

SUPREME COURT OF INDIA

Ram Sukh

vs.

Dinesh Aggarwal

C.A.No.6128 of 2008

(D.K. Jain, H.L. DattuJJ.)

18.07. 2009

JUDGMENT

D.K.Jain, J.

1. This appeal under Section 116A of the Representation of the People Act, 1951 (for short the 'Act') is directed against the judgment and order dated 15th January, 2008, rendered by the High Court of Uttaranchal at Nainital in Writ Petition No.03 of 2007 (M/S). By the impugned order, the High Court, upholding the preliminary objection raised by the first respondent, has dismissed the election petition mainly on the ground that it did not comply with the mandatory requirement of furnishing material facts so as to disclose cause of action and was not supported by an affidavit in the prescribed form.

2. Election to the State Legislative Assembly of Uttaranchal (now Uttarakhand) was held on 21st February, 2007. The results were declared on 27th February, 2007. The first respondent, who had contested the election as an Indian National Congress candidate, was declared elected. The appellant (hereinafter referred to as the 'election petitioner') having lost the election, as a candidate of the Nationalist Congress Party, challenged the election of the first respondent by filing an election petition under Section 80 read with Section 100(1)(b) and (d) of the Act. The election of the returned candidate was challenged mainly on the grounds:

(i) that the election petitioner having submitted 2 sets of the requisite Form-8 (Praroop-8) in respect of his election agent Manbir Singh Dagur before the Returning Officer, who having obtained the signatures of the election petitioner as also of the polling/election agent in proforma (Anulagnak-22), deliberately did not send the signed Anulagnak-22 of the election petitioner to different polling stations, with the result that his polling agent was not permitted by the polling officer to act as such on the date of polls;

(ii) that the Returning Officer deliberately delayed the distribution of Anulagnak-22 at various polling stations and on account of inaction on his part, election petitioner's

supporters got confused and either did not vote or voted in favour of the first respondent, an Indian National Congress candidate;

(iii) that the first respondent put pressure on the election petitioner to withdraw from the contest and on his refusal to do so, a rumour was spread by the first respondent that the election petitioner had withdrawn from the election fray and thus the first respondent used corrupt practice;

(iv) that the first respondent got a fabricated 'Fatva' from Devband circulated among the Muslim voters asking them to cast votes in his favour and thus the Muslim voters were unduly influenced by the issuance of the aforesaid religious Fatva - a corrupt practice;

(v) that the Polling Officers at various polling stations did not seal Electronic Voting Machines in presence of the election agent of the election petitioner and other candidates and further before the commencement of counting the Returning Officer did not get the seal of strong room certified from any of the polling agents; and

(vi) that the Electronic Voting Machines of various polling stations were either changed or were used after the polling time was over, showing misuse of the official machinery in support of the first respondent and, thus, putting a question mark on the fairness of the election.

3. The first respondent on being served with notice, instead of filing a written statement, filed an application under Order VI Rules 16 and 17 and Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short 'the Code') read with Section 86 of the Act raising a preliminary objection to the maintainability of the petition, inter-alia, on the ground that the petition was lacking in material facts and particulars and was also defective for want of requisite affidavit in support of allegations of corrupt practice and that since it did not disclose any cause of action, it deserved to be dismissed at the threshold. It was pleaded that on account of failure on the part of the election petitioner to file an affidavit in support of his allegations, the entire election petition was liable to be dismissed and allegations of corrupt practices made in paragraphs 14, 17, 19, 20 and 21 as well as grounds D and E of the election petition were liable to be struck off.

4. On consideration of the rival stands, the High Court came to the conclusion that the allegations of corrupt practices are entirely superfluous in nature; the concise statement of material facts is completely lacking and mandatory requirement of an affidavit in support of the allegations of corrupt practices was also not complied with. Relying on the decision of this Court in *Ravinder Singh Vs. Janmeja Singh & Ors¹*, the High Court came to the conclusion that non-filing of affidavit in support of the allegation of corrupt practices, is an incurable and fatal defect and, therefore, the election petition was liable to be rejected on that ground as well. Aggrieved, the election petitioner is before us in this appeal.

5. In spite of service, the first respondent - the elected candidate has not entered appearance. Therefore, we heard learned counsel appearing on behalf of the election petitioner.

¹2000 (8) SCC 191

6. It was submitted by learned counsel for the election petitioner that the High Court has committed an error of law as well as of procedure in entertaining first respondent's application and dismissing the election petition at the threshold. It was contended that the question whether "material facts", as contemplated in Section 83 of the Act, had been stated or not, cannot be decided without providing an opportunity to the election petitioner to prove his case upon trial. Learned counsel argued that if an election petition is rejected at the threshold on account of non-compliance with Section 83 of the Act, it would amount to reading into Section 86 an additional ground for dismissal of the election petition which cannot be permitted in law. Relying on the Handbook for Returning Officers issued by the Election Commission of India for the guidance of the Returning Officers in the conduct of elections, learned counsel submitted that the instructions so issued are binding on the Returning Officers and, therefore, having obtained the specimen signatures of the appellant and his election agent, it was obligatory on the part of the Returning Officer to circulate these specimen signatures to all the Presiding Officers in the prescribed performa in terms of Para 12 of Chapter VII of the said Handbook. It was contended that this omission on the part of the Returning Officer had materially affected the election result. However, the learned counsel fairly conceded that since the election petitioner did not file the affidavit as required under proviso to sub-section (1) of Section 83 of the Act, he was not pressing the ground pertaining to corrupt practice. Therefore, the issue surviving for consideration is only in relation to alleged violation of Section 100(1)(d)(iv) of the Act.

7. Before examining the merits of the issues raised on behalf of the election petitioner with reference to the relevant statutory provisions, it would be appropriate to bear in mind the observations of this Court in *Jagan Nath Vs. Jaswant Singh and Ors*². Speaking for the Constitution Bench, Mehr Chand Mahajan, C.J., had said that the statutory requirement of election law must be strictly observed and that the election contest is not an action at law or a suit in equity, but is purely statutory proceeding unknown to the common law and that Court possesses no common law power. It is also well settled that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. Nevertheless, it is also to be borne in mind that one of the essentials of the election law is to safeguard the purity of the election process and, therefore, the courts must zealously ensure that people do not get elected by flagrant breaches of that law or by indulging in corrupt practices, as enumerated in the Act.

8. In this backdrop, we may now turn to the procedural provisions in the Act insofar as they are relevant for our purpose:- .

"81. Presentation of petitions.--(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates

²[1954] S.C.R. 892

Explanation.--In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(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.

83. Contents of petition.--(1) An election petition--

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided 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 allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

86. Trial of election petitions.--(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section

117. Explanation.--An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.--For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

87. Procedure before the High Court.--(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits: Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings. (2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition."

9. From the afore-quoted provisions, it would appear that Section 81 enables a petitioner to call in question any election on one or more of the grounds specified in sub-section (1) of Section 100 of the Act. Section 83, the pivotal provision for the present case, requires that:

(a) the election petition must contain a concise statement of "material facts" on which petitioner relies and (b) he should also set forth "full particulars" of any corrupt practices which the petitioner alleges. Proviso to clause (c) of sub-section (1) of Section 83 also provides that where the petitioner alleges any corrupt practice, the election petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. It is plain that the requirement of disclosure of "material facts" and "full particulars" as stipulated in the Section is mandatory. Section 86 mandates that where the election petition does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, the High Court should dismiss the election petition. Section 87 which lays down the procedure required to be followed by the High Court while trying an election petition, requires that every election petition shall be tried, as nearly as may be, in accordance with the procedure applicable under the Code to the trial of the suits, subject of course to the provisions of the Act and of any requirement made thereunder.

10. It is evident that controversy in this appeal lies in a narrow compass. It revolves around the ambit of Section 83 of the Act. The point for consideration is whether the election petition lacked "material facts" required to be stated in the election petition in terms of Section 83(1) of the Act and if so, could it be dismissed summarily without trial?

11. As already noted, it is mandatory that all "material facts" are set out in an election petition and it is also trite that if material facts are not stated in the petition, the same is liable to be dismissed on that ground alone. Therefore, the question is as to whether the election petitioner had set out "material facts" in his petition?

12. The phrase "material facts" has neither been defined in the Act nor in the Code and, therefore, it has been understood by the courts in general terms to mean the entire bundle of facts which would constitute a complete cause of action. In other words, "material facts" are facts upon which the plaintiff's cause of action or defendant's defence depends. (See: *Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu & Ors*³. Broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the defendant are "material facts". Material facts are facts which, if established, would give the petitioner the relief asked for. But again, what 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.

13. The requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to Sections 81, 83 and 86 of the Act came up for consideration before a three-Judge Bench of this Court in *Samant N. Balkrishna & Anr. Vs. George Fernandez & Ors*⁴. Speaking for the three-Judge Bench, M. Hidayatullah, C.J., inter-alia, laid down that: (i) Section 83 of the Act is mandatory and requires first a

concise statement of material facts and then the fullest possible particulars; (ii) omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad; (iii) the function of particulars is to present in full a picture of the cause of action and to make the opposite party understand the case he will have to meet; (iv) material facts and particulars are distinct matters - material facts will mention statements of fact and particulars will set out the names of persons with date, time and place and (v) in stating the material facts it will not do merely to quote the words of the Section because then the efficacy of the material facts will be lost. 14. At this juncture, in order to appreciate the real

³(2004) 7 SCC 181

⁴(1969) 3 SCC 238

object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice distinction between the phrases "material facts" as appearing in clause (a) and "particulars" as appearing in clause (b) of sub-section (1) of Section 83. As stated above, "material facts" are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "Particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that opposite party is not taken by surprise.

15. The distinction between "material facts" and "particulars" and their requirement in an election petition was succinctly brought out by this Court in *Virender Nath Gautam Vs. Satpal Singh & Ors*⁵, wherein C.K. Thakker, J., stated thus:, para 50) "50. There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

16. Now, before examining the rival submissions in the light of the afore-stated legal position, it would be expedient to deal with another submission of learned counsel for the appellant that the High Court should not have exercised its power either under Order VI Rule 16 or Order VII Rule 11 of the Code to reject the election petition at the threshold. The argument is two-fold viz. (i) that even if the election petition was liable to be dismissed ultimately, it should have been dismissed only after affording an opportunity to the election petitioner to adduce evidence in support of his allegation in the petition and (ii) since Section 83 does not find a place in Section 86 of the Act, (2007) 3 SCC 617 rejection of petition at the threshold would amount to reading into sub-

section (1) of Section 86 an additional ground.

17. In our opinion, both the contentions are misconceived and untenable.

Undoubtedly, by virtue of Section 87 of the Act, the provisions of the Code apply to the trial of an election petition and, therefore, in the absence of anything to the contrary in the Act, the court trying an election petition can act in exercise of its power under the Code, including Order VI Rule 16 and Order VII Rule 11 of the Code. The object of both the provisions is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election petition is likely to inhibit the elected representative of the people in
⁵(SCC p.631

the discharge of his public duties for which the Electorate have reposed confidence in him. The submission, therefore, must fail. Coming to the second limb of the argument viz., absence of Section 83 in Section 86 of the Act, which specifically provides for dismissal of an election petition which does not comply with certain provisions of the Act, in our view, the issue is no longer res-integra. A similar plea was negatived by a three-Judge Bench of this Court in *Hardwari Lal Vs. Kanwal Singh*⁶, wherein speaking for the Bench, A.N. Ray, J. (as His Lordship then was) said:.

"23. Counsel on behalf of the respondent submitted that an election petition could not be dismissed by reason of want of material facts because Section 86 of the Act conferred power on the High Court to dismiss the election petition which did not comply with the provisions of Section 81, or Section 82 or Section 117 of the Act. It was emphasised that Section 83 did not find place in Section 86. Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. A suit which does not furnish cause of action can be dismissed."

18. The issue was again dealt with by this Court in *Azhar Hussain Vs. Rajiv Gandhi*⁷. Referring to earlier pronouncements of this Court in *Samant N. Balkrishna (supra)* and *Udhav Singh Vs. Madhav Rao Scindia*⁸ wherein it was observed that the omission of a single material fact would lead to incomplete cause of action and that an election petition without the material facts is not an election petition at all, the Bench held that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and omission of even a single material fact would amount to disobedience of the (Supp) mandate of Section 83(1)(a) of the Act and an election petition can be and must be dismissed if it suffers from any such vice.

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."

⁶(SCC p.221, para 23) ⁸(1977) 1 SCC 511

⁷(1972) 1 SCC 214 1986

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. As already stated, in the present case, the allegation of the election petitioner is that the Returning Officer failed to circulate the attested signatures of his election agent to various polling stations and, therefore, failed to comply with para 12 of Chapter VII of the Handbook for Returning Officers. The pleadings in the election petition, in relation to grounds (i) and (ii), extracted in para 2 above, were as under:

"That due to aforesaid inaction of the Returning Officer the polling agent of the petitioner was not permitted to function till 3.00 P.M. by which time more than 80% polling was over. This inaction on the part of Returning Officer materially affected the election as almost all other polling agents of the petitioner working in other polling stations got confused and supporters of the petitioner either returned back or voted for congress candidate.

12. That the Returning Officer was duty bound to send required Praroop of the petitioner and his agent's signature one day before the day of election which he did not do. Due to his inaction of the Returning Officer the election of 13 Laxman Chowk Legislative Assembly Constituency was materially affected."

21. There is no quarrel with the proposition that the instructions contained in the Handbook for the Returning Officers are issued by the Election Commission in exercise of its statutory functions and are, therefore, binding on the Returning Officers. They are obliged to follow them in letter and spirit. But the question for consideration is whether the afore-extracted

paragraphs of the election petition disclose material facts so as to constitute a complete cause of action. In other words, the question is whether the alleged omission on the part of the Returning Officer ipso facto "materially affected" the election result. It goes without saying that the averments in the said two paragraphs are to be read in conjunction with the preceding paragraphs in the election petition. What is stated in the preceding paragraphs, as can be noticed from grounds (i) and (ii) reproduced above, is that by the time specimen signature of the polling agent were circulated 80% of the polling was over and because of the absence of the polling agent the voters got confused and voted in favour of the first respondent. In our opinion, to say the least, the pleading is vague and does not spell out as to how the election results were materially affected because of these two factors. These facts fall short of being

"material facts" as contemplated in Section 83(1)(a) of the Act to constitute a complete cause of action in relation to allegation under Section 100(1)(d)(iv) of the Act. It is not the case of the election petitioner that in the absence of his election agent there was some malpractice at the polling stations during the polling. It needs little reiteration that for purpose of Section 100(1)(d)(iv), it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent, was materially affected due to the said omission on the part of the Returning Officer. Unfortunately, such averment is missing in the election petition. In our judgment, therefore, the Election Tribunal/High Court was justified in coming to the conclusion that statement of material facts in the election petition was completely lacking and the petition was liable to be rejected at the threshold on that ground. We have, therefore, no hesitation in upholding the view taken by the High Court."

22. Consequently, this appeal, being devoid of any merit, fails and is dismissed accordingly. Since the first respondent remained unrepresented, there will be no order as to costs.