

(2010) 09 BOM CK 0168

In the Bombay High Court

Case No : Application No. 21 of 2010 in Election Petition No. 7 of 2009

Mr. Dahyabhai Vallabhai Patel

APPELLANT

Vs

Mr. Lalubhai Patel and Others

RESPONDENT

Date of Decision : 03-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Representation of the People Act, 1951 — Section 100, 20B, 20B(1), 64A, 66

Citation : (2010) 6 BomCR 349

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Pradeep Rajgopal and Malar Manoharan, instructed by Rekha Rajgopal, in application No. 21 of 2010, P. Bhushan Kakade, Neha Bhide and Sonal Parab, for the Appellant; Pradeep Rajgopal and Malar Manoharan, instructed by Rekha Rajgopal, for Respondent Nos. 2 and 3 in Election Petition No. 7 of 2009 and Nitin Mulye, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—This is an application filed by Respondent Nos. 2 and 3 for deleting their names from the array of Respondents in the Election Petition. The learned Counsel appearing for the Petitioner fairly conceded to delete Respondent No. 2 - Chief Election Commissioner, Delhi. However, by referring to the allegations made in Paragraph Nos. 11, 13, 17, 19, 23 and 30 against Respondent No. 3, he contended that such election observer, against whom allegations are made, which according to him goes to the root of the matter, is a necessary party and therefore there is no case made out to delete the name of Respondent No. 3.

2. An affidavit dated 2nd September, 2010 is also filed to oppose the present Application filed by Respondent Nos. 2 and 3.

3. The learned Counsel appearing for Respondent Nos. 2 and 3 has strongly relied upon the provisions of The Representation of the People Act, 1951 (for

short, the Act), basically Sections 82 and 86(4) which read as under:

82. Parties of the petition.- A petitioner shall join as respondents to his petition-

(a) where the petitioner, in addition to claiming declaring that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

86 (4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

4. He has also relied upon the cases of Jyoti Basu and Others Vs. Debi Ghosal and Others, ; B. Sundara Rami Reddy v. Election Commission of India and Ors. 1991 Supp. (2) SCC 624 and Michael B. Fernandes Vs. C.K. Jaffer Sharief and Others, . All these judgments revolved around the basic contention, so raised by the learned Counsel appearing for the Petitioner. These judgments have also taken into consideration the provisions of Section 82, 86(4), 87, 97 and 99 and Order 1 Rule 10 of the Code of Civil Procedure, 1908 (for short, CPC). The relevant observations in Jyoti Basu (Supra) are as follows:

It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of "proper parties" enter the picture at all" We think that the concept of "proper parties" is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86(4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

The same view and principle has been followed in B. Sundara Rami Reddy (Supra) and Michael B. Fernandes (Supra).

5. The Election Petition in question is governed by a special Act and special provisions in all respects. I have already taken with the Election Petition No. 34 of 2009 in the case of Mr. Surendra Budhaji Borkar v. Mr. Narayan Tatu Rane decided on 6th August, 2010, referring to Section 82 of the Act, in the following words:

19. The effect of provisions of Section 82 of the Act is very clear that the election Petition has to be arrayed of all the contesting candidates specially in case the Petitioner makes a claim to be declared as a winning candidate. The special

provisions in the election statutes with regard to this are mandatory and cannot be waived. It should prevail.

6. It is, therefore, necessary to take note of the special provisions of this Act in all respects. If all elections are governed by the particular statute, it also means all rights and remedies available under the Act need to be respected in every aspect, even with regard to the Election Petition and/or challenge so raised against the candidates in question.

7. The word "candidate" is explained in Section 79(b) of the Act.

The "Candidate" means a person who has been or claims to have been duly nominated as a candidate at any election. Returning candidate has defined in Section 79 also means a candidate is name has been published u/s 79 as dealt elected.

8. The Petitioner lost the election and Respondent No. 1 won the same.

9. The basic prayers in the present Election Petition are as under:

a) Rule be issued, records pertaining to the Communication and Reports filed by the Election Observer, of 1 Daman & Diu Constituency be called for;

b) The writ of certiorari or in the nature of certiorari be issued directing the Respondents to order re-polling in the polling station Nos. 33 to 39 and on recounting and ascertaining that the Petitioner has secured highest number of votes, the Petitioner be declared to have been elected in the election in question.

10. The scope and purpose of the Election Petition is restricted and limited. In other way, the Petition will be dismissed, if no case is made out and if the case is made out, the court may consider the case of the Petitioner to declare him as elected in the election after quashing the whole election decision.

11. Therefore, in such election process/proceedings, the Court cannot pass any order against Respondent No. 3, who at the relevant time was on duty as "observer" as contemplated u/s 20B, nominated by the Election Commissioner to watch the conduct of election or elections in a constituency and to perform such other functions as may be entrusted to her by the Election Commission.

The relevant Section 20B is as under:

20-B. Observers.- (1) The Election Commission may nominate an Observer who shall be an officer of Government to watch the conduct of election or elections in a constituency or a group of constituencies and to perform such other functions as may be entrusted to him by the Election Commission.

(2) The Observer nominated under Sub-section (1) shall have the power to direct the returning officer for the constituency or for any of the constituencies for which he has been nominated, to stop the counting of votes at any time before the declaration of the result or not to declare the result if in the opinion of the Observer booth capturing has taken place at a large number of polling stations or

at places fixed for the poll or counting of votes or any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are damaged or tampered with to such an extent that the result of the poll at that polling station or place cannot be ascertained.

(3) Where an Observer has directed the returning officer under this section to stop counting of votes or not to declare the result, the Observer shall forthwith report the matter to the Election Commission and thereupon the Election Commission shall, after taking all material circumstances into account, issue appropriate directions u/s 85-A or Section 64-A or Section 66.

12. The allegations so made against Respondent No. 3 are first of all needs to be proved by the Petitioner in all respect, by putting substantial material in support of the same. Mere allegations/averments made against Respondent No. 3, at this stage, or even otherwise, just cannot be the reason to overlook the specific provisions of the Act and specially the interpretation/observations made by the Supreme Court in above referred judgments, in view of this special and specific provisions of the Act itself. Those observations revolving around the specific sections as relied by both the counsel, in my view, need no discussion. It is clear in all respects. Therefore, even the submission revolving around Order 1 Rule 10 of CPC and/or common law and/or law of equity are also of no assistance in view of specific provisions as referred above. Therefore, both these Respondents are not necessary and/or even proper party for final decision of this election Petition.

13. Even otherwise, it is relevant to note that Section 98 and 99 of the Act which empowered the High Court, at the time of conclusion of the trial of such Election Petition, gives notice to a person who is not party to the Petition and/or issue show cause notice as to why he/she should not be named. These provisions read with Section 100 of the Act also just cannot be read in isolation by overlooking Section 82, 86(4) as referred above.

14. The learned Counsel appearing for Respondent Nos. 2 and 3 to remove office objections within two weeks with regard to the Vakalatnama, if any, as per the office remarks. It is signed by only one person.

15. Resultantly, the Application No. 21 of 2010 is allowed in terms of prayer Clauses (a) and (b) with no order as to costs. The Petitioner to carry out the amendment within a week from today.