

Anil R. Deshmukh

Vs

Onkar N. Wagh

Civil Appeal No. 1731 of 1997

(M. Srinivasan, R. P. Sethi JJ)

21.01.1999

JUDGMENT

M. Srinivasan J

1. The appellant is aggrieved by the dismissal of his election petition No. 3/95 by the Bench at Aurangabad of the High Court of Bombay on preliminary issues without trial.
2. The first respondent was declared elected at the election to the Maharashtra Legislative Assembly held on 9.2.1995 for 96 Pachora Constituency. The appellant filed the petition for declaring the election to be void and illegal and for declaring him as duly elected. In view of the limited scope of this appeal, it is unnecessary to refer to the allegations made in the said petition. Suffice it to mention that the petition contained allegations of certain corrupt practices as against the first respondent. An affidavit was filed along with the petition as required by the proviso to S. 83(1)(c) of the Representation of the People Act (for short, the Act). The affidavit was attested and the endorsement of attestation contained the particulars as required by law.
3. When the copies of the petition, documents and the affidavit were served on the respondents, the copy of the affidavit did not bear the endorsement of attestation found on the original or the seal or stamp of the attesting officer. The appellant signed below the rubber stamp endorsement "Attested as true copy". But for the absence of the notarial endorsement, it was a true copy of the original as it was a xerox copy. The first respondent and the tenth respondent raised objections that the election petition should be dismissed in limine as the provisions of S. 83(1) of the Act were not complied with. Besides the contention that the copies of the affidavit served on them were not true copies, the tenth respondent contended that a true copy of the petition was not supplied to him as required by S. 81(3). The first respondent filed a separate application for dismissing the election petition for non-compliance with S. 81(3) of the Act.
4. Issues 8 and 9 based on the said objections were as follows :

Issue No. 8 :-

"Whether the affidavit filed by the petitioner under provisions of the Proviso to S. 83(1) of the Representation of People Act, 1951 read with Rule 94-A of the Conduct of Election Rules, 1961 is not in conformity with the provisions and it yes, what is its effect ?"

ISSUE No. 9 :-

"Whether the true copy of the petition is properly served on the respondent in compliance with the rules ?"

5. The two issues were treated as preliminary issues and the High Court heard arguments on the same before the commencement of the trial. The Court found against the contention that true copy of the petition was not supplied. But the objection that the copy of the affidavit supplied was not a true copy in as much as it did not contain the endorsement of attestation was upheld. The High Court held that the defect was fatal to the election petition and dismissed the same for non-compliance of S. 83(1) read with Section 81 of the Act. For coming to the said conclusion the High Court relied on a previous judgment of that Court in *Purushottam v. Returning Officer, Amravati, AIR 1992 Bombay 227* which was approved by this Court in *Dr. (Smt.) Shipra v. Shanti Lal 1996(5) SCC 181*.

6. The appellant has contended that the endorsement of verification and stamp and seal of the attesting officer on the copy of the affidavit supplied to the first respondent do not form part of the election petition and the absence of such endorsement etc. will not make the copy any the less true copy of the election petition. Consequently, according to him the provisions of Section 81(3) were fully complied with and at any rate there was substantial compliance of the said provisions. It is further contended that long before 21.9.1996 when the preliminary objection was heard by the Court, true copies of the affidavit containing the endorsement of verification etc. was served on the first respondent as well as his counsel on 24.7.1996. The covering letters accompanying the said copies are found on the file of the High Court at pages 74 and 77 of the Part D. The postal receipt and acknowledgment signed by the first respondent are found at pages 75 and 76. According to learned counsel, the decision in *Dr. (Smt.) Shipra's case* runs counter to the decisions rendered by the Constitution Bench in *Murarka Radheshyam Ram Kumar v. Roop Singh Rathore and others, 1964(3) SCR 573* and *Ch. Subbarao v. Member, Election Tribunal, Hyderabad, 1964(6) SCR 213*. It is therefore contended by the learned counsel that the order of the High Court dismissing the election petition without trial is erroneous and requires to be set aside.

7. Though the respondents have been served with notices in the appeal, none of them except the 7th respondent has entered appearance. The said 7th respondent is not contesting the claim of the appellant and his counsel did not advance any argument.

8. Section 86(1) of the Act provides that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. Section 81 deals with the presentation of petitions. It is not the case of the respondent that there is any defect in presentation of the election petition as prescribed by sub-section (1) of Section 81. Their contention is that sub-s. (3) of Section 81 has not been complied with in this case. The said sub-s. (3) reads as follows :

"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."

Section 82 sets out the parties who shall be joined as respondents to a petition. Section 83 deals with the contents of a petition. The Section requires an election petition to contain a concise statement of the material facts on which the petitioner relies and to set forth full particulars of any corrupt practice alleged by the petitioner. The petitioner is also required to be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of the pleadings. Proviso to sub-s. (1)(c) states that where the petitioner alleges any corrupt practice, the

petition shall also be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. According to the respondents, the petition having contained allegations of corrupt practices, the affidavit accompanying the same forms part of the petition and as there is a defect in the copy of the affidavit supplied to the respondent, it is not a true copy and there was thus non-compliance of sub-s. (3) of Section 81 read with the proviso to Section 83(1)(c). It was that argument which found favour with the High Court.

9. In *Murarka Radheyshyam Ram Kumar v. Roop Singh Rathore and others*, 1964(3) SCR 573, a Constitution Bench of this Court held that the word "copy" in Section 81(3) of the Act did not mean an absolutely exact copy but a copy so true that nobody could be any possibility misunderstand it and that the test whether a copy was a true one was whether any variation from the original was calculated to mislead an ordinary person. It was also held that a defect in the verification of an election petition as required by Section 83(1)(c) was not fatal to the maintainability of the petition and that a defect in the affidavit was not a sufficient ground for dismissal of the petition. In that case there was a defect in the verification of the original affidavit itself. The Election Tribunal held that the defect was due to inexperience of the Oath Commissioner and it was not a sufficient ground for dismissal of the petition summarily. It was also observed by the Election Tribunal that an affidavit as required by law can be allowed to be filed at a later stage also. That view of the Election Tribunal was affirmed by the High Court. The Constitution Bench agreed with the view expressed by the Election Tribunal as affirmed by the High Court and observed that the defect in the verification due to inexperience of the Oath Commissioner was not a fatal defect as to require dismissal of the election petition. As regards copies supplied to the respondents in the petition, the contention was that they were not true copies as they did not contain the signatures of the petitioner below the word 'petitioner'.

10. Rejecting the said contention the Bench observed :

"When every page of the copy served on the appellant was attested to be a true copy under the signature of the petitioner, a fresh signature below the word "petitioner" was not necessary. Sub-s. (3) of S. 81 requires that the copy shall be attested by the petitioner under his own signature and this was done. As to the second defect the question really turns on the true scope and effect of the word "copy" occurring in sub-s. (3) of S. 81. On behalf of the appellant the argument is that sub-s. (3) of S. 81 being mandatory in nature all the requirements of the sub-section must be strictly complied with and the word "copy" must be taken to be an absolutely exact transcript of the original. On behalf of the respondents the contention is that the word "copy" means that which comes so near to the original as to give every person seeing it the idea created by the original, alternatively, the argument is that the last part of sub-s. (3) dealing with a copy is merely directive, and for this reliance is placed on the decision of this court in *Kamaraja Nadar v. Kunju Thevar*. We are of the view that the word "copy" in sub-s. (3) of S. 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can be any possibility misunderstand it (see *Stroud's Judicial Dictionary*, third edition, volume 4, page 3098). In this view of the matter it is unnecessary to go into the further question whether any part of sub-s. (3) of S. 81 is merely directory".

After referring to the English decisions on the meaning of the word "copy", the Bench said :

"Having regard to the provisions of Part VI of the Act, we are of the view that the

word "copy" does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it. The test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person. Applying that test we have come to the conclusion that the defects complained of with regard to Election Petition No. 269 of 1962 were not such as to mislead the appellant; therefore there was no failure to comply with the last part of sub-s. (3) of S. 81. In that view of the matter sub-s. (3) of S. 90 was not attracted and there was no question of dismissing the election petition under that sub-section by reason of any failure to comply with the provisions of S. 81".

11. In *Ch. Subbarao v. Member, Election Tribunal, Hyderabad, 1964(6) SCR 213* another Constitution Bench held that the expression "copy" in Section 81(3) did not mean an exact copy but only one so true that nobody by any possibility misunderstands it not being the same as the original. It was further held that only if there was a total or complete non-compliance with the provisions of Section 81(3), the election petition might not be an election petition presented in accordance with the provisions of that part of the Act. The Bench referred to *Murarka Radhey Shyam Ram Kumar* and ruled that substantial compliance with Section 81(3) was sufficient.

12. In *Kamalam (M) v. Dr. V.A. Syed Mohamad, 1978(3) SCR 446*, a Bench of two Judges held that copy of the election petition required to be filed under sub-s. (3) of Section 81 would on a fair reading of that provision along with Section 83 include a copy of the affidavit filed under the proviso to Section 83(1)(c). In that case, the signature of the petitioner was not appended to the copy of the election petition proper but it was placed only at the foot of the copy of the affidavit. The Bench held that it was sufficient compliance with the requirements of Section 81(3) of the Act.

13. In *F.A. Sapa and others v. Singora and other, 1991(3) SCC 375* a Bench of three Judges held that a defect in the verification of the election petition is not fatal to the maintainability of the petition and it cannot be thrown out solely on that ground. The Bench referred to Section 86(1) and pointed out that Section 83 is not one of the three provisions mentioned in that Section and ordinarily it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Section 81. It was further held that the defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition in which case, the defect concerning material facts will have to be dealt with subject to limitation under Section 81(3).

14. In *Purushottam v. Returning Officer, Amravati, AIR 1992 Bombay 227*, a Single Judge of the Bombay High Court held that the absence of endorsement of the Notary on a copy of the affidavit accompanying election petition rendered the copy as not conforming to the requirements of Section 81(3) of the Act and therefore the petition was liable to be dismissed on account of that omission. It was opined that the absence of endorsement of the Notary on the copy of the affidavit was not a clerical or typographical mistake and it was a substantial defect. Though the learned Judge referred to the rulings of this Court adverted to earlier in this judgment, he was of the opinion that the omission was of a vital nature which was likely to prejudice the returned candidate.

15. The view expressed by the Bombay High Court as stated above was expressly approved by this Court in *Dr. (Smt.) Shipra v. Shanti Lal, 1996(5) SCC 181*. A batch of appeals were disposed of by a common judgment. The facts of each appeal were set out shortly which referred only to the absence of notarial endorsement in the copy of the affidavit supplied to the respondents in the election petition. It is not possible to ascertain from the report whether the original affidavits filed in those cases were in accordance with law. Justice Ramaswami held that the principle of substantial

compliance could not be accepted in the "fact-situation". He observed : 73_

"Sections 81, 83(1)(c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme. When so read, if the court finds on an objection, being raised by the returned candidate, as to the maintainability of the election petition, the court is required to go into the question and decide the preliminary objection. In case the court does not uphold the same, the need to conduct trial would arise. If the court upholds the preliminary objection, the election petition would result in dismissal at the threshold, as the court is left with no option except to dismiss the same."

Justice Bharucha, while expressing his agreement with Justice Ramaswamy, observed that the document purporting to be a true copy of the election petition gave the impression that the petitioner's affidavit supporting his allegations of corrupt practice had not been sworn or affirmed and was therefore no affidavit at all which misled the opposite party in a material particular and its supply was fatal to the election petition. Justice Paripoornan who also wrote a concurring judgment referred to the judgment of the single Judge of the Bombay High Court in detail and adopted the observations made in that judgment as his own.

16. In scope of the ruling in Dr. (Smt.) Shipra's case (supra) came up for consideration in *T.M. Jacob v. C. Poulouse and others, 1998(2) SCC 31* before a bench of Three Judges. The Bench referred the matter to a larger Bench with the following observations :

"Having heard Shri Sorabjee, we are not too sure that the principle indicated in the said decision

can apply to the facts of the present case but certain wide observations, in the opinion of Justice Paripoornan and Justice K. Ramaswamy may support the appellant's contentions. In our opinion, the matter would, therefore, require reconsideration by a larger Bench to decide whether even in a case like the present one, the decision in *Shipra (Dr.) v. Shantilal Khoiwal* apply.

17. It is to be noticed that the reference is only with regard to the applicability of Dr. (Smt.) Shipra in cases like the one which arose before the said Bench. In the light of the rulings of the Constitution Bench referred to earlier, we have our own reservations on the correctness of the view expressed in Dr. (Smt.) Shipra's case (supra) but it is unnecessary in the present case to dwell on the same. As pointed out earlier, Justice Ramaswamy has confined the ruling to the "fact-situation" in that case. In so far as the present case is concerned, there is a distinguishing factor which makes the ruling in Dr. (Smt.) Shipra's case (supra) inapplicable. We have already referred to the fact that even before arguments were heard on the preliminary objection by the High Court in this case the true copies of the affidavits had been served on the first respondent and his counsel. In the facts and circumstances of this case, we have no doubt that there was sufficient compliance of the provisions of Section 81(3) read with Section 83(1)(c) of the Act even if it could be said that the copies served in the first instance on the first respondent were not in conformity with the provisions of the Act. Unfortunately, this aspect of the matter has been completely ignored by the High Court. Hence the order of the High Court dismissing the election petition in limine is unsustainable.

18. In the result, the appeal is allowed and the order of the High Court in Election Petition No. 3 of 1995 dated 1.11.1996 is set aside. The said Election Petition is restored to the file of the High Court.

It shall be decided on merits. The High Court is requested to dispose of the same expeditiously and if possible within a period of four months from the date of receipt of records. There will be no order as to costs.