

(2014) 09 GAU CK 0013

In the Gauhati High Court

Case No : C.M. Appl. No. 88 of 2014 in Election Pet. No. 13 of 2014

H. Rohluna

APPELLANT

Vs

L. Thangmawia

RESPONDENT

Date of Decision : 06-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, Order 7 Rule 11, Order 7 Rule 11(a)

Penal Code, 1860 (IPC) — Section 171G

Representation of the People Act, 1951 — Section 100, 100(1)(d)(iii), 117, 80, 81

Citation : AIR 2014 Guw 172 : (2015) 2 GLD 88 : (2014) 4 GLT 888

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : A.K. Rokhum and Lalsawirema, Advocate for the Appellant; C. Lalramzauva, M. Zothankhuma, Sr. Advocates, K. Laldinliana, Zoramchhana, Lalramsangzuali, Ruth Lalrinliani, Johny L. Tochhawng, Lalfakawma and Rosangzuala Ralte, Advocate for the Respondent

Judgement

Ujjal Bhuyan, J.—Heard Mr. Lalsawirema, learned counsel for the applicant/respondent No. 1 (returned candidate) and Mr. C. Lalramzauva, learned senior counsel assisted by Mr. Johny L. Tochhawng, learned counsel appearing for the Opposite Party No. 1/election petitioner. Also heard Mr. M. Zothankhuma, learned senior counsel for Election Commission of India. This is an application under Order 7 Rule 11 of the Civil Procedure Code, 1908 for rejection of the election petition for want of cause of action and for non-compliance of the mandatory provisions of the Representation of the Peoples Act, 1951 (for short "the Act").

2. Rejection of the election petition has been sought for primarily on three grounds. First, the election petition does not disclose material facts to constitute a cause of action to warrant trial of the election petition. Secondly, the prayer made in the election petition is beyond the relief which can be granted to an election petitioner under the Act. Hardly, since the election petitioner has sought for a declaration that not only the election of the returned candidate be declared

as void, he should also be declared as the elected candidate, all the other contesting candidates of the constituency should have been made parties to the election petition, which has not been done. This is a violation of the mandatory provision of Section 82 of the Act.

3. Opposite Party No. 1 i.e. the election petitioner has filed written objection. It is contended that there is no necessity to entertain and decide the misc. application at a preliminary stage. It is asserted that material facts have been pleaded in the election petition. Reliefs sought for in the election petition cannot be said to be beyond the scope of the law. Though in the election petition, the election petitioner has made further prayer for declaring him as the elected candidate after declaring the election of the applicant as void, he is not pressing the same and would be satisfied if the first part of the prayer is granted i.e. if the election of the applicant (returned candidate) is declared as void. Misc. application should, therefore, be dismissed.

4. Mr. Lalsawirema, learned counsel for the applicant by referring to the averments made in the election petition submits that even a cursory reading of the averments would show that the election petition is entirely based on suspicion and apprehension of the election petitioner about the fairness of the electoral process, particularly about the alleged misuse of the Electronic Voting Machines (EVMs). Not a single material fact has been pleaded to support the ground urged. On the basis of such vague allegation, there can be no trial and the result of applicant's election cannot be subjected to enquiry. He also submits that the first prayer made in the election petition is for constitution of an enquiry committee of experts to scrutinize the correctness of the election result by checking the Electronic Voting Machines (EVMs) is beyond the scope and ambit of an election petition. He further submits that the prayer of the election petitioner to declare him as the elected candidate after declaring the election of the applicant as void would attract the provisions of Section 82 of the Act. In the face of such prayer, all the candidates who were in the electoral fray in the particular constituency ought to have been made respondents in the election petition which is a mandatory requirement. Non-compliance with such mandatory requirement would entail automatic dismissal of the election petition. He therefore submits that the election petition suffers from fundamental technical defects and as such proceeding further with the election petition would be totally unwarranted.

5. Mr. C. Lalramzauva, learned senior counsel for the election petitioner on the other hand submits that keeping in mind the mandatory nature of Section 98 of the Act, an election petition cannot be rejected at the preliminary stage by invoking the provisions of Order 7 Rule 11 of the Civil Procedure Code. It is only after conclusion of the trial that the High Court can pass either of the 3 orders mentioned in Section 98. He submits that since election petitioner has already declared that he does not seek a declaration to the effect that he is the returned candidate, he may be permitted to amend the election petition. He finally submits that all the issues raised by the applicant can be gone into at the final

hearing of the election petition and not at the thresh hold.

6. In reply, Mr. Lalsawirema, learned counsel for the applicant submits that after the statutory period of 45 days of filing election petition under Section 81 of the Act is over, there is no question of amendment of the election petition. Amendment as suggested, if granted, would change the very nature and character of the election petition, which cannot be permitted. In any case, he submits that in the absence of any formal application for amendment, such an oral prayer of the election petitioner cannot be accepted, that too, after the technical defects in the election petition were pointed out in the misc. application.

7. Though the Election Commission of India is neither a necessary party nor a proper party in an election petition in view of the clear enunciation of law by the Hon"ble Supreme Court in the case of B. Sundara Rami Reddy Vs. Election Commission of India reported in 1991 Supp. (2) SCC 624, the Court has none-the-less given audience to learned senior counsel appearing for the Election Commission of India since the election petitioner has himself made the Election Commission of India and its officials respondents in the election petition Mr. M. Zothankhuma, learned senior counsel appearing for the Election Commission of India submits that the scheme of the election law is to uphold the purity of the electoral process while maintaining the secrecy of ballot Unsettling an electoral verdict being a serious matter having wide ramification, law mandates that there should be strict compliance of procedural requirements. Violation of the mandatory conditions, particularly those mandated in Sections 81, 82 and 117 of the Act would result in dismissal of the election petition, he submits.

8. I have heard the rival submissions and also perused the materials on record.

9. To appreciate the rival contentions, it would be apposite to briefly refer to the election petition at the outset. Election petitioner has challenged the election of the applicant as MLA in the legislative assembly elections to the Mizoram State Legislative Assembly, 2013. As can be seen from the cause titles the following are the parties to the election petition:-

"Sh. L. Thangmawia S/o Dammunga (L) R/o Mission Vengthlang, Aizawl.

...Petitioner

Vs.

1. H. Rohluna S/o. H. Laldawla (L) R/o Ramthar Veng, Aizawl

...Respondent

2. Election Commission of India through its Secretary, Nirvachan Sadan, Ashoka Road, New Delhi.

3. Chief Electoral Officer, Mizoram, Aizawl.

4. Returning Officer, 21-Lengteng, AC, Champhai, Mizoram.

...Proforma Respondents."

The reliefs sought for by the election petitioner are as under:-

"(i) An enquiry committee consisting of experts recommended by the petitioner as well as by the respondents shall not be constituted for the purpose of scrutinizing the correctness of the result of the election by checking the EVMs concerned with the help of a scientific device, and

(ii) on the basis of the findings of the expert committee why the election of the respondent No. 1 shall not be declared to be void and why the petitioner shall not be declared elected from the said constituency."

10. Regarding the substance of the allegation and the ground for challenging the election of the applicant, election petitioner has relied upon Section 100(1)(d)(iii) of the Act which says that if the High Court is of the opinion that the result of the election in so far it concerns a returned candidate has been materially affected by improper reception, refusal or rejection of any vote or by the reception of any vote which is void, the High Court shall declare the election of the returned candidate to be void. In support of the above ground of challenge, the election petitioner has put forward the following averments:-

"5. That during the preceding MLA Elections held in Mizoram, the result of Postal Ballots used to be unfailing indicators for the final outcome of the election results. In this connection, it may briefly be stated that in the 1998 MLA General Election, the MNF Party and the MPC Party had joined hands in which as per the result of the Postal Ballots, the two Parties together had won in 24 Constituencies and in the final result, they had won in 29 Constituencies. Similarly, in the 2003 MLA General Election in which the MNF Party had fought singly, it had won in 23 Constituencies as per the Postal Ballot and in 21 Constituencies in the final result. However, in the 2008 MLA General Election, in which the Election Commission of India had decided to switch over to the EVM, manufactured by the ECIL Company, there occurred a drastic change in the result. Though the MNF Party had won in 20 Constituencies as per the result of the Postal Ballot, the result of the EVM had shown that the MNF Party could win only in 3 Constituencies such as in the 25-East Tuipui AC(ST) in the undivided Aizawl District, in the 32-Lunglei West AC (ST) in Lunglei District and in the 37-Lawngtlai West AC (ST) of Lawngtlai District. The result as per the postal ballot and the EVM in all the constituencies being so contradictory, the same had led to a strong suspicion against the correctness of the EVM by all the Parties other than the INC Party. It may be stated here that the MNF Party had come to its own conclusion that there was wide spread manipulation/rigging of the EVMs at the instance of the winning Party i.e. INC Party by hacking the said EVMs with the help of some experts in the field. The same EVMs which were kept by the Election. Department in their safe custody were again used in all the polling booths in all the Constituencies except in the 10 Constituencies within Aizawl City where VVPAT system were used in place of EVMs. It is not known why the ECIL

Company could provide VVPAT only for 10 Constituencies of Aizawl City while the remaining 30 Constituencies were left with no other option but to use the same EVMs used earlier and against which the MNF Party had made a number of complaints of their being hacked/manipulated. Copies of the Abstract of Postal Ballot record in different constituencies in the MLA Elections, 1998, 2003, 2008 & 2013 are at Annexures-3, 4, 5, & 6 respectively.

6. That at this stage, it may be pertinent to state that due to a number of complaints against the EVM, as a device for conducting Elections, from different corners, a number of Scientists of different countries worked together to see whether" there is a possibility of manipulating the EVMs for altering the election results. As per the finding of the experts in the field published in an Article/Paper - "Security Analysis of India's Electronic Machines", it was stated that in (Spite of the stand taken by the Election Commission of India that the EVMs were fully tamper-proof and that the machines were "perfect" with no need for technological improvement, the expert team in their said Paper had, after thorough scrutiny and analysis of the EVM, had come to the finding that the EVMs used in India are not tamper-proof and are susceptible to a range of attacks and that while the use of paperless DRE (Direct Recording Electronic) voting machines has been discontinued in California, Florida, Ireland, the Netherlands and Germany, Indian election authorities are still sticking to it and it is high time that they should immediately review the security procedures now in place and should inspect all EVMs for evidence of fraud. Moving forward, they had suggested that India should adopt a different voting system that provides greater securities and transparency. In the said Paper it was clearly highlighted that on the basis of expert scrutiny. Observations and tests there are a number of attackers who could manipulate the EVMs and that these attacks are possible even if the voting software is completely error-free. It was found by the said expert team that the EVM firmware is stored in masked read-only memory inside the microcontroller chips, and there is no provision for extracting it or verifying its integrity. This means that if the software was modified before it was built in to the CPUs, the changes could be difficult to detect. Similarly even the engineer responsible compiling the source and transmitting it to the CPU manufacturer could substitute a version containing a back door with little chance of being caught and mat employees at the chip makers could alter the compiled programmed image before burning it in to the chips. It was also highlighted that attackers might try to substitute look-alike-CPU's containing software that counts the votes dishonestly. And that anytime between the start of polling and the public count, dishonest election insiders or other criminals could use the clip-on device to change the votes recorded in the EVM. A copy of the said Article Dt. 29/7/2010 is at Annexure-7.

9. That in this connection it may humbly be stated that the respondent has been declared elected in the said General MLA Election, 2013 held on 25/11/2013 on

the basis of reception of the winning votes which were void. In other words, the actual and valid votes so polled in favour of the respondent were less than the votes so polled in favour of the Petitioner, and the respondent could not have been declared elected but for the reception of votes, which were void, on the basis of rigging and manipulation of some of the EVMs within the said Constituency. At this stage it may be humbly submitted that since it is not possible on the part of the petitioner to produce any documentary evidence in support of his contention as required, the Hon''ble Court shall have to constitute a committee to enquire into the allegation made herein and the said committee will have to function with the help of those having expertise in the field. In this connection it may also be noted that during the election, a number of outsiders who claimed to be the officials of the ECIL Company came to Mizoram and stationed themselves at different places where counting took place. Such persons were claiming to be supervising the functioning of the EVM''s for which those personnel used to be present in and around the Polling Booths. Even when polling was over those personnel continued to be present in Aizawl and again distributed themselves at the time of counting of Votes at different counting stations. Though the Petitioner did not raise any objections to the presence of those personnel, however he had doubted the necessity of their presence. The subsequent event had confirmed his suspicion regarding the manipulation and hacking/rigging of the EVMs as well as the VVPAT Systems during the process of Election. To add salt to his already injured and suspicious mind, one Mr. K. Chhawnthuama (as Phantom,) owner of K.V. Multipurpose (English Medium) High School and ordained Elder of the Durtlang Presbyterian Church, had sent two text messages to the present Chief Minister who has been elected from the 26-Serchhip (ST) Assembly Constituency immediately after he was declared elected. The text messages read as under:

"To win an election based upon the manipulated CPU supported EVM is such a dirty game. You are no doubt the dirtiest person alive. Even the lives of those of you who had manipulated/rigged the EVMs are at great risk. The bribe given to the DC was also no doubt high. It is hard to say how many of you will suffer. Proofs would come with photographs! There is none among the Mizos who is more corrupted than you. You are so despicable. Considering the degree of crime you have committed, you have failed to take proper care bringing disgrace to yourself.

PHANTOM

I continue to know who you are - the dirty and despicable CM who had gone to the extent of manipulating EVM. The highest form of corruption, winning with the help of manipulated EVM is bound to be exposed. You are bringing disgrace upon yourself for acting in such a manner. How you have manipulated the EVM will be exposed with the help of photographs.

I know you through and through.

PHANTOM

After detecting the sender of the said two text messages, the police had registered a case (i.e. CrI. Tr. No. 2195 of 2013: Azl. P.S. Case No. 373 of 2013 u/s. 171G IPC r/w 66A(a), (b) IT Act) against the author who had sent the said messages. The said text messages have been published in the Zalen weekly local newspaper on 22.12.2013. Copies of the text messages and their English translations are at Annexures-8 and 9 respectively."

10. That at this stage, since the Petitioner is having a serious and legitimate doubt about the correctness of the result as per the EVMs, and since the experts in the field have already come to the conclusion that EVMs in India are vulnerable to fraud as already highlighted by those experts in the Paper enclosed herein above, and in view of the fact that the results of the Election in the EVMs, are highly contradictory to the results of postal ballots, it is necessary and in the interest of justice to enquire into the matter so as to bring out the true factual position."

11. Since the election petitioner has raised objection about applicability of the provisions contained in Order 7 Rule 11 of the Civil Procedure Code for rejection of an election petition at the preliminary stage, the said issue may be taken up first for consideration. Under Order 7 Rule 11(a) of the Civil Procedure Code, a plaint shall be rejected where it does not disclose a cause of action. Section 87 of the Act deals with the procedure to be followed by the High Court while adjudicating an election petition. It says that subject to the provisions of the Act and the 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 to the trial of suits. In *Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi*, , the Hon"ble Supreme Court considered the question as to whether the High Court had the jurisdiction to strike out pleadings under Order 6 Rule 16 of the Code of Civil Procedure and to reject the election petition under Order 7 Rule 11 thereof at the preliminary stage. The Apex Court clearly held that both Order 6 Rule 16 and Order 7 Rule 11 of the Code of Civil Procedure are applicable to proceedings relating to trial of an election petition. Court has the power to reject an election petition under Order 7 Rule 11. If an election petition does not disclose a cause of action, it should be rejected at the initial stage Cause of action in questioning the validity of election must relate to the grounds specified in Section 100 of the Act. This view has been reiterated in *Ram Sukh Vs. Dinesh Aggarwal*, . It has been held that undoubtedly by virtue of Section 87 of the Act, the provisions of the Civil Procedure Code applied to the trial of an election petition and the High Court trying an election petition can invoke powers under the Civil Procedure Code including the powers under Order 6 Rule 16 and Order 7 Rule 11, the objective being to ensure that meaningless litigation which is otherwise bound to prove abortive should not be permitted to occupy the judicial time of the Courts. In view of the above authoritative pronouncements of the Apex Court, the objection raised by the election

petitioner on this ground is rejected. This Court accordingly holds that it would be open to the returned candidate to file application under Order 7 Rule 11 of the Civil Procedure Code to seek rejection of the election petition if it does not disclose any cause of action.

12. Having held so, let us now turn to the relevant provisions of the Act. While Section 80 to Section 81 deals with filing of election petition in the High Court and the manner of its presentation, Section 82 deals with parties to the election petition. Clause (a) of Section 82 is very specific. It provides that in a case where an election petitioner in addition to claiming declaration that the election of the returned candidate is void, also claims a further declaration that he himself or any other candidate has been elected, all the contesting candidates of the constituency are required to be made respondents and where no such additional declaration is sought for, only the returned candidate is to be made a party. Section 83 of the Act stipulates what should be the contents of an election petition. First and foremost, an election petition should contain a concise statement of the material facts on which the petitioner relies. If allegation is made of corrupt practice, full particulars of corrupt practice alleged are to be set out. Provisions of Section 87 has already been noticed above. Under Section 98, at the conclusion of the trial of an election petition, the High Court can either dismiss the election petition or declare the election of the returned candidate as void and can also declare the petitioner to be the elected candidate. Section 100 lays down the grounds for declaring an election to be void. As already noticed, in the related election petition, the election petitioner has challenged the election of the applicant on ground 100(1)(d)(iii) i.e., the election of the applicant has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void. Under Section 117, the election petitioner has to deposit costs in the High Court at the time of presentation of the election petition.

13. Having noticed the above, we may now turn to Section 86 of the Act which has a decisive bearing on the case. As per Section 86 of the Act, the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act. The word used is "shall", which denotes mandatory consequence of noncompliance of Sections 81, 82 or 117.

14. Keeping the above in mind, let us examine the objection of the applicant regarding non-joinder of necessary party as respondents and seeking relief beyond the ambit and scope of an election petition. Since both these issues are interrelated, those are taken up together. As already noticed above, the first relief sought for by the election petitioner is to constitute an enquiry committee of experts to scrutinize correctness of the election result by checking the EVMs. Admittedly, such a relief is not open to an election petitioner and no order to this effect can be passed under Section 98 of the Act. Second relief sought for by the election petitioner is to declare the election of the applicant as void and

thereafter to declare him as the elected candidate. If that is the prayer, under Section 82 of the Act, all the contesting candidates of the particular constituency ought to have been joined as respondents in the election petition, which has not been done. Thus, there is no compliance of the provisions contained in Section 82(a) of the Act. In view of the clear language of Section 86 of the Act, there is no other alternative but to dismiss the election petition for non-compliance of Section 82 of the Act. Submission made by the election petitioner that he has given up the second prayer i.e., to declare him as an elected candidate and that he should be allowed to amend the election petition cannot be acceded to at this stage, more so, when there is no formal application to that effect.

15. Though in view of the above finding, it is really not necessary to go into the other issue regarding lack of material facts in the election petition, since the same has been argued at length, it is considered appropriate to address the same.

16. As already noticed, Section 83 of the Act stipulates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. In *Azhar Hussain Vs. Rajiv Gandhi*, it has been held by the Apex Court that if essential particulars are not pleaded, election petition is to be dismissed. In *Ananga Uday Singh Deo Vs. Ranga Nath Mishra and Others*, the Apex Court made it clear that an election petition must disclose material facts. Averments must be adequate, clear and specific. In *Ram Sukh (supra)*, it has been held that since the phrase "material facts" has neither been defined in the Act nor in the Civil Procedure Code, 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. "Material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. In *Jitu Patnaik Vs. Sanatan Mohakud and Others*, it has been held that all basic or primary facts which must be proved at the trial for establishing cause of action or defence are material facts, which would however depend on facts of each case. Bare allegations are never treated as material facts. Failure to state even a single material fact will entail dismissal of an election petition.

17. From a reading of the averments made in the election petition as extracted hereinabove it is more than clear that the entire grievance of the election petitioner is structured on the basis of his suspicion and apprehension. No material fact has been pleaded by the election petitioner which would constitute the ground that the election of the applicant has been materially affected by the cause of the improper reception, refusal or rejection of any valid vote or by the reception of any void vote. Suspicion and apprehension howsoever great those may be, cannot be construed as material facts as is understood in law.

18. That being the position, there is no other alternative but to hold that the election petition suffers from fundamental defects under Section 82 of the Act and also does not disclose material facts to hold trial to examine the validity of the election of the applicant.

19. Accordingly and in view of the discussions made above this Misc. application is allowed and the related election petition is dismissed. However, there shall be no order as to costs.