeal No. 2005 of 1978

(V.D. Tulzapurkar, E.S. Venkataramiah JJ)

12.11.1979

JUDGMENT

VENKATARAMIAH, J. –

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 and 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.

2. At the general election held in the year 1977 to elect members to the Legislative Assembly of the State of Jammu and Kashmir, the appellant and the respondent were candidates for the seat to be filled from the Handwara Assembly Constituency. The respondent was declared as the successful candidate by the Returning Officer. Thereafter the appellant filed an election petition before the High Court of Jammu and Kashmir challenging the validity of the respondent's election on various grounds. The respondent raised two preliminary objections to the election petition : (1) that the petition had not been presented in accordance with sub-section (1) of Section 89 of the Act, and (2) that the copy of the election petition had not been attested by the appellant under his own signature to be a true copy of the petition as required by Section 89(3) of the Act. The respondent contended that the petition was liable to be dismissed in view of Section 94 of the Act which provided that the High Court should dismiss an election petition which did not comply with provisions of Section 89 or Section 90 or Section 125 of the Act. We are not concerned with the first ground as it has been held by the High Court that the petition had been validly presented in accordance with Section 89(1) of the Act. The appellant while admitting that the copies of the election petition had not been attested by him under his own signature to be true copies of the petition pleaded that Section 89(3) of the Act had been substantially complied with as the copies of the election petition had been signed by his advocate and that they had been authenticated to be true copies of the petition. On the basis of the above pleadings, the High Court raised two preliminary issues - one relating to the validity of the presentation of the election petition and the other relating to the effect of the absence of attestation of the copies of the election petition by the appellant. After recording the evidence led by the parties on the preliminary issues and hearing the counsel for the parties, the High Court disposed of the petition by the judgment under appeal. In the course of its judgment while the High Court upheld the case of the appellant that the petition had been validly presented under Section 89(1) of the Act came to the conclusion that the petition was liable to be dismissed as required by Section 94 of the Act on the ground that Section 89(3) of the Act had been complied with by the appellant. Accordingly, the petition was dismissed. Hence this appeal.

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 a 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. Whereas in Section 94 of the Act, the High Court is required to dismiss an election petition which does not comply with provisions of Section 89 or Section 90 or Section 125 of the Act, Section 86(1) of the Central Act requires the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Central Act. The topics dealt with by Sections 89, 90 and 125 of the Act are the same as the topics dealt with by Section 81, 82 and 117 of the Central Act. Section 89 of the Act and Section 81 of the Central Act deal with presentation of election petitions. Section 90 of the Act and Section 82 of the Central Act deal with the parties to the petition and Section 125 of the Act and Section 117 of the Central Act deal with security for costs.

6. It is admitted that neither of the two copies of the election petition which had been filed along with it had been signed by the appellant. Both the copies contained identical endorsements at the foot which read : "Attested true copy, Piyare Lal Handoo, Advocate".

7. The advocate had presented the election petition along with his Vakalatnama.

8. The crucial part of Section 89(3) of the Act with which we are concerned provides that "every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition" and the critical words in this part are "under his own signature". The case of the respondent is that the requirement of Section 89(3) of the Act that the copy of the election petition should be attested by the petitioner under his own signature is a mandatory one. It is his further case that the language of Section 89(3) of the Act does not permit of any other mode of compliance and, therefore, the attestation made by the counsel for the petitioner filing the election petition is no compliance with that provision. It is, therefore, contended by him that the petition is liable to be dismissed as required by Section 94 of the Act. On the other hand, the appellant's case is that since the copies of the petition had been signed by his advocate who had been empowered to act for him in the case it should be treated as substantial compliance with Section 89(3) of the Act which having to its object must be considered to be directory.

9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus : The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated

by noncompliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

10. We shall now proceed to deal with some of the decisions cited before us at the hearing of the appeal.

11. In one of the connected appeals which was disposed of by this Court by its common judgment in *K. Kamaraja Nadar v. Kunju Thevar* ((1959) SCR 583, 606 : AIR 1958 SC 687 : 1958 SCJ 680 : 14 ELR 270) the person who had filed the election petition had deposited in the Government Treasury a sum of Rs. 1000 towards security under Section 117 of the Central Act for the costs in favour of the Election Commission instead of in favour of the Secretary to the Election Commission as required by that section as it stood then. It was contended that Section 117 of the Central Act had been contravened thereby and that the petition was liable to be dismissed under Section 90(3) (since repealed) of the Central Act which required the Election Tribunal to dismiss an election petition which did not comply with Sections 81, 82 and 117 of the Central Act notwithstanding that it had not been dismissed by the Election Commission under Section 85 (since repealed) of the Central Act. Without going into the relationship between the Election Commission on the one hand and the Secretary to the Election Commission on the other for the purpose of examining the correctness of the said contention, this Court proceeded to negative it with the following observations vide at page 606 :

It would be absurd to imagine that a deposits made either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of Section 117 and could involve a dismissal of the petition under Section 85 or Section 90(3). The above illustration is sufficient to demonstrate that the words "in favour of the Secretary to the Election Commission" used in Section 117 are directory and not mandatory in their character. What is of the essence of the provision contained in Section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else.

12. It is seen from the above decision that this Court regarded the words "in favour of the Secretary to the Election Commission" used in Section 117 of the Central Act directory as the essence of Section 117 of the Central Act was that the petitioner should deposit the amount by way of security for the costs of the petition and that the said amount should be at the disposal and control of the Election Commission to be used by it in the manner authorised by law. As the amount was in fact at the disposal of the Election Commission, the Court held that Section 117 of the Central Act had been complied with by the petitioner in that election petition as there was nothing else in the relative provisions which precluded the Court from taking that view.

13. In *Ch. Subbarao v. Member, Election Tribunal, Hyderabad* ((1964) 6 SCR 213 : AIR 1964 SC 1027 : 26 ELR 1) the question of non-compliance with Section 81(3) of the Central Act directly arose for consideration. The facts of that case were these : The petitioner had filed along with the election petition sufficient number of copies as required by Section 81(3) of the Central Act. The election petition was type-written and the copies which accompanied the petition were carbon copies of the type-script. Each of the copies bore the signature of the petitioner. The petitioner had not, however, inserted the words "true copy" before or above his signature. Without going into the question whether Section 81(3) of the Central Act or any portion of it was merely directory, this Court held that the signatures in original found on the copies were intended to authenticate the documents to which they were appended and that in the circumstances of that case, the absence of the words "true copy" above the signature of the election petitioner in the copies was not fatal. The Court held that there was substantial compliance with the requirement of Section 81(3) of the Central Act.

14. In *Jagat Kishore Prasad Narain Singh v. Rajendra Kumar Poddar* ((1971) 1 SCR 821 : (1970) 2 SCC 411 : AIR 1971 SC 342), this Court dismissed an election petition on the ground of non-compliance with Section 81(3) of the Central Act as the copies furnished to the contesting respondents were not true copies as there was divergence between the allegations made in the petition and the allegations made in the copies. This decision has no bearing on the question involved in this case.

15. In *Satya Narain v. Dhuja Ram* ((1974) 3 SCR 20 : (1974) 4 SCC 237 : AIR 1974 SC 1185), this Court held that the first part of Section 81(3) of the Central Act which required that the election petition should be accompanied by as many copies thereof as there were respondents mentioned in the petition was mandatory in character and non-compliance with it was fatal to the petition in view of Section 86(1) of the Central Act. The Court was not concerned in that case with the second part of Section 81(3) of the Central Act.

16. In *M. Kamalam v. Dr. V. A. Syed Mohammed* ((1978) 3 SCR 446, 452 : (1978) 2 SCC 659, 666 : AIR 1978 SC 840), the signature of the election petitioner by way of authentication appeared at the foot of the copy of the affidavit but there was no such signature separately appended at the foot of the copy of the election petition. The respondent by way of preliminary objection to the election petition contended that since the copy of the election petition had not been attested by the petitioner under her own signature to be a true copy, there was no compliance with Section 81(3) of the Central Act and hence the petition was liable to be dismissed. The High Court accepted the said contention and dismissed the petition. In appeal, this Court held that Section 81(3) of the Central Act had been complied with for the following reasons : (SCC p. 666, para 6)

Now, it is true that no signature was appended by the appellant on the copy of the election petition proper and the signature was placed only at the foot of the copy of

the affidavit, but that, in our opinion, was sufficient compliance with the requirement of the last part of sub-section (3) of Section 81. The copy of the affidavit was, for reasons already discussed, part of the copy of the election petition and when the appellant put his signature at the foot of the copy of the affidavit, it was tantamount to appending signature on the copy of the election petition. The law does not require that the authenticating signature must be made by the petitioner at any particular place in the copy of the election petition. It may be at the top of the copy or in the middle or at the end. The place of the signature is immaterial so long as it appears that it is intended to authenticate the copy. When original signature is made by the petitioner on the copy of the election petition, it can safely be presumed, as pointed out by this Court in Ch. Subbarao case ((1964) 6 SCR 213 : AIR 1964 SC 1027 : 26 ELR 1), that the signature is made by the petitioner by way of authenticating the document to be a true copy of the election petition. Now, here the appellant placed her signature in original at the foot of the copy of the affidavit and the copy of the affidavit was part of a composite document, namely, copy of the election petition, and hence the signature of the appellant must be regarded as having been appended on the copy of the election petition. In fact, the copy of the affidavit constituted the end-portion of the copy of the election petition and the signature placed by the appellant at the foot of the copy of the affidavit was, therefore, clearly referable to the entire copy preceding it and it authenticated the whole of the copy of the election petition to be a true copy. We cannot, in the circumstances, accept the contention of the respondent that the copy of the election petition was not attested by the appellant under her own signature to be a true copy of the petition. The requirement of the last part of sub-section (3) of Section 81 was complied with by the appellant inasmuch as the copy of the election petition was authenticated to be a true copy by the appellant by placing her signature at the foot of the copy of the affidavit which formed part of the copy of the election petition. The High Court was clearly in error in dismissing the election petition under sub-section (1) of Section 86.

17. It is seen from the above decision that this Court held that the second part of Section 81(3) of the Central Act had been complied with after holding that the copy of the petition and the affidavit filed along with it as required by law constituted one single document and the signature in original of the petitioner at the foot of the affidavit satisfied the requirements of Section 81(3) of the Central Act. In none of the decisions of this Court referred to above it has been held that the absence of the signature of the election petitioner on the copies of the petition was not a material defect.

18. It was argued by the learned Counsel for the appellant that the object of enacting sub-section (3) of Section 89 of the Act which was merely procedural in character being that the respondents should be able to secure copies of the election petition as early as possible to enable them to file their statement of objections to it early, it would be sufficient compliance with the said provision if the true copies are filed along with it and since in the instant case, there had been no allegation that the copies which were filed were not exact copies of the original election petition, the petition should have been disposed of on its merits instead of dismissing it under Section 94 of the Act. He contended that the attention made by the advocate on the copies was sufficient to assure the respondent that the copy served on him was in reality a true copy of the election petition. He also contended that if a suit instituted in a civil court was not to be dismissed on the ground that the copy of the plaint was not authenticated to be a true copy by the plaintiff under his own signature, there was no justification for treating the second part of Section 89 of the Act as mandatory. It is true that Section 89(3) of the Act is purely procedural in character and that ordinarily procedural law should

not be given that primacy by courts as would defeat the ends of justice. But if a law even though it may be procedural in character insists that an act must be done in a particular manner and further provides that certain consequences should follow if the act is not done in that manner, courts have no option but to enforce the law as it is. A rule of limitation, for example, which is generally considered as procedural in character is strictly enforced by courts since the rule lays down that no court shall entertain a suit, an appeal or an application which is barred by time.

19. An election to a Legislative Assembly can be called in question only by filing an election petition and not otherwise. The right to challenge the election by filing an election petition is a statutory right and not a common law right. A successful candidate is entitled to enjoy the privileges attached to the membership of the Legislative Assembly unless his right to do so is successfully challenged in an election petition filed within the prescribed period and in accordance with law. Section 89 (3) of the Act consists of two parts. The first part requires that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and the second part requires that every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. The first part of Section 89(3) of the Act has been held to be a mandatory requirement by this Court in the case of Satya Narain ((1974) 3 SCR 20 : (1974) 4 SCC 237 : AIR 1974 SC 1185) as this Court was of the view that the copies of the election petition should be filed along with it in order to prevent the delay in the disposal of the election petitions. The question whether a provision of law is mandatory or not, as observed already, depends upon its language, the context in which it is enacted and its object. Sub-section (3) of Section 89 of the Act provides that a copy of the petition shall be attested by the petitioner "under his own signature" to be a true copy of the petition. The emphasis in the above provision appears to be on the words "under his own signature". We do not find the same expression used in Section 91(1) (c) of the Act which provides that an election petition shall be signed by the petitioner and verified in the manner laid down in the Jammu and Kashmir Code of Civil Procedure (Act 10 of 1977), for the verification of pleadings. Sub-section (3) of Section 89 of the Act was inserted by Jammu and Kashmir Act 1 of 1962. Section 94 of the Act which requires the High Court to dismiss an election petition when the petitioner has not complied with the provisions of Section 89 was enacted in the place of the former Section 94 of the Act by Jammu and Kashmir Act 11 of 1967 by the Legislature with the full knowledge of the requirements of Section 89(3) of the Act. The object of requiring the copy of an election petition to be attested by the petitioner under his own signature to be a true copy of the petition appears to be that the petitioner should take full responsibility for its contents and that the respondent or respondents should have in their possession a copy of the petition duly attested under the signature of the petitioner to be the true copy of the petition at the earlier possible opportunity to prevent any unauthorised alteration or tampering of the contents of the original petition after it is filed into court. We have no doubt that the records and documents in the custody of courts are taken due care of by the courts and the courts would not by themselves give any scope for tampering with them. But still experience show that allegations are sometimes made that records in the court have been tampered with notwithstanding the care and caution taken by courts. Such allegations may not always be without basis. It is probably to obviate any scope for such an allegation being made or to protect the interest of the respondent, the Legislature thought of enacting sub-section (3) of Section 89 of the Act so that the respondent may rely on the copy served on him when he finds that the original document in the court contains allegations different from those in the copy in his custody. A respondent would not have the same degree of assurance if a copy served on him is one attested by any person other than the petitioner himself. The attestation by the advocate for the petitioner cannot be treated as the equivalent of attestation by the petitioner under his own signature. If the requirement of the second part of Section 89(3) that copy of the petition should contain the

signature of the petitioner himself is not on of substance, there was no need to enact it as the first part of sub-section (3) of Section 89 of the Act would have been sufficient for it provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and the word "copies" mentioned therein can only mean "true copies". The importance of the provision contained in Section 94 of the Act which makes it obligatory on the part of the High Court to dismiss a petition when it is established that Section 89 of the Act had not been complied with also cannot be overlooked in this context.

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.

21. For the foregoing reasons, the appeal fails and is hereby dismissed with costs.

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