

(2000) 05 BOM CK 0011

In the Bombay High Court

Case No : Election Petition No. 5 of 1999

Narendra Bhikahi Darada

APPELLANT

Vs

Kalyanrao Jaywantrao Patil and Others

RESPONDENT

Date of Decision : 05-05-2000

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 94A

Representation of the People Act, 1951 — Section 81(3), 83(1), 83(2), 86(1)

Citation : AIR 2000 Bom 362 : (2000) 4 ALLMR 151 : (2000) 3 BomCR 744

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

**Advocate : A.C. Singh, instructed by S. Subramanniyam, for the Appellant;
Balkrishna D. Joshi, for the Respondent**

Judgement

T.K. Chandrashekhara Das, J.—The petitioner who was defeated in the election to the Maharashtra Legislative Assembly from 71 Yeola Assembly Constituency which was held on 11th September 1999, filed this petition. He challenges the election of the respondent No. 1, who was declared elected on 7-10-1999 for having secured 39419 votes as against the petitioner, who is the immediate defeated candidate having secured 39198 votes. So the petitioner was defeated on a margin of 221 votes.

2. The petitioner had contested the election as an official candidate of Congress (I) on the symbol of "HAND", and the first respondent had contested the election as an official candidate of Shiv Sena whose symbol is "BOW AND ARROW".

3. The petitioner challenges the election of the first respondent on the ground of corrupt practices and also on material irregularities of counting of votes. The first respondent appeared and filed the written statement. He has also taken out a Chamber Summons being No. 184/2000, raising preliminary objection and praying for dismissing the election petition u/s 86 of the Representation of Peoples Act 1951 (hereinafter called the Act) for non-compliance of sections 84 and 83 of the said Act.

4. The preliminary objections of the first respondent can be summarized thus :-

i) In compliance of section 81(3), the copy of election petition to be served on the respondent shall be attested by the petitioner under his own signature to be a true copy of the petition. According to the first respondent, even though all the pages of the election petition were signed by the petitioner many of the pages of the copies of the election petition, which was served on the respondent, did not contain the signature of the petitioner attesting to be true copy.

The learned Counsel for the first respondent brought to my notice the pages 3, 25, 27-B, 29, 31, 33, 35, 35-Y, 62, 62-B, 64, 64-B, 66 and 66-B. He also contended that these pages do not contain the signature of the petitioner, under the seal of true copy. Only advocate of petitioner initialled it. This is fatal to the election petition, as it cannot be treated as true copy of the election petition as reserved on the respondent No. 1. Therefore it violates the mandatory provision of section 81(3) which entail dismissal of the election petition.

ii) At page 27-B of the copy of the election petition served on the first respondent, the name and designation of the officer before whom the election petition was affirmed and verified was not there. In the election petition presented before the Court, the petitioner affirmed and signed before one "Mrs. K.M. Rane, Associate, High Court, Bombay". The signature and also the name and designation of Mrs. K.M. Rane were omitted in the true copy served on the respondent. Therefore according to the Counsel for the petitioner this is a fatal defect which again violate the provisions of section 81(3) which also entail dismissal of election petition without trial. Similar omission regarding the attestation is again repeated in page 27, 29, 31, 33, 35, 35-Y, 62, 62-B, 64, 64-B, 66, 66-B and 67. In 67 of course, the designation of the officer before whom the signature was attested is there but the name of the officer was missing. According to the petitioner this is also a fatal mistake which attracts section 81(3) of the Act. Therefore the election petition is liable to be dismissed at the threshold, as a true copy of the election petition has not been served.

iii) Copy supplied by the petitioner was defective which may likely to mislead the respondent effecting the right of the respondent to formulate his defence. According to the respondent No. 1 there is total variation in the particulars contained in the annexure. He has pointed out that the document at page 36 in the original is quite different from the document contained on the same page of the copy of the petition. In fact the same defect can be said with regard to the documents contained at page 49 also. At page 36, the document evidenced by Annexure F-1 is exhibited. But annexure F-1 in copy of the petition was quite different. Because of this variation in the annexure, the respondent No. 1 was mislead and created confusion in his mind in formulating his defence. It is a fatal defect which entail again dismissal of the election petition.

iv) Concise statement contained in the copy of the petition was not verified in the manner verified and signed in the original. Verifications at page 66-B and the

verification in corresponding page 131 in the copy are quite different. Therefore according to the Counsel it is a fatal defect.

v) The copy of the affidavit annexed to the copy of the petition supplied to the respondent is lacking the name of the person before whom it was affirmed. This defect is fatal and therefore election petition is liable to be dismissed. He cited a decision in 1997(II) Mh.L.R. 509. Apart, from the above, u/s 83(2) every annexure and schedule shall be signed and verified in the manner prescribed in the C.P.C. Documents 35-A to 35-X are not verified as per C.P.C. as provided in section 83(2) except 35-X.

5. The Counsel for the respondent also contended that certain correction in original is not incorporated in the copy served on the respondent. For example at page 25 of the election petition, affirmation is struck out but this correction is not there in the copy at page 57. In the original of the election petition at page 25 date 19th has been corrected as 20th whereas in the copy there is no correction at all. In page 27 of the original affirmation was corrected but at page 59 in the corresponding affirmation in the copy, the date is different.

6. Similarly the learned Counsel for the respondent No. 1 has pointed out that corrections in the original at page 29 and pages 62, 62-B, 64, 64-B and 66 are not carried out in corresponding page of the copy of the election petition served on the petitioner namely page 63, 121, 123, 125, 127 and 129 respectively. For the reason of above defects the petitioner's Counsel submits that all the defects are both coming u/s 81(3) and also section 83(1) and therefore the election petition is liable to be dismissed at the threshold.

7. In reply to the aforesaid objections, the learned Counsel for the petitioner submits that the defects pointed out by the Counsel for the respondent No. 1 are only the curable defects, which cannot be said to be fatal resulting dismissal of the election petition. According to the Counsel the written statement has been filed on 7-2-2000 and after reading the written statement (the corrected copy rectifying the curable mistake was offered on 3-3-2000 before the argument of the preliminary issue came up for hearing. According to the Counsel for the petitioner) the election petition could be dismissed only on the ground of mistakes that cause prejudice to the case of the respondent. According to him under the various decision of the Supreme Court, if there has been a substantial compliance of the conditions mentioned in section 81, then the mere technical defect or omission will not entail the dismissal of the election petition. He further contended that all the mistakes which touches on section 83 are curable, and when those mistakes were cured then the election petition cannot be thrown out. The Counsel further says that the clerical or hypo graphical error pointed out by the respondent No. 1 are of no consequences. As regards the misplacement of the documents at page 36 and 49 in election petition which were mistakenly shown at 95 and 108 respectively is only an accidental mistake which was occurred at the time of stitching the paper book. According to him the pages 95 and 108 has been mutually misplaced and stitched and therefore it is only an

accidental mistake which cannot go to the root of the matter resulting dismissal of the election petition.

8. Both sides cited various decisions to support their respective contentions. I do not think it is necessary to cite all those decisions here. But some of them, that too latest ones, on the points raised herein relied on by both parties are required to be discussed herein. Before going to that discussion I have to mention only defects referred to above in paras (i) to (v) need to be considered here. Defects pointed out in para 5 and 6 are not of importance because the defects pointed out was that corrections made in the election petition was not found in copy of the petition. This objection is too technical that does not deserve any consideration. It is well settled that a true copy of the election petition need not be the identical replica of the election petition. In *Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Others*, it has been held that copy in section 81(3) of the Act does not mean absolute, exact copy but a copy to be true that be could not be misunderstood. But it has to be noted that the contentions of the learned Counsel for the petitioner that each page of the copy of the election petition need not be attested to be true copy under the signature of the petitioner cannot be accepted. Each page or each annexure were signed by the petitioner, in the election petition but copy was attested as true copy by the advocate for the petitioner as a substantial compliance of section 81(3). I do not think this view is right for the reasons stated below.

9. It is well settled by now that an Election Petition is liable to be thrown out at the threshold without the trial u/s 86 of the Representative of Peoples Act if the Election Petition violates the mandatory provisions contained in section 81. Mandatory provision contained in sub-section (3) of section 81 says that, Every election petition shall be accompanied by as many copies thereof, as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be true copy of the petition. In the light of this legal paradigm we have to examine the defects pointed out by the Counsel for the first respondent in sub para (1).

10. As I indicated earlier some of the pages of the election petition particularly the pages mentioned above are not signed by the petitioner to be true copy. Only his advocate has signed to certify the same to be true copy. In this context a decision of the Supreme Court reported in AIR 1980 S.C. 393 *Sharif-ud-Din v. Abdul Gani Lone*, and in para 19 it has been held thus:

"The attestation by the advocate for the petitioner cannot be treated as the equivalent of attestation by the petitioner under his own signature. The object of requiring the copy of an election petition to be attested by the petitioner under his own signature to be a true copy of the petition is that the petitioner should take full responsibility for its contents and that the respondents should have in their possession a copy of the petition duly attested under the signature of the petitioner to be the true copy of the petition at the earliest possible opportunity to prevent any unauthorized alteration or tampering of the contents of the

original petition after it is filed into Court."

11. In the reply to this argument the learned Counsel for the petitioner has submitted that those mistakes are inconsequential and are curable, and in fact Counsel before the Court takes up the matter for bearing. He also cited a decision of the Supreme Court in *Anil R. Deshmukh Vs. Onkar N. Wagh and Others*, . I shall deal this contention of the petitioner later.

12. Second objection raised by the respondent No. 1 is that at page 21 of the copy of the election petition, attestation of the signature and verification was done by the Associate of Bombay High Court. It was written as "Sd Associate of Bombay High Court" whereas in the original, seal of "Mrs. K.M. Rane, Associate, High Court, Bombay" is there. In almost all places when the verification was done, the same omission was repeated in the copy of the Election Petition. No where in the copy of the election petition, name of the attesting officer was written. Petitioner's Counsel submits that when the respondent receives such copy without the verifying officer's name, it will amount misleading and it affects the case of the respondent as to what defence he has to take. Unless the name of the officers is seen in the copy, how the respondent knows whether it has been verified by a competent officer and he is compelled to presume that Election Petition is also having this mistake.

13. Third defect pointed out by the Counsel for the respondent No. 1 is that the copy supplied to him was defective. He submits that Exhibit F-1 between page 36 and at page 45 were the statement containing the figures of various rounds of counting. Copy of those statement was stated to be contained in the copy of the Election Petition at page 95 and 108. But on perusal of the statement it can be seen that figures contained in Exh. E-1 annexed to Election petition and that contained in the copy of the election petition are different. Figures shown in the original and copy are different. This according to the learned Counsel for the respondent No. 1 violate the mandate contained in section 81(3) of the Act and therefore Election Petition is liable to be dismissed as the copy of the Election Petition served on the respondent cannot be said to be true copy as envisaged u/s 81(3) of the Act.

14. Fourth defect pointed out by the Counsel for the petitioner is that concise statement of material facts contained in the copy of the petition, does not contain the verification as required under law.

15. Lastly copy of the affidavit annexure to the petition, also does not contain the verification required under law.

16. On verification of the copy of the election petition I found that all these defects do exist and then the election petition liable to be dismissed at the threshold without being tried.

17. Learned counsel for the petitioner submitted that all the defects are coming under the categories of curable and sufficient to be substantially complied with.

He also relied on T.M. Jacob Vs. C. Poulose and Others, and Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu, . I will discuss about this aspect a little later.

In T.M. Jacob Vs. C. Poulose and Others, , deal I with absence of signature of the attesting officer. In that case there are similar defect as appeared in this case. The affidavit served on the respondent, name of the Notary was omitted. The Supreme Court was examining that defect in the light of the earlier decision recorded in (Dr. (Smt.) Shipra and others v. Shantilal Khoiwal and others), reported in AIR 1996 S.C. 1694. The Supreme Court held that omission of the name of Notary in the copy will be treated as substantial compliance of 81(3), and therefore not fatal entailing dismissal of the election petition. Para 15 of the T.M. Jacob's JUDGMENT reads thus :

"A batch of appeals came to be dealt with in Dr. Shipra's case. In all the appeals, the only question that arose for consideration was whether the copy of the election petition accompanied by supporting affidavit in Form 25 prescribed under Rule 94-A of the Conduct of Elections Rules, 1961, served on the respective respondents but not containing the verification of attestation made by the District Magistrate/Notary/Oath Commissioner could be said to be a "true and correct copy" of the election petition as envisaged by section 81(3) of the Act? K. Ramaswamy, J., who authorized the lead judgment referred to various provisions of the Act and a number of judgments dealing with the scope of section 81(3) (read with section 86(1) of the Act and approving the view of the Bombay High Court in Purushottam Vs. Returning Officer, Amravati and Others, ."

18. However Supreme Court has tried to distinguish on facts the defect in the Dr. Shipra's case and the defect pointed out in T.M. Jacob's case. He held in T.M. Jacob's case thus:

"24. Reverting now to the facts of the present case. A perusal of the copy of the affidavit served on the appellant shows that the copy of the affidavit supplied to the appellant contained the endorsement that the affidavit had been duly affirmed, signed and verified by respondent No. 1 before a Notary. Under the affirmation by the notary, the word. Sd Notary were also written. What was, however, found missing in the copy of the affidavit was the name and address of the Notary as well as the stamp and seal of the Notary, before whom the affidavit had been so affirmed and who had attested the affidavit.

25. The defect found in the present case is almost identical to the defect which had been found in the copy of the affidavit supplied to the first respondent in Anil R. Deshmukh's case (supra). The defect is materially different from the defect found in Dr. Shipra's case, where the true copy of the election petition furnished by the election petitioner, to the successful candidate did not show that the affidavit filed in support of the allegation of corrupt practices had been duly sworn or affirmed and verified by the election petitioner before a notary, whose attestation was also found missing.

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28. In our opinion the principle indicated in Dr. Shipra's case has to be considered as confined to the facts and circumstances of that case as opined by Ramaswamy, J., himself, when His Lordship observed :

"The principle of substantial compliance cannot be accepted in the fact situation." and cannot be considered to be of general application diverse from the fact situation of a given case."

19. In the light of the above observations omissions to write name of the attesting officer held to be not fatal and can be found that 81(3) has been substantially complied with. But T.M. Jacob's case cannot be used by the petitioner in this case. In that case only signature of the officer was missing. Instead, it was written "Sd" and below that name of the officer was written. In that circumstances. Supreme Court has held that defect is not fatal and held to be substantially complied with. But here in this case, name of the officer was missing and verification is also not there. If one receives a copy of the Election Petition, naturally doubt may arise and confusion may creep in as to whether it was signed by a proper officer and as to what objection he has to be raised in the Election Petition. Therefore, absence of the name of the officer before whom the petitioner put signature can not be said to be one that can be substantially complied with. It is really a fatal defect. Other defects pointed out that the absence of verification as prescribed under law in the annexure and absence of attestation of true copy under the signature of the petitioner has also to be found to be fatal. Moreover defect No. (iii) of supplying document and annexures along with copy different from that of the original is liable to mislead the respondent No. 1 in formulating his defence as held in Dr. Shipra's case which reads thus in para 11:

"In Purushottam Vs. Returning Officer, Amravati and Others, , the present question had arisen. In that case the copy contained omission of vital nature, viz. the attestation by the prescribed authority. The High Court had held that the concept of substantial compliance cannot be extended to overlook serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy. We approve of the above view verification by a Notary or any other prescribed authority is a vital act which assures that the election petitioner had affirmed before the notary etc. that the statement containing imputation or corrupt practices was duly and solemnly verified to be correct statement to the best of his knowledge or information as specified in the election petition and the affidavit filed in support thereof that reinforces the assertions .Thus affirmation before the prescribed authority in the affidavit and the supply of its true copy should also contain such affirmation so that the returned candidate would not be misled in his understanding that imputation of corrupt practices was solemnly affirmed or duly

verified before the prescribed authority. For that purpose, Form 25 mandates verification before the prescribed authority. The object appears to be that the returned candidate is not misled that it was not duly verified. The concept of substantial compliance of filing the original with the election petition and the omission thereof in the copy supplied to the returned candidate as true copy cannot be said to be a curable irregularity. Allegations of corrupt practices are very serious imputations which, if proved, would entail civil consequences of declaring that he become disqualified for election to a maximum period of six years u/s 8-A apart from conviction u/s 136(2). Therefore compliance of the statutory requirement is an integral part of the election petition and true copy supplied to the returned candidate should as a sine quo non contain the due verification and attestation by the prescribed authority and certified to be true copy by the election petition in his/her own signature. The principle of substantial compliance cannot be accepted in the fact situation."

Supplying a different copy Exh. F1 along with copy of the petition assuming importance in this case, because petitioner challenges the election of the returned candidate of irregular counting also. The annexure F1 relates to the number of votes obtained in a particular round of counting. The petitioner is relying on this document to establish his case that there were irregularity in counting of votes.

20. Though the observation in Dr. Shipra's case has critically been examined by the Supreme Court in T.M. Jacob's case (supra) it has not overruled Dr. Shipra's case. As I indicated earlier Supreme Court was distinguishing the fact of each case and held that defect in T.M. Jacob's case was found to be one which can be substantially complied with. Therefore I find that the defects pointed out in sub para (i) to (iii) are fatal and is to be held that section 81(3) has been vitiated as the defect pointed out here was similar to the facts situation in Dr. Shipra's case.

21. Regarding defects (iv) and (v) it has been contended by the Counsel for the petitioner that these defects have been cured as it comes under the category of curable defects. He submits that before the preliminary objection was heard, the same was cured. Concise statement and Affidavit in the copy does not contain the affirmation as prescribed under as contemplated u/s 83(1). The Counsel for the petitioner tried to fortify his contention by relying upon the decision of Anil Deshmukh's case (supra). In that case defect pointed out was u/s 83(1)(c) and held that those defects were curable. But in this case true copy supplied to the respondent No. 1 was defective. On the above defects namely i) each page or annexure to the petition were not verified by the petitioner, (ii) attesting Officer's name was omitted to be furnished in the copy, (iii) Documents were produced in such a way that it may result in confusion and misunderstanding in the mind of the respondent. The petitioner's Counsel has tried to justify the misplacement of the documents saying that the original document is in Marathi, were properly annexed and duly English translation of documents annexed was wrongly compiled. English translation of every document in other language is

required to be filed in the Court as indicated in the High Court Rules. Therefore same cannot be treated as lightly. Question required to be asked whether such defect susceptible for misleading the respondent. In defending this omission Counsel for the petitioner relies upon the Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu, . In that judgment in para 24 the Supreme Court has observed thus :

Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petition as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect the allegations of corrupt. Practices cannot be inquired and tried at all. In such a case petition has to be rejected on the threshold for non compliance with the mandatory provisions of law as to pleadings. It is no part of duty of the Court suo motu even to direct furnishing of better particulars when objection is raised by other side. Where the petition does not disclose any cause of action it has to be rejected. Court however, cannot direct the pleadings into several parts and consider whether each one of them discloses a cause of action. Petition has to be considered as a whole. There cannot be a partial rejection of the petition.

22. Counsel for the petitioner, however, contends that for the above defect the election petition is not liable to be dismissed. The aforesaid observation of the Supreme Court cannot be relied on by the petitioner. In Narayanswamy's case the material particulars has not been supplied by the petitioner and in that context the Supreme Court said that, that defect could be curable by seeking amendment of the petition. But in the aforesaid para Supreme Court has in unambiguous term held that if an Election Petition contain no material facts, constituting cause of action is fatal. Here in the present it is not non supply of material particular only but non verification of concise statement and affidavit. Therefore, it cannot been said that a true copy has been supplied to respondent No. 1. In view of the above observations of the Narayanswami's case, non-verification of concise statement of material facts and affidavit in the copy of the Election petition cannot be considered to be curable defect by way of an amendment of the Election petition.

23. In the copy of the Election Petition absence of verification of concise statement and affidavit can be treated as not only a defect u/s 83(2), but also a non-compliance of the section 81(3) of the Act as the true copy of the Election Petition cannot be said to be served on the respondent.

24. To sum up I find that all the defects enumerated above are fatal to the Election Petition and has to be held that there is non compliance of the section 81(3) as well as section 83(1) of the Representative of Peoples Act. Therefore preliminary objection raised by the respondent No. 1 has to be upheld and Election Petition stands dismissed u/s 86 of the Act. Petitioner is also liable to pay cost of Rs. 1000/- to the respondent No. 1.

In view of the above, the Chamber Summons 184/2000 stands disposed of.

Parties to act on the ordinary copy of this order issued by P.A. and authenticated by the Shirastedar of this Court.