

**BOMBAY HIGH COURT**

Purushottam

Vs.

Returning Officer, Amravati

Election Petn. No. 7 of 1990

(M.M. Qazi, J.)

29.01.1991

**ORDER**

**M.M. Qazi, J.**

1. The elections for electing the Members of the Maharashtra Legislative Council from the Amravati Division Teachers, Constituency were held on 15-7-1990, in which the petitioner contested as one of the candidates. The result of the elections was declared on 17-7-1990 in which the second respondent Vasant Purushottam Maldhuee (hereinafter referred to as 'the returned candidate') was declared elected. The petitioner challenged the said election by filing the present petition on several grounds, inter alia, on the allegation of corrupt practice alleged to have been committed by the returned candidate and the Madhyamik Shikshak Parishad with his consent. It is not necessary to refer to the various challenges raised in the petition at this stage, since the present petition has to be disposed of in view of the preliminary objection raised by the returned candidate.

2. The returned candidate filed an application dated 19-11-1990 for dismissal of the petition under Order 7, Rule 11 and Order 6, Rule 16 of the Civil Procedure Code read with Sections 83 and 86 of the Representation of the People Act (hereinafter referred to as 'the Act'). The material portion of the said application reads as under :

"That, the affidavit filed by the petitioner under Rule 94-A of the Conduct of Election Rules, 1961 is not in conformity with Form No. 25 and the mandate of Rule 94-A of the Conduct of Election Rules. The affidavit is vague and incomplete.

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That, this respondent is entitled to receive a true copy of the petition which includes the affidavit sworn by the petitioner under Rule 94-A of the Rules. The copy of the affidavit furnished to this respondent does not bear the name and designation of the Notary as also

it does not contain the endorsement made under the signature of the Notary which finds place in the original affidavit. The copy of the affidavit served on this respondent does not contain the stamped endorsement by the Notary about the affirmation before him. In other words, this respondent has not been served with the true copy of the petition by the petitioner which in itself is a material contravention of the provisions of the Act and the Rules. This respondent is put to disadvantageous position and is made to suffer as the abovestated details could not be verified by this respondent."

3. In view of the above objections, I heard the counsel on the preliminary point. Mr. Manohar, the learned Counsel appearing on behalf of the returned candidate, at the outset submitted that the challenge raised by him is no more *res integra* since it has already been concluded by the decision of this Court in (*Anees Ahmed v. Returning Officer*<sup>1</sup>) dated 10-11-1990. According to him, the copy of the petition which is supplied to the returned candidate is not in conformity with the provisions of Section 81(3) of the Act, inasmuch as the copy of the affidavit accompanying the petition does not carry (i) the endorsement "affirmed and signed before me"; (ii) the designation and name of the Notary; and (iii) the stamped endorsement regarding affirmation by the Notary. There is no dispute that the true copy of the affidavit supplied to the returned candidate does not bear the above endorsements. In view of this, the question that falls for my consideration is; whether the copy of the petition supplied to the returned candidate can be said to be a true copy within the meaning of Sub-Section (3) of Section 81 of the Act, in the absence of the above endorsement.

4. In this connection, Mr. Manohar has invited my attention to Sections 81 and 83 of the Act coupled with Rule 94-A of the Conduct of Election Rules, 1961, and Form No. 25 thereunder. According to Rule 94-A, an affidavit referred to in the proviso to Sub-Section (1) of Section 83 of the Act, has to be sworn before a Magistrate of the First Class or a Notary or Commissioner of Oaths and shall be in Form No. 25. Mr. Manohar has relied on the two decisions of the Supreme Court reported in *M. Kamalam v. Dr. V. A. Syed Mohammed*<sup>2</sup> and *Rajendrasingh v. Smt. Usha Rani*<sup>3</sup>.

5. Mr. Deshpande appearing on behalf of the petitioner has fairly conceded that the point involved in the present case has been squarely covered by the decision of this Court in Election Petition No. 2 of 1990 dated 10-11-1990 (cited supra). However, relying on the Division Bench decision of the Madhya Pradesh High Court reported in *Gangaram Bendil v. Rashmi Parihar*<sup>4</sup>, he has addressed the Court at some length and submitted that the view taken by this Court in Election Petition No. 2 of 1990 needs reconsideration. According to Mr. Deshpande, the affidavit accompanying the petition cannot be said to be an integral part of the petition. He has submitted that Sub-Section (3) of Section 81 merely requires that the election petitioner to supply as many copies of the election petition as there are respondents and every such copy has to be attested by the petitioner under his own signature to be a true copy of the petition. Thus, the petitioner fully complied with the requirements of Sub-Section (3) of Section 81 of the Act, he contended.

According to him, the petition has to be accompanied by an affidavit only in the event of allegations of corrupt practice as per Section 83. Therefore, any defect in the copy of the affidavit cannot be taken into consideration in order to find out whether the requirements of Sub-Section (3) of Section 81 are complied with or not. If it is so done, it would only mean that we are reading something in Section 81 of the Act which is not there. According to him, the affidavit is distinct from the petition and, therefore, the defect in the copy of the affidavit cannot warrant dismissal of the petition. He has heavily relied on the decision reported in (*Ch.*

*1 Election Petition No. 2 of 1990*

*3 AIR 1984 Supreme Court 956,*

*2 AIR 1978 Supreme Court 840,*

*4 AIR 1987 Madhya Pradesh 208,*

*Subbarao v. Member, Election Tribunal, Hyderabad*<sup>5</sup>). In this case the returned candidate has raised the preliminary objection that the copies supplied to the respondents were not in conformity with Sub-Section (3) of Section 81 of the Act, inasmuch as the endorsement "true copy" was absent either before or above the signature of the petitioner. The High Court upheld the objection and dismissed the petition. The order of the High Court was challenged before the Supreme Court. The Supreme Court in para 19 of its judgment observed as under :

"19. We are not impressed with this argument. While we are conscious of the need for expeditious disposal of election petitions, and for the strict enforcement of provisions designated to achieve this purpose, we cannot be oblivious of the circumstances that to read every requirement literally might equally defeat the purpose for which Part VI is intended, viz., that elections are conducted in accordance with the relevant statutory provisions framed to ensure purity and orderliness and that the candidate who has not obtained a majority of valid votes or has obtained it in flagrant breach of the statutory provisions is not held entitled to represent the constituency."

Relying on these observations, Mr. Deshpande contended that every requirement if read literally might frustrate the object of the Act; to ensure purity and orderliness in the election matters. The Supreme Court further observed that if there was substantial compliance with the requirement of Section 81 (3) of the Act, the election petition cannot be dismissed. In this case the Supreme Court found that (i) the petition was accompanied by requisite number of copies; (ii) the copies accompanying the petition were true copies; and (iii) each of those copies bore the signature of the petitioner. The Supreme Court held that the signature of the petitioner at the end of the petition authenticated the contents of the copy of the petition and thus there was substantial compliance with the requirement of Section 81(3). The Supreme Court further found that mere absence of the words "true copy" before or above the signature of the election petitioner would not detract the copy being a 'true copy'. Hence it was found that there was substantial compliance with the requirement of Section 81(3) of the Act. The order of the High Court was, therefore, quashed and the petition was directed to be disposed of according to law.

6. Mr. Deshpande also relied on the decision reported in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore*<sup>6</sup>. In this decision, it was contended by the respondents that there was a

defect in the affidavit and, therefore, there was failure on the part of the election petitioner to comply with the provisions of Section 83 of the Act. The affidavit was sworn before the Oaths Commissioner, who instead of writing the words "verified before me" wrote the words "verified by me". The Election Tribunal observed that the mistake appeared to have been committed due to inexperience of the Oaths Commissioner. This view was affirmed by the High Court as well as the Supreme Court. The Supreme Court observed that a proper affidavit could be allowed to be filed at a later stage and the defect in the affidavit could not warrant dismissal of the petition. The Supreme Court further held that the mistake of the Oaths Commissioner in verifying the affidavit could not be a sufficient ground for dismissal of the petitioner's petition summarily. Relying on this decision, Mr. Deshpande argued that if the defect in the

<sup>5</sup> AIR 1964 SC 1027

<sup>6</sup> AIR 1964 SC 1545

affidavit is not held to be substantial, how the absence of the endorsement by the Notary on the copy of the affidavit can be held substantial. It is difficult to accept this contention. In the above case, as shown above, the defect in the affidavit was due to the mistake on the part of the Oaths Commissioner. It is not that the Oaths Commissioner was not authorised to administer Oath. Moreover, the defect was obviously due to inexperience of the Oaths Commissioner and it could not be said that such a copy of the affidavit misled the respondents. I do not think, the above two decisions relied by Mr. Deshpande have any relevance to find out as to whether the absence of endorsement by the Notary on the copy of the affidavit is substantial.

7. Mr. Deshpande also relied on the decision reported in *Dr. Anup Singh v. Abdul Ghani*<sup>7</sup>. In this case, necessary number of copies were filed and each copy bore the signature of the petitioner concerned. The copies were the carbon copies of the original and it was not in dispute that they were true copies thereof, but the attestation required by Section 81(3) was not there specifically on the copies. Consequently it was contended that there was no compliance with the provisions of Section 81(3) of the Act and in consequence the petition should have been rejected. The Supreme Court relying on its earlier decision in AIR 1964 Supreme Court 1027 (cited supra) held that there was substantial compliance, with the provisions of Section 81(3) and the petition could not, therefore, be dismissed on that ground.

8. Mr. Deshpande further referred to the decision reported in *Smt. Sahodrabai Rai v. Ram Singh Aharwar*<sup>8</sup>. In this case, the copy of the pamphlet was not annexed to the copy of the petition that was supplied to the respondents though the translation of the pamphlet was incorporated in the election petition. Therefore, the question arose whether the pamphlet could be described as a part of the election petition and since it was not annexed to the copy of the petition; whether the petition could be dismissed for non-compliance with the provisions of Section 81(3) of the Act. Negating the challenge of the respondents, the Supreme Court observed that since the election petition itself reproduced the whole of the pamphlet, it could be said that the averments with regard to pamphlet were themselves a part of the petition and, therefore, the pamphlet was served upon the respondents. The Supreme Court further observed that the documents which were merely evidence in the case were in no sense an integral part of the averments of the petition but

were only evidence of those averments and in proof thereof. The pamphlet, therefore, must be treated as a document and not as a part of the election petition insofar as the averments were concerned, the Supreme Court observed. In regard to Sub-Section (2) of Section 83, the Supreme Court observed that it would amount to stretching the words of the said provision too far to think that every document produced as evidence in the election petition becomes a part of the election petition proper. Mr. Deshpande also referred to the decision reported in *Virendrakumar Saklecha v. Jagjivan*<sup>9</sup>. It is not relevant to the point involved in the present case. It pertains to the type of affidavit required to be filed in support of the election petition.

9. In the present case, the crucial question that falls for consideration is; the effect of the absence of endorsement of the Notary on the copy of the affidavit supplied to the returned candidate. The Supreme Court in the decision reported in

*7 AIR 1965 Supreme Court 815,*                      *9 AIR 1974 Supreme Court 1957,*

*8 AIR 1968 Supreme Court 1079*

*Mithilesh Kumar Pandey v. Baidyanath Yadav*<sup>10</sup> has laid down the following principles :-

"(1) That where the copy of the election petition served on the returned candidate contains only clerical or typographical, mistakes which are of no consequence, the petition cannot be dismissed straightway under Section 86 of the Act.

(2) A true copy means a copy which is wholly and substantially the same as the original and where there are insignificant or minimal mistakes, the Court may not take notice thereof.

(3) Where the copy contains important omissions or discrepancies of a vital nature, which are likely to cause prejudice to the defence of the returned-candidate it cannot be said that there has been a substantial compliance of the provisions of Section 81(3) of the Act.

(4) Prima facie, the statute uses the words "true copy" and the concept of substantial compliance cannot be extended too far to include serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy within the meaning of Section 81 (3) of the Act; and

(5) As Section 81(3) is meant to protect and safeguard the sacrosanct electoral process so as not to disturb the verdict of the voters, there is no room for giving a liberal or broad interpretation to the provisions of the said Section."

In the light of the principles laid down by the Supreme Court (referred supra), it is difficult to hold that absence of endorsement of the Notary on the copy of the petition supplied to the returned candidate was only a clerical or typographical mistake. On the contrary, the defect appears to be substantial and it could cause prejudice to the returned candidate, who is not expected to wade through the original record.

10. Mr. Deshpande has contended that no exception could be taken to the copy of the petition in the present case merely because the Notary's endorsement on the copy of the affidavit is absent.

According to him, the copy and the affidavit are quite distinct and separate. He has advanced this argument relying on the provisions of Sections 81 and 83 of the Act. According to him, the affidavit is required to be filed under Section 83 of the Act when there are allegations of corrupt practices. Filing of an affidavit is not required under Section 81, he contended. According to him, the plain wording of Sub-Section (3) of Section 81 shows that every copy has to be attested by the petitioner to be a 'true copy' and, therefore, while interpreting Sub-Section (3) of Section 81, Section 83 cannot be imported. There is no substance in this contention. The Supreme Court in *M. Kamalam v. Dr. V. A. Syed Mohammed*<sup>11</sup>, has observed as under (at page 844 of AIR) :

"It would, therefore, be seen that if a schedule or annexure is an integral part of the election petition, it must be signed by the petitioner and verified, since it forms part of the election petition. The subject-matter of Sub-Section (2) is thus a schedule or annexure forming part of the election petition and hence it is placed in Section 83 which deals with contents of an election petition. Similarly, and for the same reasons, the affidavit referred to in the proviso to Section 83, Sub-Section (1) also forms part of the election petition. The election petition is in truth and reality

<sup>10</sup> AIR 1984 SC 305

<sup>11</sup> AIR 1978 SC 840

one document, consisting of two parts, one being the election petition proper and the other being the affidavit referred to in the proviso to Section 83, Sub-Section (1). The copy of the election petition required to be filed under the first part of Sub-Section (3) of Section 81, would, therefore, on a fair reading of that provision along with Section 83, include a copy of the affidavit. That is why the appellant attached a copy of the affidavit to the copy of the election petition proper and filed the two as one single document along with the election petition."

In view of the above observations, the contention of Mr. Deshpande that the copy and the affidavit are distinct and separate has to be rejected.

11. In the case reported in *Rajendra Singh v. Smt. Usha Rani*<sup>12</sup>, the Supreme Court has observed as under (at page 958 of AIR) :

"This being the position, it is manifest that the appellant did not receive the correct copies as contemplated by Section 81(3) of the Act. The respondent has also not been able to prove that the copies served on the appellant were out of the 10 corrected copies which she had signed and filed. It appears that in view of a large number of the copies of the petition having been filed, there was an utter confusion as to which one was correct and which was not. It is obvious that if an election petitioner filed a number of copies, some of which may be correct and some may be incorrect, it is his duty to see that the copy served on the respondent is a correct one. A perusal of Sections 81 (3) and 86 of the Act gives the impression that they do not contemplate filing of incorrect copies at all and if an election petitioner disregards the mandate contained in Section 81(3) by filing incorrect

copies, he takes the risk of the petition being dismissed *in limine* under Section 86. It is no part of the duty of the respondent to wade through the entire record in order to find out which is the correct copy. If out of the copies filed, the respondent's copy is found to be an incorrect one, it amounts to non-compliance of the provisions of Section 81(3) which is sufficient to entail a dismissal of the election petition at the behest."

Thus, it is clear from the above observations that it is no part of the duty of the respondent to wade through the entire record in order to find out whether the copy supplied to him was a correct one or not. In the present case, in the absence of the endorsement of the Notary on the copy supplied to the returned candidate, it was not possible for him to know whether the affidavit was really sworn and if so, before whom it was sworn and on what date. Thus it is not possible to hold that the copy supplied to the returned candidate really conforms the requirement of Section 81(3) of the Act.

12. In the identical circumstances, this Court in Election Petition No. 2 of 1990 dated 10/11th October, 1990 has held that the absence of the endorsement of the Notary on the copy of the affidavit renders the copy as not conforming the requirements of Section 81(3) of the Act. The following observations of the said judgment apply to the present case with full force :

"50. That, however, leaves one question to be considered and it is whether the  
<sup>12</sup> AIR 1984 SC 956  
copy of the endorsement "Affirmed and signed before me" by the Notary, designation of the Notary and the stamped endorsement regarding the affirmation which he made at the time of the making of the affidavit, were necessary and essential parts of the document and if these are omitted from the copy furnished, that would render the copy, which is furnished, incomplete, and the defect would be so glaring as to negative the inference that the copy was furnished. When Form No. 25 prescribes a particular form and the copy of that affidavit is to be furnished, it seems to me that the endorsement of the authority before whom the affirmation was made, together with his official designation and the stamped endorsement, are also essential and without them the copy cannot be regarded as true copy. It is not merely the contents of the affidavit which brings sanctity to the document but the affirmation that has been made, and without the affirmation, it can be no affidavit at all. I am not impressed by the submission of Shri Bobde that these endorsements were merely formal, because what is required under the proviso to Sub-Section (1) of Section 83 is an affidavit, and it should be possible for the respondent to ascertain whether, in fact, the contents were sworn, affirmed and signed before the Magistrate or the Notary or the person in whose presence the swearing of the affirmation was made, had authority to administer oath. The respondent will not be in a position to point out that the person, who is said to have administered the oath, was not in existence or had no authority to administer the oath or that the signature and the endorsement on the document purported to have been made by the alleged authority were fake. If the

copies of the affidavit are not faithful and do not include these endorsements, a valuable right of the respondent is taken away and considering the purpose which the copy of the endorsement would serve, it cannot be said that this portion would not be integral part of the affidavit. Since these details form an integral part of the affidavit, furnishing a copy without that portion would not be furnishing a complete copy, and in that event, merely because the returned candidate made an endorsement that it was a true copy, it cannot be regarded as a true copy. Considering the purpose that is to be served, I do not think that the lapse can be regarded as inconsequential."

Having regard to the above facts, the absence of endorsement of the Notary "Affirmed and signed before me", his designation and the stamped endorsement regarding the affirmation, cannot be regarded as inconsequential. It is an omission of a vital nature which is likely to prejudice the returned candidate. It is, therefore, not possible to hold that there has been substantial compliance of the provisions of Section 81(3) of the Act, as contended by the petitioner. The preliminary objection, therefore, deserves to be upheld and the petition deserves to be dismissed on that ground alone.

13. In the result, the election petition is dismissed with costs.  
Petition dismissed.