
(2011) 02 BOM CK 0157

In the Bombay High Court

Case No : Election Petition No. 7 of 2009

Mr. Dahaybhai Vallabhai Patel

APPELLANT

Vs

Mr. Lalubhai Patel and Others

RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Limitation Act, 1963 — Section 29(2), 5

Representation of the People Act, 1951 — Section 81, 82, 83, 84, 85

Citation : (2011) 7 ALLMR 134 : (2011) 3 MhLj 344

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : P.B. Kakade, Sonal Parab and Neha Bhide, for the Appellant; Nitin Mulye, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner, residing at Nani Daman and Ex Member of the Parliament, has filed the present Election Petition on 29th June, 2009 and thereby challenge the election of Respondent No. 1, of Daman and Diu Parliamentary constituency. Respondent Nos. 5 to 9 are the other candidates, who also contested the election, but lost.

2. By order dated 27th July, 2009, while accepting the Petition, the Court has issued notices/process. On 7th September, 2009, Respondent Nos. 5,6 and 7 appeared in person and sought time to engage an advocate.

3. On 5th October, 2009, Respondent No. 1 the elected candidate appeared in the matter, but the other Respondent Nos. 3, 5 to 9 were absent.

4. On 30th November, 2009, the Petitioner was directed to file affidavit of service. Respondent No. 1 filed written statement/ reply. None appeared for the Respondents. The Court directed the parties to exchange the draft issues and place the matter on 25th January, 2010 for framing issues.

5. On 1st February, 2010, Respondent Nos. 2 and 4 were not served therefore,

time was granted to take steps.

6. On 15th February, 2010, therefore, a fresh notice was issued to Respondent No. 4. The Petitioner filed affidavit of service with regard to Respondent Nos. 1, 3, 5, 6, 7, 8 and 9. None appeared for Respondent Nos. 2, 3, 5, 6, 7, 8 and 9.

7. On 23rd July, 2010 the Petitioner, Respondent Nos. 1, 2, 3, 4 and 5 were present with their advocates. None appeared for Respondent Nos. 5 to 9.

8. On 27th August, 2010, two Applications were filed on behalf of Respondent Nos. 2, 3 and 4 for deleting their names from the Election Petition (Application Nos. 21 of 2010 and 22 of 2010). The matter was adjourned for reply and/or rejoinder. Except contesting Respondent Nos. 1 and 4, no other Respondents appeared.

9. After hearing both the parties, by reasoned order dated 3rd September, 2010, both these Applications were allowed, Respondent Nos. 2, 3 and 4 i.e.; The Chief Election Commissioner, Delhi; The Election Observer; and The Union of India were deleted from the array of the Respondents. It was specifically directed that the Petitioner to carry out the amendment within a week from the date of the order. The matter was adjourned on 15th October, 2010 and 28th October, 2010 but the Petitioner failed to comply with the order.

10. On 26th November, 2010, the statement was made on behalf of the counsel appearing for the Petitioner that in spite of repeated communications, even in writing, the Petitioner is not responding for more than last two months. However, to give one more opportunity, the matter was adjourned to 10th December, 2010 under the caption "for dismissal".

11. Ultimately, on 16th December, 2010 as the statement was again made by the learned Counsel appearing for the Petitioner, about no instructions, in spite of repeated communications. In view of the earlier reasons, to give one more chance, this Court had issued fresh notice to the Petitioner and made it returnable on 21st January, 2011 with clear observations that "if the Petitioner failed to appear in the matter, the Election Petition will be dismissed".

12. On 21st January, 2011, the matter was listed but the position was same. The Petitioner, inspite of oral as well as written communications, as well as the Court's notice did not give instructions to the counsel, nor appeared in the matter.

13. There is office report dated 3rd February, 2011 that the personal service is effected upon the Petitioner, though there was no report from the Principal District and Sessions Judge, District Court, Daman.

14. On 4th February, 2011, therefore, the matter was listed again and closed for orders as the Petitioner in spite of service of the Court, failed to appear. Other Candidates/Respondents were also absent.

15. In view of above background, in my view, there is no point in keeping this

Election Petition pending as the Petitioner appears to have lost interest in the matter and/or does not want to proceed further with the challenges so raised in the Petition, now. The Election Petition needs specific challenges to the election duly held under The Representation of the People Act, 1951 (for short, the Act). Mere allegations of corrupt practice and/or irregularity itself are not sufficient to set aside the election of elected candidate in question. The prayers seeking directions to order repolling in the polling station Nos. 33 to 39; and/or recounting, and declaration that the Petitioner has secured highest number of votes, therefore, be declared to have elected in the election in question, just cannot be granted merely upon the averments made in the Petition, specially when contesting Respondent No. 1 by its reply has denied all the averments/ issues so raised in the Petition. Therefore, heavy burden lies upon the Petitioner to prove the case in all respect.

16. Though the Petitioner has filed this Petition in June, 2009, it appears that he lost the interest in the Petition and therefore, not even contacting and/or giving any instructions to the Advocate/Counsel appearing for him. Even the Petitioner's counsel unable to make any statement and/or carry out the amendments/ or to comply with the order passed by this Court. There is no point in dismissing such election petition for non prosecution, for noncompliance of the order passed by this Court, specially when the Petitioner from above observations/ conduct shows that lost the interest in the matter and probably could not be in a position to sustain the averments so raised in the Petition.

17. In Mr. Surendra Budhaji Borkar Vs. Mr. Narayan Tatu Rane Falshiyewadi, I have already observed as under:

11 The learned Counsel appearing for the Respondent has relied upon the judgment of the Supreme Court, reported in 1984, S.C.

Dr. P Nalla Thampy Thera v. B.L. Shanker and Ors. 135, The relevant paragraph 18 is as under:

18. Similar view has been expressed by another Full Bench of the Allahabad High Court in Duryodhan Vs. Sitaram and Others, . A four Judge Bench of this Court in Rajendra Kumari Bajpai Vs. Ram Adhar Yadav and Others, , referred to the Punjab case, Fazal Ali, J. speaking on behalf of the Court quoted a portion of the judgment of Grover, J. which we have cited above and said:

We fully approve of the line of reasoning adopted by the High Court in that case.

It, therefore, follows that the Code is applicable in disposing of an election petition when the election Petitioner does not appear or take steps to prosecute the election petition. Dismissal of an election petition for default of appearance of the Petitioner under the provisions of either O.IX or O XVII of the Code would, therefore, be valid and would not be open to challenge on the ground that these provisions providing for dismissal of the election petition for default do not apply.

12 He has also relied on Gurmish Bishnoi Vs. Bhajan Lal, . The relevant

paragraph 9 reads thus:

9 So far as the first question is concerned, it need not detain this Court any further as this question is no more res integra. It stands completely answered without any ambiguity by a Full Bench of this Court in the case of Jugal Kishore Vs. Doctor Baldev Parkash, which was approved by the Hon'ble Apex Court in the case of Dr. P. Nalla Thampy Thera V. B.L. Shanker AIR 1984 SC 135. Consequently, I have no hesitation in coming to the conclusion that an election petition can be dismissed for default or for non prosecution, as the case may be, if the order is otherwise called for. The Court can hardly compel an unwilling party to prosecute its litigation even if such inaction may spring from negligence, indifference or even incapacity or inability. The power to dismissal of election petition is inherent power which every Tribunal possesses. Thus, this contention of the applicant is rejected.

(Emphasis added)

13. The mandate, therefore, in view of the above, and even after reading the relevant Sections and Rules of the Act, is very clear that there is no bar to dismiss the Election Petition for want of prosecution and/or for default. Considering the scheme and purpose of the Act and as the Election Petition needs to be disposed of expeditiously, there is no point in adjourning the matter again as the Petitioner is not taking interest in the matter, though ample opportunities have been given to him to take effective steps and to appear before the Court to support the case.

20. After considering the provisions of Section 81 to 86 and 99 of the Act, it is cleared that the mandate of the special Act needs to be respected for all the purposes and there is no question to consider the provisions of Limitation Act, 1963 and specially Section 5 to 29(2) for condoning the delay in election petition of any kind. Madhya Pradesh High Court referring to various Supreme Court Judgments, in Abhimanyu Rath Vs. Virendra Pandey, has also observed the same.

26. The Supreme Court in Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar, , has held that, even if a single material fact is missing that itself is a sufficient to dismiss the Election Petition. In the present case all the necessary parties are absent. Such incomplete and defective Election Petition for want of nonjoinder of necessary parties and necessary averments, also mean lack of supporting facts and the materials which are necessary for proper and effective trial and expeditious decision in the Election Petition as contemplated u/s 81 to 86 of the Act.

27. The present Petition is defective. No effective steps were taken in time. There is no scope now for any rectification by invoking a discretionary power of the Court even if any, which, in the present facts and circumstances, now is not available to the Petitioner. There is no option but to dismiss the Election Petition at this stage itself. Mulayam Singh Yadav Vs. Dharampal Yadav and Others, .

18. In view of above evidence of law and in the present facts and circumstances and as apart from the fact that such Petition can be dismissed in default, I am inclined to dismiss this Petition also for following reasons.

19. Any residence/ citizens of the area can challenge the election within specified time. Therefore, in the present case, though the Petitioner has filed the Petition and challenged the election of Respondent No. 1, lost interest and never persuaded the Election Petition since 3rd September, 2010. Other Respondents 5 to 9 who were also candidates and contested the election could have challenged the election of Respondent No. 1 either by participating in this Election Petition and/or by applying to replace as a Petitioners and by filing separate petition within limitation. They failed to do so.

20. As per the provisions of the Act, it is necessary to file such Election Petition within limitation. The Election Petition is governed by the Special Act and provisions. The mandate of such provision if taken note of, and as there is no other election petition filed and/or brought on record against Respondent No. 1, Respondent Nos. 5 to 9 never took any steps to continue the challenge so raised by the Petitioner. In my view no one else, and now even otherwise, could have filed the Election Petition against Respondent No. 1 after the expiry of period of limitation. Various opportunities have been given to all the persons concerned or the person interested in the Election, but in the present facts and circumstances, and as no other candidates who lost the election and/or any other citizen is interested in persuaded the Election Petition, I see there is no reason to keep this Election Petition pending. The Petitioner in spite of full opportunity so given failed to appear and/or contest and/or pursue the present Election Petition by getting supporting evidence and/or by pressing the material with the specific prayers so raised and in such Election Petition the burden always lies upon the Petitioner to bring the material to support the grounds on record and as the Petitioner failed to do so, the Election Petition is, therefore, dismissed. Rule discharge. No costs.