

(2010) 07 BOM CK 0070

In the Bombay High Court

Case No : Writ Petition No's. 2644 and 6330 of 2008

Mr. Shaikh Fateh Mohammed Mohd. Raza

APPELLANT

Vs

Mr. Kamlesh Somnath Yadav and Others
 Kamlesh
Yadav Vs Mahendra Jeetbahadur Pandey, Brihan Mumbai
Municipal Corporation and The State Election Commission

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 100(1), 28, 28F, 32, 33
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 7 Rule 11, 115
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2011) 4 BomCR 261

Hon'ble Judges : R.M. Savant, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : A.R. Mishra, instructed by P.L. Singh, in WP No. 2644 of 2008 and P.N. Patil, in WP No. 6330 of 2008, for the Appellant; P.N. Patil, in WP No. 2644 of 2008, S.B. Shete, in WP No. 2644 and 6330 of 2008 and D.S. Sakhalkar, instructed by S.S. Bangera, in WP No. 6330 of 2008., for the Respondent

Judgement

P.B. Majmudar, J.—Rule.

2. Learned Counsel for the respective respondents waives service of rule on behalf of the respondents. With the consent of the parties, rule is made returnable forthwith and heard.

3. Since common point is involved in both the above petitions, they are heard together and are being disposed of by this common judgment.

4. The learned Single Judge of this Court (A.S. Oka, J.) by order dated 17-11-2009, has referred the following point for the determination by the Larger Bench and accordingly, this Court is required to consider the following point in the aforesaid two writ petitions:

Whether an election petition u/s 33 of the Bombay Municipal Corporation Act,

1888 (hereinafter referred to as the said Act) can be permitted to be amended?

5. Both these petitions are filed under Article 227 of the Constitution of India, challenging the legality and validity of the orders passed by the learned Additional Chief Judge of Small Causes Court, Mumbai, dated 25-02-2008 and 23-06-2008 in Election Petition Nos. 176 of 2007 and 72 of 2007 respectively.

6. The petitioner of Writ Petition No. 2644 of 2008 has filed a Election Petition No. 176 of 2007 before the Court of Small Causes, Mumbai, challenging the election of Returned/elected candidate i.e. respondent No. 1 Mr. Kamlesh Somnath Yadav. The petitioner contested the election of Municipal Corporation of Greater Mumbai, held on 01-02-2007 from Ward No. 19 Kandivali (W), as a candidate of Republican Party of India. The respondent No. 1 contested the said election from the said Ward as a candidate of Nationalist Congress Party. In the said election, the respondent No. 1 was declared elected, which election has been challenged by the petitioner on the ground that that the respondent No. 1 was engaged in certain corrupt practices. In the said election petition, the petitioner herein submitted an application below Exh.18 to amend the election petition on the ground that during the pendency of the election petition, he came to know certain material facts regarding the election of respondent No. 1. The petitioner wanted to add certain paragraphs viz. Para No. 13(A) to 13(e) in the original election petition by taking the grounds that the name of respondent No. 1 was appearing in the electoral role at two places i.e. one at the native place at (234) Barsathi Assembly Constituency and the second at the place from where respondent No. 1 was contesting the municipal elections. The other grounds which the petitioner was desirous to add in the election petition are that the respondent No. 1 submitted false declaration in the nomination form and that the respondent No. 1 was habitual in constructing illegal and unauthorized structures and has suppressed material facts before the State Election Commission.

7. The learned Trial Judge partly allowed the said amendment in connection with Para 13(B) only by holding that the proposed amendment in Para 13(B), does not change the nature of the proceedings as it is clarificatory in nature. Being aggrieved and dissatisfied by the aforesaid order, by which the learned trial Judge has only granted part of the amendment, the original election petitioner has filed writ petition No. 2644 of 2008 in so far as part of the prayers for amendment is rejected by the learned Trial Judge.

8. So far as the writ petition No. 6330 of 2008 is concerned, it is filed by the petitioner, who is respondent No. 1 in Writ Petition No. 2644 of 2008. The petitioner challenges the impugned order of the learned Trial Judge by which the amendment application is partly allowed, as according to the said petitioner, the entire application is required to be rejected.

9. At the time of hearing, it is requested by the learned Counsel appearing in the writ petitions that after giving answer to the reference, it is not necessary to send the matter back to the learned Single Judge of this Court and this Court

may dispose of both the writ petitions finally on the basis of the answer to the reference. Accordingly, we have heard the learned Counsel for the respective parties at some length on the question of law as well as on the merits of the case.

10. So far as election petition under the Municipal Corporation is concerned, the same is required to be preferred u/s 33(1) of the Mumbai Municipal Corporation Act, 1888. It would be relevant to reproduce the text of Section 33(1), which reads as under:

33. Election petitions to be heard and disposed of by Chief Judge of the Small Causes Court: (1) if the qualification of any person declared to be elected for being a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection (by the State Election Commissioner) of a nomination or of the improper reception or refusal of a vote, or for any other cause (or if the validity of the election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of Section 28F), any person enrolled in the municipal election roll may, at any time, within ten days from the date on which the list prescribed under Clause (k) of Section 28 was available for sale or inspection apply to the Chief Judge of the Small Causes Court. (If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who although not declared elected, have, according to the results declared by the State Election Commissioner u/s 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate).

11. From the plain reading of the aforesaid Section, it is crystal clear that the election petition is required to be filed within a period of 10 days from the date on which the list prescribed under Clause (k) of Section 28 was available for sale or inspection. It is pertinent to note that the aforesaid elections petitions have been filed by the respective petitioners on 12-02-2007. However, amendment application in the election petition No. 176 of 2007 came to be preferred in September 2007. Whereas, in the Election Petition No. 72 of 2007, amendment application was preferred by the petitioner on 06-02-2008. In our view, it is clear that the respective applications for amendment were filed by the election petitioners after the period of limitation prescribed for filing the election petition.

12. Mr. Patil, the learned Counsel for the respondent No. 1 in Writ Petition No. 2644 of 2008, has relied upon a judgment of the Supreme Court in the case of Vatal Nagaraj Vs. R. Dayanand Sagar, , wherein it has been held that even if there have been initial omissions in pleadings, they can be made up, by Court's leave, at any time. Omissions such as minor variance with alleged particulars may be allowed.

13. The learned Counsel appearing for the respondent No. 1, further relied upon a decision of the Supreme Court in the case of K.D. Deshmukh Vs. Amritlal Jayaswal, , wherein it has been held that no new ground can be allowed to be

added in the election petition. Para No. 4 of the said decision, reads thus:

4. We have heard the learned Counsel for the parties and we are inclined to allow this appeal. It is an admitted position that the result of the election was declared on 28-02-1990 and the election petition could have been filed within 45 days of such result. It is also an admitted position that on 08-03-1991 when the amendment application was filed, the said period of 45 days had expired long back. The ground now sought to be raised by way of amendment is totally a new ground falling u/s 100(1)(d) of the Act. The original petition was filed on the ground of improper rejection of nomination papers of three candidates u/s 100(1)(c) of the Act, and the ground now sought to be raised by amendment is of improper acceptance of nomination paper of the appellant himself u/s 100(1)(d) of the Act. In our view, the High Court was wrong in allowing the amendment application and in taking the view that the objection regarding limitation shall be decided while disposing of the election petition on merits finally. This approach of the Court is totally wrong inasmuch as no amendment could have been allowed by which totally a new ground was sought to be taken and which was clearly beyond limitation on 08-03-1991, the date of filing the amendment application.

14. He further relied upon a decision of the Supreme Court in the case of Baburao Vs. Manikrao and Another, , wherein it has been held that "in case candidate's name is appearing in the electoral roll of more than one constituencies, that would not disqualify him from contesting election from any of those constituencies. The said decision is rendered under the Representation of the People Act, 1950.

15. Mr. Patil, further placed strong reliance on the ruling of the Supreme Court in the case of Hari Shankar Jain Vs. Sonia Gandhi, , wherein it has been held by the Supreme Court that "if the material facts is not stated in the election petition, the same are fatal to the election petition. The Court is duty bound to examine the petition regardless of written statement or denial in some other form and to reject it if it does not disclose a cause of action". The said decision is of course given under the Representation of the People Act, 1951 and it is held that the provisions of Order VII Rule 11 are applicable to the election petition. In the aforesaid case, the High Court dismissed the election petition at the preliminary stage which decision was upheld by the Supreme Court by the aforesaid decision.

16. Mr. Patil, learned Counsel appearing for respondent No. 1 has relied upon a decision in the case of R.S. Navalkar v. Mrs. Sarojini Naidu 1923 (25) B.L.R. 463, wherein it was held that "the Chief Judge in the Small Causes Court at Bombay, acting under the powers granted by him by Section 33 of the City of Bombay Municipal Act, 1888, is a persona designata and is not a Court subordinate to the High Court of Bombay. The High Court has, therefore, no jurisdiction u/s 115 of the Civil Procedure Code, to interfere with his decision". It is required to be noted that this Court is dealing with the writ petitions filed under Article 227 of the Constitution of India, which is a constitutional remedy and therefore, the efficacy of a Pre-Constitution judgment is doubtful.

17. He further placed reliance upon a decision in the case of *Shahinara Salim Baig Vs. B.M.C. and Others*, wherein it was held that in an election petition u/s 33 of the Bombay Municipal Corporation Act, no interim relief can be granted to the aggrieved party. Relying on the same, it is submitted that the provisions of Order VI Rule 17 granting amendment to pleadings, cannot be made applicable to the election petition. However, in our view, we do not accept such a contention that the provisions of the CPC are not applicable to the election petition at all.

18. Mr. Patil, has placed reliance upon a decision of a Division Bench of this Court in the case of *Rajendra Dhanji Sakhala Vs. State Election Commission and Others*, wherein it was held that Section 5 of the Limitation Act, is not applicable so far as election petition filed u/s 33 of the Mumbai Municipal Corporation Act, 1888 is concerned.

19. A reference is required to be made on the judgment of the learned Single Judge (R.M. Lodha, J., as His Lordship then was) in Writ Petition No. 74 of 1998, on which strong reliance is placed by Mr. Sakhalkar, learned Counsel appearing for respondent No. 1 in Writ Petition No. 6330 of 2008. The learned Single Judge has held that the Judgment of the Supreme Court which was referred to in his judgment, was in connection with the Representation of the People Act. The learned Single Judge has further held that if the amendment is allowed it will have retrospective effect and therefore, it is deemed to be within the period of limitation. A reading of the said judgment would indicate that no proposition of law as such, has been laid down by the learned Single Judge and the matter proceeded on the basis of the principles applicable to amendments of pleadings under the Code of Civil Procedure. Considering the judgments of the Supreme Court, which we have referred above, in our view, though it is true that the provisions of the Representation of the People Act, are not straight way applicable so far as election petition filed u/s 33 of the Act, is concerned. However, analogy and principles of the Representation of the People Act, can be made applicable to the election petition even under the Mumbai Municipal Corporation Act. It is required to be noted that even as per the decision of this Court, Section 5 of the Limitation Act, is not applicable in so far as election petition filed u/s 33 of the Act. Election petition is required to be filed within a period of 10 days as stipulated u/s 33(1) of the said Act and if there is no cause of action and if no particulars of the grounds made out have been given, election petition can be dismissed at a preliminary stage. We therefore, do not agree with the view taken by the learned Single Judge in the aforesaid writ petition, as in our view, it does not lay down correct proposition of law.

20. Considering the scheme of the Act, in our view, no amendment is permissible after the prescribed period of limitation and no new ground can be taken once it is filed. Even within the period of limitation, no new ground can be added. However, regarding existing ground taken in the petition, if any particulars are to be given, the same can be given within the prescribed period of limitation. However, giving of such particulars may not be permissible after the period of

limitation, as election petition cannot be equated with a civil suit. However, clerical or typographical error can be carried out at any point of time, of course, with the leave of the Court. In our view, therefore, no new ground can be taken by way of amendment once election petition is filed. Better particulars can be given but that too within the period of limitation. Since in the instant case, amendment is permitted after a long time, the learned trial Judge has erred in granting amendment after the period of limitation, which in our view, could not have been granted. It cannot be said that even otherwise, amendment granted by the learned Trial Judge, is clarificatory in nature. We accordingly answer the Reference by holding that amendment in the election petition is not permissible after the prescribed period of limitation. No new ground can be taken in the election petition after it is filed.

21. The upshot of the aforesaid discussion is that the writ petition No. 2644 of 2008 is dismissed and the writ petition filed by the returning candidate bearing No. 6330 of 2008 is allowed in the aforesaid terms, by quashing and setting aside the impugned order of the learned Trial Judge. The learned trial Judge may now proceed with the Election petitions on its own merits and in accordance with law and without considering the amendment.