

(2011) 07 KAR CK 0133

In the Karnataka High Court

Case No : Misc Civil No. 13993, 13994 and 13995 of 2011 in Election Petition
No. 7 of 2008

Kavitha Mahesh

APPELLANT

Vs

Chief Election Commissioner and Commissioners and Others

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 6, Order 18 Rule 17, 151
Representation of the Peoples Act, 1951 — Section 86 (7), 87

Citation : (2011) 07 KAR CK 0133

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; B.G. Sridharan and C.
Shashikantha, for R-5, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—Three applications have been filed on behalf of the Respondent in Misc Civil No 13993 of 2011, u/s 151 CPC reference with Rule 94 of the Conduct of Election Rules, 1961 [for short, the Rules]; Misc Civil No 13994 of 2011, under Order XVI Rule 6 reference with Section 151 CPC reference with Rule 94 of the Rules and Misc Civil No 13994 of 2011 under Order XVIII Rule 17 reference with Section 151 Code of Civil Procedure.

2. All applications are supported by affidavits sworn to by Sri Nandiesha Reddy, Respondent in this election petition.

3. Sri B G Sridharan, learned senior advocate appearing for the applicant-Respondent submits that the first application has become necessary in view of the apprehension of the Respondent that while the Rules, particularly Rule 94 of the Rules, provide for retention of some election papers for some duration also provides for destruction of other election papers after a specified period. This has reference to the provisions of Rule 93 of the Rules, providing for production and inspection of election papers and Rule 94 relates to disposal of election papers and with the nomination papers with which the applicant-Respondent is

concerned, being not an election paper expressly dealt with either under Clause (a) or (aa) or (b) or Rule 94 of the Rules, but being relegated to Clause (c) of Rule 94 which is a provision to regulate the manner of preservation or destruction of non-specified type of election papers and the Hand Book for Returning Officers providing guidelines about not only the manner of conduct of elections by the returning officer but also the manner of retention and disposal of the election papers, particularly the manner of disposal of nomination papers having been provided for in para-10.1 of Chapter XVIII providing for disposal of election papers, reading as under:

DISPOSAL OF ELECTION PAPERS

10.1 The Commission has made the following direction under Rule 94 of the Conduct of Elections Rules, 1961 for the disposal of election papers. Subject to any direction to the contrary given by the Commission or by a competent Court in any case and subject to the instructions contained in para 12 below, the election papers may be disposed of as indicated below:

and para-10.5 of these guidelines, specifically dealing with the situations contemplated under Rule 94(c) of the Rules and the manner of disposal of nomination papers having been dealt with in para 10.5(ii), reading as under:

10.5 DIRECTION UNDER RULE 94(C)

XXX

ii. The list of challenged votes (Form 14) and the receipt book used for collection of challenge fee, the dispatch register of postal ballot papers and forms of nomination papers should not be destroyed before the expiry of 5 years from the date of declaration of the result or till they are audited and audit objections, if any, settled whichever is earlier.

providing for retention of nomination papers for not less than a period of five years from the date of declaration of results and these documents being not a "record" expressly mentioned in para-11, which provides for retention of papers when an election petition is pending and the situations covered under para-10.5 not finding a mention in para-11 and particularly the option having been given to the returning officer not to destroy the nomination papers before the expiry of five years or till they are audited and audit objections, if any, settled, whichever is earlier, the applicant-Respondent has apprehension that if the audit objections, if any, are settled even before five years period, the nomination papers may be destroyed and therefore the application in Misc Civil No 13993 of 2011 is made for issue of directions to the returning officer/additional district election officer, in whose custody such records are maintained, to save the records relating to nomination papers and also the electronic records including video-graphs pertaining to the election held to the K R Puram assembly constituency of Karnataka Legislative Assembly during the year 2008.

4. A cursory glance at the statutory provisions and the paragraphs relevant for

our purpose in the Hand Book for Returning Officers, indicates that it is mandatory for the returning officer or the person incharge of the records relating to the nomination papers to retain them for a minimum period of five years from the date of declaration of results and the shorter period referred to is only in the context of the audit objections and the settlement of the same and are not relevant provisions for the purpose of retention or destruction of nomination papers, as there is no audit of nomination papers, but the audit part of the guidelines have relevance only with reference to maintenance or retention of receipt book for collection of fee and such other registers which reflect any fee which is collected in the context of issue of copies or certified copies etc., of any election papers.

5. The present election petition is only three years old as of now and from the date of declaration of results on 25-5-2008, a period of three years having elapsed, a direction as sought for, in my considered opinion, is redundant at this stage, as it is even otherwise mandatory for the officer incharge of the particular record to retain it for a minimum period of five years and it is the earnest impression that this election petition should be disposed of within the period of five years from the date of declaration of results for retention of documents or records, particularly having regard to the provisions of Section 86(7) of the Representation of People Act, 1951, reading as under:

86. Trial of election petitions:

XXX

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

6. It is, therefore, the application in Misc Civil No 13993 of 2011, which is merely on the apprehension and surmises, is rejected.

7. In so far as the other two applications are concerned, submission of learned Senior Advocate appearing for the applicant-Respondent is that the application for recalling PW3 for further cross-examination is more in the context, of getting the record marked as document in the present election petition, particularly as the nomination papers of other candidates received by the returning officer and available at the office of the additional district election officer, will have some bearing on the outcome of this case and therefore these two applications are filed.

8. The application for recalling PW3 made under Order XVIII Rule 17 Code of Civil Procedure is supported by an affidavit sworn to by the Respondent, para-3 of which reading as under:

3. I submit that the records sought to be summoned in the other application are required to be confronted to the PW-3 i.e., the Returning Officer and to be marked in further cross examination. The said records could not be confronted to

PW-3 on earlier occasion as those records were kept in sealed covers and the same was not read/seen by my advocate. Therefore summoning those records is absolutely required and asking certain questions in the background of the said documents to PW-3 is also necessary. I submit that since the evidence of PW-3 is crucial to either of the parties and veracity of the statements recorded in the evidence of PW-3 can be verified only by confronting the above said documents to PW-3, it is just and necessary to recall PW-3 for further cross examination.

9. The applications are opposed by the Petitioner and it is submitted that an application for recalling a witness for further cross-examination, which is an application filed under Order XVIII Rule 17, a provision basically meant for empowering the court to call any witness and examine but is not a provision which can be called in aid, by a party to the proceedings, particularly for recalling a witness for further cross-examination; that the application is not tenable in law, and the other application being to mark a document, which is not a document but is only a part of the record etc., is also not tenable.

10. In support of the submissions, Petitioner has placed reliance on a decision of a single judge of Gauhati high court in the case of Jhanwarlal Patwa v. Uday Narain Goswami AIR 2004 GAU 184.

11. Submission made by the Petitioner does receive sustenance from this decision.

12. Petitioner has also drawn attention of the court to para-3 of the affidavit supporting the application, as extracted above, to submit that what is stated in para-3 is more a matter relating to argument and not relating to receiving of any evidence and therefore also no need for ordering these applications.

13. I have examined the submissions made at the Bar and perused the contents of the applications.

14. Any evidence let in by any party in a suit is one to support the respective versions of the party, which is required to prove the version in the context of the issues framed by the court. A party succeeds in his/her version by adducing evidence in support of the plea put forth or set up in the case.

15. If there is no plea which is required to be proved by a party, if no such issue has been framed, the question of such party leading evidence by marking any document etc., does not arise. In this regard, the provisions of Section 87 of the Act, particularly the proviso to Sub-section (1) of Section 87 is a significant provision to be noticed which empowers the high court, which is acting as election tribunal, a discretionary power even in the matter of refusing some witness to be examined on behalf of either party, if in the opinion of the court, the evidence of such witness is not material for the decision of the petition. The provision reads as under:

PROVIDED that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion

that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

16. Anything which is placed by way of evidence being a material to support a plea and required to be so proved only if it is an issue and in the present election petition, even as fairly conceded by Sri B G Sridharan, learned senior advocate appearing for the applicant-Respondent, no issue having been framed which casts the burden on the Respondent and which might have a bearing and relevance to the particular prayer made in these applications, the question of going through this ordeal is not necessary and is nothing short of spending time unnecessarily on such matters and the exercise is a futile one and an act at variance with Sub-section (7) of Section 86 of the Act.

17. On an examination, I do not find any need or necessity to allow both these applications for the purpose for which they are filed and therefore both the applications are rejected.

18. In the result, applications in Misc Civil Nos 13993, 13994 and 13995 of 2011 are all rejected.