

(1997) 09 GUJ CK 0007
In the Gujarat High Court

Nagjibhai Ramjibhai Kakadia

APPELLANT

Vs

M.D. Mankad and Others

RESPONDENT

Date of Decision : 05-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 79, 84, 84(c)
Representation of the People Act, 1951 — Section 80A, 81, 82, 82(a), 86(4)

Citation : (1998) 3 GLR 2342

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

J.N. Bhatt, J.—In this election petition u/s 80A of the Representation of People Act, 1951 ("R.P. Act"), the petitioner has challenged the validity and legality of the election of Junagadh Lok Sabha constituency and has sought an order for re-election.

2. A resume of material and relevant facts shortly may be stated at the outset so as to appreciate and examine the merits of election petition at the threshold. The petitioner N.R. Kakadia was contesting 11th Lok Sabha Election from 6/Junagadh constituency as a candidate of National party (Bahujan Samaj Party). The petitioner has inter alia contended that the returning officer-respondent No. 1, M.D. Mankad had adopted malpractices which he has stated in paras 1 to 9 of the petition. His main grievance seems to be that respondent No. 1 returning officer despite giving notice about irregularities, did not respond, as a result of which, he secured only about 200 votes. After filing his nomination papers on 30-3-1996, respondent No. 1 out of grievance and grudge from the very beginning of the election process, declared him as candidate of separate party and with separate name.

3. The petitioner has also inter alia contended that though he was a candidate of National Party (Bahujan Samaj Party) in press and daily newspaper of Saurashtra and Gujarat, many times, his name was shown as candidate of Bahujan Samaj

Party. In the similar fashion, his name was published many times in the newspapers and in some of the newspapers, instead of the name of the petitioner, name of Maqsood Ibrahim Kadri was shown as candidate of Bahujan Samaj Party. The petitioner has given a list of different news items datewise and paperwise in para 14 of his petition.

The petitioner has sent registered notice to the returning officer to stop such publications showing wrong name and wrong party through the Department of Information. He had also received a list of rival candidates in prescribed form from the returning officer. There was mistake in the said list. The petitioner was allotted the symbol of elephant for the Lok Sabha Election.

4. In nutshell, the main grievance of the petitioner was that his name and his party name had not been correctly published in the newspapers. He believed, therefore, that publication of information in relation to the election must be at the instance of the Public Information Department of the Government and, therefore, it was incumbent upon the returning officer to get it stopped. Since he failed to do it, he has committed irregularities and non-action on the part of the returning officer.

5. First of all, election petition is not maintainable for the simple reason that the petitioner has not joined the returned candidate Mrs. Bhavnaben Chikhaliya as party-respondent in this petition. During the course of hearing, on two occasions, the petitioner who lastly appeared as party-in-person was offered legal aid or service of any Advocate as amicus curiae. But he refused saying that he himself is a practising Advocate and he himself would be able to argue and convince the Court. Earlier his Advocate Mr. S.K. Patel had appeared. However, the petitioner did not want the learned Advocate Mr. Patel to continue. He, therefore, requested Mr. Patel to drop out and withdraw. Accordingly, Mr. Patel by giving a written note to the Registrar dated 11-7-1997 withdrew his appearance under instructions from the petitioner. With minor digression and detour, we may now proceed to examine the merits of the case. The petitioner has not impleaded the returned candidate Mrs. Bhavnaben Chikhaliya as party-respondent and despite inquiring from him, the petitioner has thought it fit not to join the returned candidate for the reasons not known to us and likewise, refused the offer of an experienced legal service either from the legal aid or from any good member of bar.

6. The question, therefore, which now assumes singular dimension is as to whether the returned candidate is a necessary party and more so when the election is sought to be declared as null void and re-election is sought, what will be the effect of absence of necessary party on record? It is settled proposition of law that no effective and efficient adjudication of a dispute can be reached without presence of a necessary party. Who are necessary parties to such election petition and the main question in focus would be if there is non-joinder thereof, what consequences will entail and what will be the legal fate of the election petition u/s 80A of the R.P. Act?

7. It would be expedient at this juncture to have a close look into the scheme of election law provided in the Constitution of India in general and in the R.P. Act in particular, for election of Parliament.

Chapter II of the Constitution of India provides for constitution and business of Parliament. Article 79 in the said Chapter provides that there shall be a Parliament for the Union consisting of President and two Houses to be known respectively as Council of States and House of People, popularly known as Upper House and Lower House, in common parlance known as Rajya Sabha and Lok Sabha. Article 84 prescribes qualifications for membership of Parliament. Article 84(c) further provides that it will be open for the Parliament to make law prescribing qualifications for a member of Parliament.

8. The R.P. Act requires that name of the candidate shall be registered in any Parliamentary constituency. The mechanism of election and relevant provisions of election law consistent with the provisions of the Constitution may be first examined.

9. In Chapter II of the R.P. Act, process and procedure for election petition are provided. Section 80A provides that Court having jurisdiction to try election petition shall be the High Court. The presentation and requirements of filing of petition are mentioned in Section 81 of the R.P. Act.

10. The very important and vital provision insofar as the dispute in this petition is concerned, is prescribed in Section 82 of the R.P. Act. Section 82 reads as under:

82. A petitioner shall join as respondent to his petition:

(a) where the petitioner, in addition to claiming a 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.

It could very well be visualised from aforesaid provisions that important provisions are incorporated for addition of all necessary parties in the election petition. In view of the nature of dispute, impleading of necessary parties under the R.P. Act becomes more significant and very vital. Therefore, provisions of R.P. Act are required to be considered and not the general provisions of the Code of Civil Procedure, 1908.

11. The pointed answer to the question who is to be impleaded as a party in the election petition has to be seen in the area and realm of the R.P. Act itself, as the Act is itself a complete Code which does not contemplate joinder of persons or parties as parts to election petition. Only those can be joined as respondents who are mentioned in Sections 81 and 86(4) of the R.P. Act. The scheme is such that

nonjoinder of necessary parties who are enumerated in the provisions of Section 82 will be fatal. A clear legislative mandate can be pursued from the expression employed in Section 82. The petitioner shall join as respondent to his petitioner either as per provisions of Clause (a) or Clause (b).

12. There is purpose and policy behind legislating and incorporating provisions of Section 82 in the R.P. Act. Only those can be impleaded as respondents who are mentioned in Sections 82 and 86(4) of the R.P. Act. Undoubtedly, u/s 82, this dispute confines to the candidates at election and all other persons are excluded and that cannot be joined as parties in the election petition on the principle of "fair play and equity". Though petition is a dispute in which the constituency itself is the principal party, the interested candidates and the electors can be impleaded and no others. Non-joinder of necessary parties would invite serious consequences and it is amply clear from the perusal of Section 82 of the R.P. Act that non-joinder or nonimpleading of necessary parties like the returned candidate or when the election is sought to be declared as null and void alongwith the prayer in getting himself declared as elected, all the candidates, is fatal. Dispute of such nature can only be effectively and efficiently adjudicated upon only in presence of such parties. It is in this context that the Parliament in its wisdom has provided a provision in Section 82 which is one of the integral linchpins of election mechanism.

13. In the case on hand, the returned candidate Mrs. Bhavnaben Chikhalia, M. from 6/Junagadh constituency has not been impleaded for the reasons not known to This Court. Not only that, despite pointed question there was no animus to implead the returned candidate. The petitioner who is a defeated candidate has sought a declaration of the said election of 11th Lok Sabha from 6/Junagadh constituency as null and void. The interest of returned candidate Mrs. Chikhalia is absolutely concerned and non-impleading such vitally interested, necessary or proper party would be sufficient to torpedo petition at the inception to prevent unnecessary, expensive and avoidable waste of time. It is in this context that at its threshold, This Court is inclined to reject and dismiss the election petition filed u/s 80A of the R.P. Act. This ground itself is sufficient and goes to the root of the matter warranting dismissal of the election petition and, therefore, This Court does not think it expedient to examine other aspects raised in this election petition.

14. The view which This Court is inclined to take at this juncture that provisions of Section 82 of the R.P. Act are mandatory and non-observance of the same will be fatal, is reinforced by catena of judicial pronouncements. However, a few propositions of law enunciating election scheme and law on this point may be highlighted.

15. The Honourable Apex Court in the case of Jyoti Basu and Others Vs. Debi Ghosal and Others, has clearly laid down the proposition that in the event of any infraction of provision of Section 82 of the R.P. Act and non-impeading of necessary party articulated and incorporated in the section itself would invite

ipso facto dismissal. This case law supports the version and view This Court is inclined to take at this stage.

16. The decision of the Hon"ble Apex Court in K. Venkateswara Rao and Another Vs. Bekkam Narasimha Reddi and Others, clearly lays down, upon analysis of provisions of the R.P. Act that trial of an election petition is not the same thing as to trial of a suit. Even though Section 87(1) of the R.P. Act lays down that the procedure applicable to the trial of election petition shall be like that of the trial of a suit, the R.P. Act itself makes important provisions of the Code inapplicable to the trial of an election petition. Under Order 6, Rule 17, Code of Civil Procedure, a Court of law trying the suit has very wide powers in the matter of allowing amendments of pleadings and all amendments which will aid the Court in disposing of the matters in dispute between the parties are as a rule allowed subject to the law of limitation; whereas, in the R.P. Act u/s 86(5) there is a provision for restriction on the part of the High Court to allow amendments. The High Court is not to allow amendment of particulars or further data.

17. It can very well be said that non-joinder of necessary party is a fundamental defect. This is a basic requirement in the election petition and, therefore, it is fatal to the election petition. This is not a defect which can be cured. The notification of election results was published on. Therefore, there was no scope for the petitioner to seek amendment even at the stage of hearing and to implead necessary party, the returned candidate of Bhartiya Janta Party, Mrs. Bhavnaben Chikhalia.

18. In fact, apart from the aforesaid technical and legal missile, the present petition is also liable to be rejected on facts. As a matter of fact, the grievance of the petitioner is that his name and party's name had been shown and published in the newspapers incorrectly. He alleged that it was the duty of the returning officer to take necessary action and stop such mischief. Reply to the notice given by the returning officer to the petitioner is placed on record in the election petition itself. A copy of official gazette dated 8-4-1996 is also placed on record. As per the prescribed rules under the Rules of election, there were 25 candidates to the election of Lok Sabha from the Junagadh constituency, in 1996. A copy produced at page 61 of the paper book, Schedule No. 11, clearly goes to show that the petitioner was shown as candidate of Bahujan Samaj and at the time of allotment of election symbols, he was allotted official symbol of elephant. Allotment of symbol procedure was done on 22-4-1996 in the office of the returning officer. The petitioner was present and pursuant to the application of the petitioner, dated 19-4-1996, he was allowed, as official candidate of Bahujan Samaj Party, election symbol of elephant; whereas his one of the rivals Kadri Masqood Ibrahim got his candidature registered as candidate of Bahujan Samaj Party was also present and in presence of all rival parties, work of allotment of symbols was carried out. At the time of production of "B" form from the President of Bahujan Samaj Party, they had recommended the name of the petitioner as authorised candidate of Bahujan Samaj Party. Accordingly, symbol

of elephant was allotted to the petitioner and after examining and verifying, the returning officer declared Maqsud Ibrahim Kadri as independent candidate ("Apaksh") and who came to be allotted a different symbol. This was done in the presence of all rival candidates in the office of the returning officer.

19. After having taken into account the aforesaid facts and circumstances, relevant proposition of law, it can safely be concluded that in view of provisions of Section 82(a), when the petitioner has sought declaration of election as null and void, impleading of returned candidate of Bhartiya Janty Party Mrs. Bhavnaben Chikhalia was necessary and not joining her as one of the party-respondents in the present petition is fatal and, therefore, the petition deserves to be dismissed at the threshold. Accordingly, it is rejected.