

## RAJASTHAN HIGH COURT

Heera Singh Chouhan

Vs.

C. D. Dewal

C.E.P. No. 4 of 2004

(B. Prasad, J.)

22.07.2004

### ORDER

**B. Prasad, J.**

1. An application has been filed on behalf of respondent- applicant praying *inter alia* that the affidavit filed along with the election petition is not in conformity with the provisions of Section 83(1) of the Representation of the People Act (hereinafter referred as 'the Act'). Since the mandatory provisions of Section 83(1) of the Act have not been complied with, the election petition be dismissed. It be held that there is no affidavit accompanying the election petition in the prescribed pro forma. The petition is based on allegation of corrupt practice, in absence of an affidavit in Form 25, the election petition is not liable to be sustained and hence it entails dismissal.

2. Another argument of the learned counsel for the respondent-applicant is that even after filing of the objection that the affidavit filed by the election-petitioner is not in accordance with proviso to Section 83(1) of the Act as the same is not in Form 25, the election-petitioner has failed to correct the defect. Thus, the petitioner is not liable to be granted any indulgence because compliance has not been made even after the election- petitioner was made aware of the defect in the affidavit filed. He has supported his argument by a judgment of this Court reported in *in the matter of Kanak Mal v. BhikhaBhai*.<sup>1</sup> He has further relied upon a SC decision reported in *in the matter of Regu Mahesh alias MaheshwarRao v. RajendraPratapBhanj Dev*.<sup>2</sup> Learned counsel for the respondent on the strength of the aforesaid cases urged that the provisions of Section 83(1) of the Act have been held to be mandatory. The election petition without an affidavit, where the allegations of corrupt practice are made, is no

'election petition' in the eye of law and, therefore, the petition deserves to be dismissed.

3. Per contra, the learned counsel for the election-petitioner urged that an affidavit has been filed. No doubt, it is not in the form prescribed. However, subsequent to the filing of the election petition, the election- petitioner has filed an affidavit in the form prescribed in the Rules. According to him defect in affidavit is a curable defect. He places reliance on a SC decision decided in the matter of *H. D. Revanna v. G. Puttaswamy Gowda reported in*, <sup>3</sup>in which it has been held as under :-

"The argument is no doubt attractive. But, the relevant provisions in the Act are very specific. Section 86 provides for dismissal of election petition *in limine* for non-compliance of Sections 81, 82 and 117. Section 81 relates to presentation of election petition. It is not the case of the appellant before us that the requirements of Section 81 were not complied with though in the High Court a contention was urged that a true copy of the election petition was not served on the applicant and thus the provisions of Section 81 were not complied. Sections 82 and 117 are not relevant in this case. Significantly Section 86 does not refer to Section 83 and non-compliance of Section 83 does not lead to dismissal under Section 86. This Court has laid down that non- compliance of Section 83 may lead to dismissal of petition only if the matter falls within the scope of Order 6, Rule 16 or Order 7, Rule 11, Civil Procedure Code. Defect in verification of the election petition has been held to be curable and not fatal.

In *MurakaRadheyShyam Ram Kumar v. Roop Singh Rathore*, <sup>4</sup> Constitution Bench has held in unmistakable terms that a defect in the verification of an election petition as required by Section 83(1)(c) of the Act 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. Another Constitution Bench held in *Ch. Subbarao v. Member, Election Tribunal, Hyderabad*, <sup>5</sup>that even with regard to Section 81(3), substantial compliance with the requirement thereof was sufficient and only in the cases of total or complete non- compliance with the provisions of Section 81(3), it could be said that the election petition was not one presented in accordance with the provisions of the part of the Act.

It is the said principle of substantial compliance which was adopted in *K. M. Mani v. P. J. Antony*, <sup>6</sup> Reliance has rightly been placed thereon by learned counsel for the respondent.

In *F.A. Sapa v. Singora*,<sup>7</sup> this Court held that a defect in the verification of the petition as well as a defect in the affidavit can be cured and it is not fatal to the maintainability of the petition. Neither in *Virendra Kumar Saklecha v. Jagiwan*,<sup>8</sup> nor in *L. R. Shivarama-gowda v. T. M. Chandrashear*,<sup>9</sup> this Court went to the extent of holding that the election petition should be dismissed *in limine* for a deficiency in the affidavit or verification. In fact the question was expressly left open in the former case and it did not arise in the latter."

4. Learned counsel for the petitioner has further relied on another case decided by the Hon'ble SC in the matter of *G. Mallikarjunappa v. Shamanur Shiva-shankarappa reported<sup>11</sup>in*, in which it has been held as under (at p. 1830) :-

"An election petition is liable to be dismissed *in limine* under Section 86(1) of the Act if the election petition does not comply with either the provisions of Section 81 or Sections 82 and 117 of the R. P. Act. The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed *in limine* under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly 'defective' affidavit is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

In *F. A. Sappa* (supra), a three Judge Bench of this Court specifically dealt with an issue concerning defects in the verification of an election petition as well as of defects in the affidavit accompanying an election petition wherein allegations of corrupt practice are made. After considering the provisions of Sections 83 and 86 of the Act, as also the requirement of Form No. 25 prescribed by Rule 94-A of the Rules and relevant provisions of the Civil Procedure Code, the Court opined :

"From the text of the relevant provisions of the R. P. Act, Rule 94-A and Form 25 as well as Order 6, Rule 15 and Order 19, Rule 3 of the Code and the resume of the case law discussed above it clearly emerges (i) a defect in the verification, if any, can be cured, (ii) it is not essential that the verification

clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true (iii) if the respondent desires better particulars in regard to such averments or allegations, he may call for the same in which case the petitioner may be required to supply the same and (iv) the defect in the affidavit in the prescribed in the Form 25 can be cured....."

5. The learned counsel for the petitioner has submitted that an application was filed with the averments meeting the objections of the respondent. It met with the objections of the respondent. He has done an exercise to satisfy the requirement of law. The statement has been made in the following terms.

"That the respondent No. 1 has raised an objection that the affidavit submitted by the petitioner in support of his election petition does not confirm the prescribed Form i.e. Form 25 prescribed under Rule 94-A of the Conduct of Election Rules, 1961 framed under the proviso to Section 83(1) of the Representation of the People Act, 1951. In that regard it is submitted that though the above referred affidavit substantially satisfies the requirement of law, yet to avoid unnecessary controversy on this point an additional affidavit of the petitioner drawn strictly in accordance with Form 25 is herewith submitted with an application to allow the petitioner to place the same on record."

6. Along with this reply an application has also been filed by the petitioner for seeking permission of the Court for filing an additional affidavit. Along with the application for permission to file additional affidavit, in anticipation of the permission, an affidavit has been filed.

7. Objection of the learned counsel for the respondent in relation to the affidavit filed along with application for permission to take the same on record is that this affidavit too is not in accordance with law and does not fulfill the requirement of law.

8. Learned counsel for the petitioner said that learned counsel for the defendant has though stated that the petitioner's affidavit is not in accordance with law but no specific defect has been demonstrated in relation to the filed affidavit. Therefore, the objections are non-specific in a way. The learned counsel for the petitioner submitted that the affidavit filed by him along with application, was not a fresh affidavit and is not the main affidavit, it was only an additional affidavit. The original affidavit has already been filed. The additional affidavit has been filed to meet requirements of law

as stated in Section 86(1) of the Act, therefore, anything which is done to obviate a technical defect would not in any way mean that it is required to have same color as that of the original affidavit. Learned counsel for the petitioner submits that it should be treated as part and parcel of the original petition.

9. Learned counsel for the petitioner submitted that whatever are the defects mentioned in Section 86 relate to Sections 81, 82 and 117 of the Act and these are the defects of the kind which do not go into the form of the petition. They relate to the presentation requiring limitation and costs. None of the defects being there, the petition of the petitioner could not have been dismissed *in limine* at the initial stage. According to the learned counsel for the petitioner, the respondents application under Order 7, Rule 11, Civil Procedure Code is not maintainable because that could only be entertained by the Court after the applicant-respondent had filed his written statement.

10. The question regarding the verification of the petition or the affidavit has been addressed by the Hon'bleSC in various cases. The Hon'bleSC has come to the conclusion that any defect in verification can be cured at subsequent stages. The defect in verification should not be permitted by the Court to be an embargo in trying an election petition. What appears here is not a defect in verification but the defect is in the form of the affidavit. Form of the affidavit goes to the root of the character of the affidavit. Requirement of law is that the affidavit should be filed in the form prescribed. The affidavit admittedly, has not been filed along with the election petition in the form as prescribed in the proviso to sub-section (1) of Section 83 of the Act. Thus what has to be looked into by this Court is that it is not the defect in verification but the defect is in the form of the affidavit. Can such defect be permitted to be cured or is of such a paramount nature which would be fatal ? This Court is required to answer this question.

11. An election petition without an affidavit is not an election petition in the eye of law. When the defect was pointed only by the respondent-applicant, it was admitted by the petitioner that the affidavit filed is not in the prescribed form. Therefore, a supplement was intended to be made and an affidavit was filed and an application was made for taking the same on record. The sequence of events shows that there was no affidavit in form 25 and, therefore, an attempt was made by the election-petitioner to supply an additional affidavit. This establishes that the election petition was filed without there being any affidavit in the prescribed form available on record and thus, according to him, it was not a petition. Question therefore is whether it entails the petition a rejection under Order 7, Rule 11 of Civil Procedure Code ?

12. According to the learned counsel for the respondent the Hon'bleSC in Sappa's case (supra) has made clear distinction in two categories of defective affidavits. One which were curable and second which were not curable. According to the learned counsel such affidavits which had defect in verification were liable to be cured but such affidavits which had defect of the form, were not liable to be corrected.

13. According to the learned counsel for the respondent the learned counsel for the petitioner has placed reliance on such cases only which relate to defective affidavits and the defect related to verification only. These cases would not govern the facts of this case because the defect in verification stood on a different footing than there being no affidavit at all. The instant case is a case which can be said to be one which is without any affidavit in the eye of law.

14. The law laid down in the case of Sappa (supra), the learned counsel for the respondent-applicant emphasized that the Hon'bleSC did not approve the findings of the High Court wherein the High Court said that the affidavit is defective and took no steps to get the defect cured. When High Court did not deem it proper to get the defect cured by keeping the petition pending in case of a defect, the matter was not approved by the Hon'bleSC and the matter was remanded back to the High Court for deciding afresh.

15. The election-petitioner while meeting out the objections raised by the applicant-respondent, had filed an application along with an affidavit presuming that the defect pointed out by the applicant-respondent was curable and an affidavit has been filed casually along with an application for seeking permission to take the additional affidavit on record. On 1-6-2004 such application was replied by the applicant-respondent and the reply contained a specific averment in the following terms :-

"That a bare perusal of the application shall reveal that the petitioner has taken the matter very casually, lightly and in routine. No application can be made without there being any provision for giving the relief prayed for and as such the application is liable to be dismissed on this count also."

16. Learned counsel for the applicant-respondent stressed on the aforesaid that the affidavit sought to be substituted is also no affidavit in the eye of law. The oath on the subsequent affidavit was taken in isolation and no contents of the facts were then sworn and, therefore, on the strength of this affidavit the contents of the election petition cannot be deemed to have been sworn by the election-petitioner.

17. Learned counsel for the respondent has relied on a case decided by the Hon'bleSC reported in *in the matter of Regu Mahesh alias ReguMaheshwarRao v. RajendraPratapBhanjDev*,<sup>12</sup> wherein the Hon'bleSC has held as under (at p. 43) :-

"It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the defect."

18. The learned counsel for the applicant-respondent further emphasises that the defect has been continued not by an ordinary electorate but the election- petitioner in the present case is a law knowing person being an advocate and, therefore, the case decided by the Hon'bleSC referred to hereinabove applies with full force. The point regarding cause of action was not pressed by the applicant at this stage.

19. I have heard the learned counsel for the parties.

20. In the instant case this is not denied that election petition as filed is not supported by an affidavit in terms of the proviso as contained in Section 83(1) of the "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 verified in the manner laid down in the Civil Procedure Code, 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."

Act. For ready reference, the provision is quoted herein below :-

21. Proviso requires that the petition shall also be accompanied by an affidavit in the prescribed form. The expression used in the proviso is 'shall also be accompanied by

an affidavit'. The use of word "shall" generally connotes the mandatory nature of the legislative enactment. The interpretation taken by the Hon'bleSC in relation to the enforcement of election law has been to the effect that while election law is enforced, the Courts have to keep in mind that the changing trends of common law are not relevant in this regard. Guiding factors of equity is not looked into. The law laid down by the Hon'bleSC in the matter of *F. A. Sapa v. Singora* is quoted below :-

"It is fairly well settled that our election law being statutory in character must be strictly complied with since an election petition is not guided by ever changing common law principles of justice and notions of equity. Being statutory in character it is essential that it must conform to the requirements of our election law. But at the same time, the purity of election process must be maintained at all costs and those who violate the statutory norms must suffer for such violation. If the returned candidate is shown to have secured his success at the election by corrupt means he must suffer for his misdeeds."

22. When the aforesaid principle is kept in mind then there remains no doubt that the law as is delineated in Section 83(1) of the Act makes it imperative for the petitioner to present the election petition along with affidavit in a prescribed form. That having not been done what follows is that there was no affidavit as prescribed in law at the time when the petition was filed. If there was no affidavit at the inception then the contents of petition so far as they relate to corrupt practice cannot be gone into by the Court as the same has a legal embargo, because law requires that allegations of corrupt practice and particulars thereof should be supported by affidavit in a prescribed form.

23. The Hon'bleSC in the case of *F. A. Sapa* (supra) has further observed as under:-

"From the text of the relevant provisions of the R. P. Act, Rule 94-A and Form 25 as well as Order 6, Rule 15 and Order 19, Rule 3 of the Code and r?m?f the case law discussed above it clearly emerges;

(i) to (iii) . . . . .

(iv) 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 the case concerning material facts will have to be dealt with, subject to limitation, under Section 81(3) as indicated earlier. Similarly, the Court would have to decide in each individual case whether the schedule or annexure referred in Section 83(2)

constitutes an integral part of the election petition or not; different considerations will follow in the case of the former as compared to those in the case of the latter."

24. The aforesaid observations of the Hon'bleSC in this case say that any defects in Form 25 can be cured but when the form itself is not there, then other contingencies will have to be seen. In the instant case while filing an affidavit in support of the allegations of corrupt practice Form 25 was not at all used. It can be considered that there was no affidavit as prescribed. It cannot be a case where the defect can be cured. Because what can be cured is a defect and not a total absence when there is no affidavit in Form 25. It was not at all available on record. It, therefore, does not come within the category where defect as there and that is required to be cured.

25. Thus, it can safely be said that the present case does not fall within the category where the defect can be cured. The question can be seen from another point of view that the petitioner is a law knowing person being a lawyer, the defect was pointed out by the respondent at the earliest possible stage. An application has been moved on behalf of the petitioner that he may be permitted to file additional affidavit and in anticipation of the permission, the affidavit has been filed. Curiously the affidavit is not self-contained and oath taken relates to certain paragraphs of the election petition regarding which no oath has been taken by the petitioner on the day when the additional affidavit was sworn. Thus on that day it cannot be said that there was an oath taken by the deponent about contents of the petition delineating corrupt practice when the affidavit was sworn. Thus, even if the attempt on the part of the election-petitioner is considered to be an attempt to cure the defect then this attempt falls short of meeting the requirement of law, because along with affidavit the contents of corrupt practice were also required to be sworn. Those contents were neither reproduced in the affidavit nor any supplementary petition was filed stating that on that day those contents were sworn. Thus, there were no oaths taken of the relevant facts along with additional affidavit. Facts contained in the petition on the day when the additional affidavit was sworn were not stated on oath. When the lawyer does this kind of compliance of law then the Hon'bleSC has described such attempts in the following words:

"It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the

defect.

The casual approach of the appellant is not only visible from the manner in which verification was done, but also from the fact that he has mentioned two different districts to which he claims to be belonging. The explanation that the same was given by mistake is too shallow when considered in the background that he is stated to be a practicing advocate. An advocate is supposed to know the importance of verification and the desirability of making a statement of correct facts in any petition and more in case of an election petition. An election petition is intended to bring into focus any illegality attached to an election. It essentially and basically puts a question mark on the purity of the election, casts doubt on the fairness thereof and seeks a declaration that the mandate of the people has been obtained by questionable means. In a democracy the mandate has sacrosanctity. It is to be respected and not lightly interfered with. When it is contended that the purity of electoral process has been polluted, weighty reasons must be shown and established. The onus on the election petitioner is heavy as he has to substantiate his case by making out a clear case for interference both in the pleadings and in the trial. Any casual or negligent cavalier approach in such serious and sensitive matter involving great public importance cannot be countenanced or glossed over too liberally as for fun."

26. Thus also the petitioner has not made sincere efforts to get the election petition in order at the earliest. From the aforesaid discussion of the facts what emanates is that there is a defect in the election petition. The petitioner has not followed the law as contained in Section 83(1) of the Act. Provisions of Order 7, Rule 11(d), C.P.C., say that if a suit is barred by any law then the same entails rejection. In this background when it is seen that the election petition is not accompanied by an affidavit in the prescribed form then it cannot be considered to be an election petition. The requirement of Section 83(1) of the Act having not been complied the petition loses its character as election petition and if it is not an election petition as required by law then the same requires rejection under Order 7, Rule 11, C.P.C.

27. In view of the above discussion, this Court feels that the election petition has not been framed properly in accordance with Section 83(1) of the Act. Thus, it suffers from the defect of improper framing. The petition deserves to be dismissed.

28. In the result, the respondents' application under Order 7, Rule 11, C.P.C., is allowed. The election petition filed by the petitioner is rejected. The parties shall bear

their own costs.

Application allowed.

Cases Referred.

1. 1996 (1) RLW 543
2. 2004 (1) SCC 46: (AIR 2004 SC 38)
3. AIR 1999 SC 768
4. 1964 (3) SCR 573: (AIR 1964 SC 1545)
5. (1964) 6 SCR 213: (AIR 1964 SC 1027)
6. (1979) 2 SCC 221: (AIR 1979 SC 234)
7. 1991 (3) SCC 375: (1991 AIR SCW 1492)
8. (1972) 1 SCC 826: (AIR 1974 SC 1957)
9. (1998) 6 Scale 361: (1998 AIR SCW 3767)
10. 2001 (5) SRJ 188: (AIR 2001 SC 1829)
11. 2001 (5) SRJ 188: (AIR 2001 SC 1829)
12. 2004 (1) SCC 46: (AIR 2004 SC 38)