

(2010) 08 BOM CK 0104
In the Bombay High Court
Case No : Election Petition No. 34 of 2009

Mr. Surendra Budhaji Borkar	Vs	APPELLANT
Mr. Narayan Tatu Rane Falshiyewadi		RESPONDENT

Date of Decision : 06-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17
Limitation Act, 1963 — Section 29(2), 5
Representation of the People Act, 1951 — Section 67, 67A, 79, 81, 82

Citation : (2010) 6 BomCR 137 : (2010) 112 BOMLR 3471

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Party in Person absent, for the Appellant; Yatin R. Shah and Bharat Puneekar, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner, was one of the "Candidate" as defined u/s 79(b) of the Representation of the People Act, 1951 (for short, the Act) has challenged the election of the Respondent, a returned candidate as contemplated u/s 67 of the Act of the Kudal Assembly Constituency to the Maharashtra Legislative Assembly.

2. The Respondent, as alleged, verified and notarized an affidavit at Malvan District Sindhudurg on 21/09/2009 and submitted along with the nomination papers on 22/09/2009. The Petitioner filed his nomination papers in person in the office of Returning Officer. After due scrutiny of nomination papers in presence of candidates and their election agents, and after taking note of objection and challenged so raised, accepted the nomination papers on 25/09/2009. The Returning Officer on 29/09/2009 declared a list of contesting candidates including of the Petitioner and the Respondent. The election was held accordingly. On 22/10/2009, the result was declared.

3. Form 21E of the Conduct of Elections Rules, 1961 (for short, Rules) reads as

under:

Election to the Maharashtra Legislative Assembly from the 269- KUDAL Assembly Constituency.

Return of Election

Sr.

No.

Name of Candidate

Party affiliation

Number of votes polled

1

NAIK VAIBHAV VIJAY

Shivsena

47666

2

NARAYAN TATU RANE

Indian National Congress

71921

3

RAVINDRA HARISHCHANDRA KASALKAR

Bahujan Samaj Party

1503

4

BORKAR SURENDRA

Rashtriya Samaj Paksha

1427

5

DR. PRASAD JANARDAN WAINGANKAR

Independent

1948

I declare that

NARAYAN TATU RANE (Name) of At/Post Fanashiyewadi, Fanasnagar, TalKankavali, DistSindhudurg (Address) has been duly elected to fill the seat.

4. The Petitioner verified and lodged the Petition on 07/12/2009, under objections. The matter was listed on board again on 11/01/2010. The Petitioner appeared in person. The Court has ordered as under:

1. The Petitioner is present in person.
2. The matter was listed earlier on 04.01.2010 for admission/notice. It was adjourned for one week as the petitioner wanted to file an affidavit for condonation of delay. Accordingly, it was filed on 05.01.2010.
3. The matter is listed today again on board.
4. The petitioner wants to correct the affidavit dated 05.01.2010 again.
5. Time as sought is granted for four weeks.
6. The office to verify and endorse; whether the Election Petition is within limitation or not; and all the necessary/proper parties are joined or not. Office objection be noted within one week. Place the matter on board subject to removal of office objection, if any, thereafter.
7. As requested by the Petitioner, S.O. to 11.02.2010.

5. The matter was listed on 01/02/2010. The Petitioner was present in person. This Court issued notice keeping all points open i.e. jurisdiction, limitation and nonjoinder of parties and made it returnable on 05/04/2010.

6. On 05/04/2010, this Court, in presence of the Petitioner, has observed as under:

1. As per the office endorsement dated 5th April, 2010, after the order passed by this Court on 1st February, 2010, the office informed the Petitioner, who appeared in person, about the specimen of draft notice and for making the necessary changes in the said draft notice. The Petitioner came to the office on 5th February, 2010 and submitted a draft notice. However, as noted, the necessary changes were not carried out which as told to him on 3rd February, 2010 itself.

2. After 15 days in the middle of the March, 2010, one person on behalf of the Petitioner, stated to be his clerk, came to the office and the office again informed that the necessary amendment/corrections were not carried out in the draft notice. Hence, the office returned back the draft notice to the clerk for making the necessary changes. Till this date, neither the Petitioner nor his alleged clerk attended the office to finalizing the said draft notice. In the result, till this date, the notice could not be sent by the office.

3. It is necessary for the office, in such matters, to see and finalize the draft as early as possible, basically when the Petitioner is appearing in person. The

necessary corrections, even if any, just cannot be made by the clerk/third person. There is no concept of sending clerk, by a person who is appearing in person in the matter. The office to note all this and should have made corrections by calling the person or raising the objection or listing the matter under objection, instead of keeping the matter pending for such a long time for issuance of notice, in the Election Petition.

4. However, the Petitioner is present in person submitted that he is ready to take steps, and he will visit the office and provide corrected draft of notice on 22nd April, 2010. The office to take note of this and proceed to issue writ / notices as ordered, returnable on 17th June, 2010.

5. In the interest of justice and to avoid further complications, I am granting this time to the Petitioner, as a last chance, as he is appearing in person.

6. If the Petitioner fails to take steps within a prescribed time, the Court will pass appropriate order, including of dismissal of this Election Petition for want of prosecution.

7. S.O. to 17th June, 2010.

7. The Respondent received the Court notice on 28/04/2010. The matter was listed again on 16/06/2010. Mr. R.Y. Gaikwad, appeared on behalf of the Petitioner and undertook to file Vakalatnama within a period of one week. The matter was adjourned to 22/07/2010, at the request of the Petitioner's advocate, to take appropriate steps/application. The Petitioner was absent.

8. On 22/07/2010, neither the Petitioner nor his advocate appeared even upto 5.00 p.m.... The Respondent's Counsel was present. The matter was kept on 23/07/2010 at 3.00 p.m. in the Court but, none present for the Petitioner though the matter was under the caption "for dismissal".

9. To give one more opportunity, the matter was again adjourned to 30/07/2010, under the caption "for dismissal", though last chance was granted on 23/07/2010 itself. Therefore, the matter was directed to be placed "for dismissal/disposal" on 06/08/2010 and accordingly it is listed today. None appeared for the Petitioner again.

10. The learned Counsel appearing for the Respondent submitted to dismiss the Election Petition on the basis of plain bare reading of the defective, vague pleading/ averments itself on the various grounds including of nonappearance,, nonprosecution, limitation and nonjoinder of necessary parties.

11. The learned Counsel appearing for the Respondent has relied upon the judgment of the Supreme Court reported in 1984 SC 135Dr. P. Nalla Thampy Thera v. B.L. Shanker and Ors. 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 Order IX or Order 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 *Gurmesh 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.

14. Even otherwise, the date of election of candidate as defined/ provided in Section 67A of the Act means the date of election of the candidate i.e. 22/10/2009. The mandate of Section 81 of the Act is that an election petition calling in question any election should be filed within 45 days from, but not earlier than, the date of election of returned candidate, or if there are more than one returned candidate at the election and dates of their election are different from the later of those two dates.

15. As noted above, the Petition was verified and lodged on 7/12/2009. The last

date to file the Petition was 5th December, 2009, which was one of the High Court working Saturday.

The Petition should have been lodged on that date itself. However, it was lodged on (Monday) 7th December, 2009.

16. Another important aspect is nonjoinder of necessary parties, as contemplated u/s 82 of the Act and even otherwise, as required for proper adjudication and for expeditious disposal of the Election Petition. Section 82 deals with the aspect of parties of the Petition as under:

[Section 82. Parties of the Petition. A petitioner shall join as respondents to his petition

(a) Where the petitioner, in addition to claiming declaration 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.]

17. The prayers in the Election Petition are:

A) Call for record and proceedings of scrutiny meeting of Returning Officer, Kudal, Sindhudurg.

B) Quash and set aside Order dated 26.09.2009 of Returning Officer reject the Nomination papers of Respondent, declare the election of returned candidate void, and declare to Petitioner as elected candidate.

C) Allow the said Original Objection Application dated 26.09.2009 filed before Returning Officer, and disqualifying the Respondent election as prayed for, in the interest of justice;

D) Award cost of this Petition to Petitioner from respondent;

E) Pass any other order and or directions as this Hon''ble Court may deem fit and proper.

18. On the face of the record, undisputed position emerges is that the Petitioner has not joined Returning Officer who has passed the impugned order, rejecting the Petitioner's objections. He has not joined other candidates whose names were published by the Returning Officer firstly, after scrutiny of nomination papers and lastly, while declaring the result of the election as quoted earlier.

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.

20. After considering the provisions of Section 81 - 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 - 29 for condoning the delay in election petition of any kind. Madhya Pradesh High Court referring to various Supreme Court Judgments, in *Abhimanyu Rath v. Virendra Pandey* AIR 1978 Madhya Pradesh 112 has also observed the same.

21. The prayers as recorded above, speak for itself, as the Petitioner has prayed for declaring the election of the Respondent as void and at the same stroke prayed to declare the Petitioner as elected candidate. In such matters, it is necessary that all other candidates including the contesting Respondent, who scored highest vote, than that of other 3 candidates, should have been joined as a party. Even otherwise, for proper adjudication it is necessary to join all the parties/candidates as Respondents under the Act which in the present case has not been done, though vague unsupported allegations are made only against the Respondent. The Petition stands today, no allegations and averments are made against other candidates, that itself can not be the reason to overlook the above mandatory provisions of the Special Act See *Krishan Chander Vs. Ram Lal*, .

22. The Apex Court in *Mohan Raj Vs. Surendra Kumar Taparia and Others*, while dealing with the Act, observed as under in paragraph 10:

10. It is argued that the CPC applies and Order 6 Rule 17 and Order 1 Rule 10 enable the High Court respectively to order amendment of a petition and to strike out parties. It is submitted, therefore, that both these powers could be exercised in this case by ordering deletion of references to Periwal. This argument cannot be accepted. No doubt the power of amendment is preserved to the Court and Order 1 Rule 10 enables the Court to strike out parties but the Court cannot use Order 6 Rule 17 or Order 1 Rule 10 to avoid the consequences of nonjoinder for which a special provision is to be found in the Act. The Court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The CPC applies subject to the provisions of the Representation of the People Act and any rules made thereunder (See Section 87). When the Act enjoins the penalty of dismissal of the petition for nonjoinder of a party the provisions of the CPC cannot be used as curative means to save the Petition.

(Emphasis added)

The Apex Court has reiterated such mandate and purpose of the Act in *Krishan Chander v. Ram Lal* (Supra).

23. The Apex Court in *Patangrao Kadam Vs. Prithviraj Sayajirao Yadav Deshmukh*

and Others, , has observed as under:

The argument that Sampatrao Chavan could have been impleaded at a later stage if necessary, u/s 99, if accepted, renders the mandatory requirement of Section 82 ineffective.

24. This Court has also in Comrade Kallappa Laxman Malabade Vs. Prakash Kallappa Awade, referring to Sections 82 and 86 of the Act, and the various judgments of the Supreme Court in this regard held as under:

4. The aforesaid holding of the Supreme Court leaves no room for doubt that the provisions of the CPC could not be restored to in order to save a petition which otherwise is liable to be dismissed for nonjoinder of the parties, which Section 82 of the Act says must be joined.

25. The same principles apply to the present facts and circumstances of the case, specially to the issue of nonjoinder of necessary parties, as it goes to the root of the matter. The defect is incurable. Besides, the Petitioner scored lesser number of votes than 4 others in the fray. There were in all 5 contesting candidates. Therefore, all were necessary parties, specially in view of the prayers so made apart from mandate of Sections 82 and 86 of the Act.

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 - 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,

28. Therefore, considering over all view of the matter, the election Petition is dismissed with no order as to costs.