
(1986) 11 GAU CK 0003
In the Gauhati High Court
Case No : Misc. Case No. 13 of 1986

Kamakhya Prasad Malaho

APPELLANT

Vs

Digendra Purkayastha and Others

RESPONDENT

Date of Decision : 03-11-1986

Acts Referred:

Election Rules, 1961 — Rule 51, 53

Representation of the People Act, 1951 — Section 100(1), 123, 123(1), 123(3), 123(7)

Citation : AIR 1987 Guw 80

Hon'ble Judges : B.L. Hansaria, J

Bench : Single Bench

Advocate : B.M. Mahanta, M. Singh and S.S. Dey, for the Appellant; A.M. Majumdar D.N. Choudhury and F.H. Laskar, (for No. 1) and P. Prasad, Sr. Govt. Advocate, Assam (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

B.L. Hansaria, J.—This is a petition by respondent No. 1 the returned candidate. His contention is that the averments made in Paras 10 to 14 and 16 to 28 of the election petition are devoid of material facts and, particulars and so they cannot form the basis of any triable issue. It has, therefore, been prayed to strike off these paragraphs.

2. Inspiration to file this petition has been drawn mainly from Azhar Hussain Vs. Rajiv Gandhi, wherein it has been held that an election petition can be and must be dismissed under the provisions of the Civil P. C. if the mandatory requirements enjoined by Section 83 of the Representation of the People Act, 1951 (for short the Act), to incorporate the material, facts and particular relating to alleged corrupt practice are not complied with. Though Azhar (sic) there is no dispute that the ratio would apply to those averments in the election petition which seek to make out a case for setting aside an election on a ground other than corrupt practice. It has been observed in Azhar Hussain that as the Civil P. C. is applicable to the trial of an election petition vide Section 87 of the Act, the

Court can act in exercise of the powers of the Code including Order 6, Rule 16 and Order 7, Rule 11 (a). It has, therefore, been held that the fact that Section 83 of the Act does not find place in S 86 of the Act, which has dealt with dismissal of an election petition, does not mean that power under the Civil P. C. cannot be exercised. According to this decision, an election petition can be summarily dismissed in exercise of the power under the Civil P. C., if it does not furnish cause of action. It is further stated that the omission of a single material fact would lead to an incomplete cause of action and a petition without material fact would not be an election petition at all. Reference may also be made to Bhagwati Prasad Dixit "Ghorewala" Vs. Rajeev Gandhi, wherein it was stated that it is settled law that in an election petition pleadings have to be precise, specific and unambiguous and if the election petition does not disclose any cause of action, it is liable to be rejected in limine.

3. The aforesaid legal position enjoins a duty on this Court to see whether all the material facts and necessary particulars, wherever required, have been averred in the aforesaid paragraphs of the election petition or not. Before the factual aspect is looked into, let the relevant portion of Section 83 of the Act dealing with contents of such a Petition be noted :--

"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 commission of such practice;"

4. It, therefore, follows that an election, petition must contain material facts relating to all the averments on which setting aside of election is prayed, and must contain full particulars of the alleged corrupt practice. In the case of the latter, the election petition has also to give as full a statement as possible of the names of the parties alleged to have committed corrupt practice and the date and place of commission of such practice.

5. It has been urged by Shri Mahanta for the election petitioner that full particulars are required only when corrupt practice is alleged; in other matters statement of material facts would do. Reference is made by the learned counsel to Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, which has brought out the distinction between material facts and full particulars. The word "material" in the expression "material fact" requires, as per the decision, that the facts necessary to formulate a complete cause of action must be stated. It was added that omission of a single material fact shall lead to an incomplete cause of action and the statement of claim would become bad. The function of particulars was stated to be to give a full picture of the cause of action with such further information and detail (like the name of the person indulging in corrupt

practice, the date, time and place of committing the same) as to make the opposite party understand the case he will have to meet. It was further pointed out that a petition which merely cites the section cannot be said to disclose a cause of action.

6. With the aforesaid legal position in mind, let it be examined whether paragraphs 10 to 14 and 16 to 28 of the election petition have satisfied the mandate of law.

7. Paragraph 10 : -- The subject-matter of this para is entry of unauthorised persons in the counting hall. A look at Rule 53 of the Conduct of Election Rules, 1961, (hereinafter the Rules), would show that the persons who have been named in para 10 are unauthorised persons and this Rule requires their removal from the counting hall. This allegation, however, attracts Section 100(1)(d)(iv) of the Act, A reading of this statutory provision would show that non-compliance with Rule 53 of the Rules would be a good ground to declare an election void if the non-compliance had materially affected the result of the election insofar as it concerns the returned candidate. In para, 10 there is not even an averment that the election result was materially affected due to the presence of the unauthorised persons in the counting hall. This aspect has, however, to be regarded as a material fact. The omission to state this material fact has led to an incomplete cause of action in so far as this allegation is concerned. The contents of para. 10, therefore, do not raise a triable issue.

Even if the averment in para. 13 of the election petition is read with those finding place in para. 10, the same does not fulfil the requirement of law, as what has been stated in para. 13 in this regard is that "(0 he petitioner further begs to state that on the facts and circumstances stated, the counting of the votes was not conducted in accordance with law and fairly and great prejudice was caused to the petitioner in the matter of the entire counting process." The contention about causing of prejudice to the petitioner cannot be equated, I am afraid, with material affect on the result of the election of the returned candidate. This construction put by me may sound strict, but the law requires a strict view so that election won in the war-front is not lightly undone in a Court-battle.

8. Paras. 11 and 12 :-- These two paras have stated about the shifting of the venue of the counting from Hall No. III of Cachar College, Silchar, as notified (Vide Annex. 2) to Hall No. VIII of the College. It has been stated that this shifting was without notice to the petitioner and/or his election agent. The further averment in this regard is that the petitioner was not allowed entry in Hall No. VIII because of which the petitioner and his counting agents had no opportunity to watch the entire counting process.

According to Shri Mahanta the aforesaid acts constituted violation of Rule 51 of the Rules which has dealt with time and place for, counting of votes. This Rule requires that the Returning Officer shall at least one week before the date fixed for poll, appoint the place or places where the counting of votes will be done

along with the date and time of the counting, and the same shall be informed in writing to each candidate or his election agent. According to the proviso to this rule, if alteration of date, time and place is found necessary by the Returning Officer, he can do so after giving notice of the same in writing to each candidate or his election agent.

The averments made in paras. 11 and 12 would prima facie show violation of Rule 51. But this allegation too attracts operation of Section 100(1)(d)(iv) of the Act. As, however, nothing has been said in these two paragraphs about the result of the returned candidate having been materially affected due to non-compliance with Rule 51, it has to be held that this omission led to an incomplete cause of action because of which the statements contained in these two paragraphs cannot also go for trial.

If the aforesaid averments finding place in para 13 of the election petition are also borne in mind in this context, the same shall not constitute complete cause of action for reasons already alluded while dealing with, para. 10.

9. Para. 13 :-- In so far as this para is concerned, it is fairly admitted by Shri Mahanta that it is general in nature and has not specified any particular illegal act due to the violation of "various mandatory provisions of the Act 43 of 1951 and the rules, orders and instructions having the force of law issued by or under the authority of the Election Commission of India" by Respondent No. 1. This paragraph has thus not raised any triable issue.

10. Paras. 14 and 19 :--The grievance in these paragraphs is that as many as 1000 valid votes cast in favour of the election petitioner had been rejected on untenable grounds. As the winning margin was of 407 votes, it is stated that this illegal rejection had materially affected the result of the election. It is stated by Shri Choudhury for respondent No. 1 that there is no indication at all in these paragraphs regarding the polling stations where improperly rejected valid votes had been cast, It is submitted that recounting cannot be allowed on such vague pleadings as the same would then be in the nature of a fishing or roving enquiry. Shri Mahanta in reply has contended that the prayer at this stage is not about any need of recounting which shall be prayed for in due course if a case for the same would be made out.

As presently, we are not concerned whether a case for recounting has been made out or not, I am of the view that the averments in these paras cannot be held due to their vagueness, as not to have raised any triable issue. As it has been specifically averred that the improper rejection of valid votes materially affected the result of the election, I am inclined to think that full material facts regarding the invalidity of the election on the ground of improper rejection of votes have been disclosed in this para. This allegation has, therefore, to be gone into.

11. Paras. 16 and 17 :-- The averments in these two paragraphs are of general nature and it has been fairly admitted by Shri Mahanta that they do not raise any triable issue.

12. Para. 18 :-- This paragraph contains the allegation of gross discrimination in the matter of rejection of doubtful ballot papers. It has been stated that "not a single of the doubtful ballot papers which might have been taken to have been cast in favour of respondent No. 1 was brought to the Returning Officer's table for examination throughout the entire counting". From this it does not follow that any vote was improperly received insofar as the returned candidate is concerned. The averments made in this paragraph! cannot, therefore go for trial.

13. Para. 20 : -- The subject-matter of this para is variation in the number of ballot papers which ought to have found place in the ballot boxes and which were actually found. According to the averments in this paragraph, the figure shown in the ballot paper account does not tally with the actual number of total votes shown in the Final Result Sheet (Annex. I). This had happened, as per the election petitioner, in polling stations Nos. 9, 12, 13, 41, 57 and 86.

Annexure 1 and the Presiding Officer's Diaries (Annexures 6 to 11) give the following vital statistics in this regard.

No. of Polling Station. Ballot papers issued as per marked copy of the electoral roll. Ballot papers actually issued at the polling station. No. of electors who had voted. No. of ballot papers found in the ballot box at the time of counting.

(1) (2) (3) (4) (5)

9 770 512 512 555

12 711 Not mentioned 712 711

13 711 711 711 512

41 753 Not mentioned 753 153

57 750 428 428 428

86 508 660 508 508

The above shows that there were some anomalies at the aforesaid polling stations. The position shall, however, become clear on perusal of the Ballot Paper Account maintained in Form No. 16, as the figures given in the Presiding Officer's Diary do not inspire full confidence because of their variations which would be apparent from a look at these figures noted above in 2nd to 4th columns which have been taken from the aforesaid Diary, the last figure being from the Final Result Sheet.

From the documents before me I am prima facie satisfied that the grievance made in this para needs to be examined, as it has also been alleged that the anomalies in question had materially affected the result of the returned candidate's election.

14. Para. 21: -- The allegation in the para is about indulgence in (I) obtaining or procuring the assistance of two doctors named in the para for the furtherance of

the prospect of the returned candidate's election which is a corrupt practice u/s 123(7) of the Act; and (2) bribery to voters dealt by Section 123(1) of the Act. As the subject matter of this paragraph is related to corrupt practice, it has to be seen whether apart from a concise statement of material facts full particulars of the corrupt practice has been given or not. Reference to para 21 shows that besides naming the officers of the gazetted rank it has been stated that the two doctors had campaigned on 13-12-85 between 6 p.m. and mid-night in Maniarkhal Tea Estate. Thus, we find the date, place and time of the campaign apart from the names of the officers. According to the election petitioner liquor and money were distributed on the aforesaid date, place and time. This apart, it has been stated in this paragraph that respondent No. 1 and the two doctors had campaigned on the nights of 14th and 15th Dec., 1985, in Alenpur Tea Estate when money and liquor had also been distributed amongst the voters for voting in favour of respondent No. 1. The further averment is that on 16-12-85 the said doctors had distributed liquor and money in Paloi Tea Estate.

All the necessary particulars required by law are thus present and these allegations do raise triable issues.

15. Para. 22 :-- The contention in this para is related to Section 123(5) of the Act which has, inter alia, stated that the hiring or procuring of any vehicle for the free conveyance of any elector to a polling station shall be corrupt practice if indulged by the candidate or his agent or any other person with the consent of the candidate or his election agent.

This para has stated that respondent No. 1 and/or his supporters with his consent had used Government vehicle No. AMA 9720 for carrying the voters to polling station on 16-12-85. The polling station in question was Puthikhal. As such, material facts and particulars relating to the corrupt practice in question do find place in this paragraph and as such an issue had to be framed relating to this allegation.

16. Para 23 : -- The grievance in para 23 is regarding the appeal of the returned candidate to refrain from voting for the election petitioner on the ground of his caste. This propaganda was done, as per the election petitioner, by publishing a leaflet in Bengali language which had also attacked the personal character of the petitioner, his father and uncle. Section 123(3) of the Act states, inter alia, that if an appeal is made to refrain from voting for any person on the ground of caste, the same would be a corrupt practice. Levelling of charges in relation to the personal character of any candidate is taken care of by Section 123(4) of the Act.

It has been stated in para. 23 that the leaflet in question had been published by one Ramdhari Rabidas and was printed in Royal Enterprise (Press) of Silchar. But there is no mention about any specific date and place of distribution of the leaflet in question as, all that has been said in this regard is that the "leaflet has widely circulated and distributed by the Congress(I) party and the agents and workers of the respondent No. 1 in the said constituency during the election campaign and

in election meetings held in support of the respondent No. 1". The names of the persons who had allegedly - distributed the leaflet have also not been mentioned in this para. The particulars given do not, therefore, present a full picture of the cause of action. So, the allegation has to be regarded as devoid of full particulars. For this reason, the averments raised in this para cannot form a subject-matter of triable issue.

17. Paras. 24 to 28 :-- These paras do not raise any separate triable issue as fairly admitted by Shri

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18. In the result, the averments made in paras. 14, 19, 20, 21 and 22 have to be subject-matter of triable issues, whereas those made in paras. 10 to 13, 16 to 18, 23 to 28 cannot go for trial.

19. The Misc. case is partly allowed, as aforesaid.