
(2013) 04 MP CK 0020

In the Madhya Pradesh High Court

Case No : Civil Revision No. 71 of 2012 (Against the order of First Additional Judge to the First Additional District Judge, Shivpuri, passed in Election Petition No. 3 of 2010)

Rajni (Komal) Sahu (Smt.)

APPELLANT

Vs

Baby Khatoon and Others

RESPONDENT

Date of Decision : 22-04-2013

Acts Referred:

Citation : (2013) 3 JLJ 203 : (2014) 1 MPLJ 85

Hon'ble Judges : A.K. Sharma, J

Bench : Single Bench

Advocate : N.K. Gupta, for the Appellant; H.D. Gupta and Ankur Maheshwari, for the Respondent

Judgement

A.K. Sharma, J.—This civil revision petition has been filed by the petitioner u/s 26(2) of the Municipalities Act, 1961 against the order dated 29.5.2012 passed by learned First Additional Judge to the First Additional District Judge, Shivpuri in election petition No. 3/10 filed u/s 20 of the M.P. Municipalities Act, 1961 (for short "the Act of 1961") by respondent No. 7 Smt. Chandra. The brief facts of the case are that petitioner is a winning candidate for the post of President of Nagar Panchayat Karera, District Shivpuri who had defeated respondent No. 7 by 210 votes. After election, respondent No. 7 filed an election petition u/s 20 of the Act of 1961 mainly only the ground of corrupt practices were adopted by petitioner by making advertisement in the newspaper and by filing incorrect statement of expenditure incurred by her during election amongst other grounds. Petitioner has denied the grounds raised in the petition. Learned trial Court by impugned order set aside the election on the ground that the petitioner got printed the calender and posters, expenditure of which has not been mentioned in the statement of accounts which false within the category of corrupt practice u/s 22(1)(b) of the Municipalities Act.

2. Against the impugned order, petitioner has filed this civil revision on the

ground that learned trial Court has neither framed the specific issue regarding printing of calender and posters nor has properly appreciated the evidence according to which there was no proof that said calendars and posters were got printed by petitioner, by her agent or any other person with her consent. The findings of learned trial Court are against the provisions of law and settled principle of natural justice.

3. The main question for deciding the petition is that whether learned trial Court is justified in passing the impugned order and giving findings of corrupt practice against the petitioner.

4. Learned counsel for the petitioner has drawn attention of this Court towards the provisions of section 22(1)(b) of the Act of 1961 and submitted that in the light of said provisions, learned trial Court has neither framed specific issue regarding each and every alleged corrupt practice and in the absence of any specific evidence on behalf of respondent No. 7 in her evidence regarding confirmation of the fact that where calendars and posters have been printed and how much amount has been paid, petition is not maintainable filed on behalf of respondent No. 7.

5. The provisions of section 22(1)(b) are reproduced below:

Section 22 Grounds for declaring election or (nomination) to be void.--(1) Subject to the provisions of sub-section (2) if the Judge is of the opinion--

(b) that any corrupt practice has been committed by returned candidate or his agent or by any other person with the consent of a returned candidate or his agent;

6. Learned counsel for the respondent No. 7 has submitted that this Court cannot appreciate the evidence under the revisional jurisdiction. In this regard he has drawn attention of this Court towards the provisions of section 26 of the Municipalities Act, 1961 which is reproduced below:

26. Finality of decision.--(1) No appeal shall lie against the decision of the Judge on the petition.

(2) Any person aggrieved by the decision of the Judge on the petition may, within thirty days from the date of such decision, apply to the High Court for revision on any of the following grounds.--

(a) that the decision is contrary to law;

(b) that the Judge has exercised jurisdiction not vested in him by law or has failed to exercise a jurisdiction vested in him by law, but subject to such orders as the High Court may pass thereon, such decision shall be final.

7. Corrupt practices are defined u/s 28 of the Act of 1961 which include at serial No. (vii) and (vii-a) as under:

(vii) The issuing of any circular, placard or poster having a reference to the

election or selection which does not bear the name and address of the printer any publisher thereof.

(vii-a) the incurring or authorising of expenditure in contravention of section 32A).

8. Provisions of section 32 of the Act of 1961 are also relevant in this context which reads as under:

32. Preparation of Electoral Roll and conduct of elections.--(1) The superintendence, direction and control of the preparation of electoral rolls for and the conduct of (all elections of Presidents and Councillors) of the Municipality shall be vested in the State Election Commission.

(2) The State Government shall, in consultation with the State Election Commission, make rules for the preparation of Electoral rolls and conduct of (all elections of Presidents and Councillors) of the Municipality.

32A. Account of Election expenses.--(1) Every candidate at an election of President shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both days inclusive.

(2) The total of the said expenditure shall not exceed, such amount as may be prescribed by the State Government in consultation with the State Election Commission.

(3) The account of expenditure shall contain such particulars as may be prescribed by the State Election Commission.

32B. Lodging of account of election expenses.--Every contesting candidate at an election of President shall, within thirty days from the date of election of the returned candidate lodge with the officer notified by the State Election Commission as account of his election expenses which shall be a true copy of the 4 account kept by him or by his election agent u/s 32A.

32C. Disqualification for failure to lodge account of election expenses.--If the State Election Commission is satisfied that a person-

(a) has failed to lodge an account of election expenses within the time and in the manner required by or under this Act; and

(b) has no good reason or justification for the failure, the State Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for being chosen as, and for being a (Councillor or President) of the Municipal Council or Nagar Panchayat, as the case may be, for a period (not exceeding) five years from the date of the order).

32D. Removal or reduction of period of disqualification.--The State Election Commission, on making an application within 30 days from the date of publication of the order, passed under clause (b) of section 32C in the Official Gazette may for reasons to be recorded in writing remove any disqualification or reduce the period of any such disqualification.

9. Learned counsel for the appellant has drawn attention of this Court towards the issues No. 1 and 2 framed by learned trial Court which are reproduced below along with their finding:

10. Learned counsel for the petitioner submitted that learned trial Court was required to frame specific issue regarding the excessive expenditure incurred in printing the alleged calenders and posters and there was no specific issue regarding printing of materials Ex. P-25 to P-27 and its distribution. It is further submitted that the statement of accounts submitted by respondent shows payment of Rs. 1900/- for posters on 18.12.2009 by voucher No. 24.

11. Learned counsel for the petitioner has drawn attention of this Court towards the statement of respondent No. 7 Chandra Goyal (PW 1) who in her cross-examination in para 9 has admitted that Ex. P-26 has been printed at Datia but she cannot state who has given the expenses and how many posters and calenders were printed she does not know. She further admitted that how many pamphlets (Ex. P-27) were printed and how much expenditure has been incurred in their printing she does not know. She has further admitted that she has no knowledge about expenditure which was in excess of account Ex. P-1 incurred in printing Ex. P-26. She has further admitted in para 14 that she has not collected any particulars from Roily Printers, Datia. Further she has not collected any information regarding expenditure incurred in printing Ex. P-26 from Roily Printers.

12. Learned counsel for the petitioner has submitted that there was no evidence before the learned trial Court regarding expenditure incurred in printing Ex. P-25 to 27. Further there was no evidence regarding confirmation that said material was printed at Roily Printers. Respondent No. 7 has not made any inquiry from Roily Printers regarding number of posters and calenders and expenditure incurred for their printing. Further learned trial Court has made imaginary calculation of Rs. 4,000/- without any evidence in this regard, therefore, the findings of learned trial Court are perverse.

13. Learned counsel for the petitioner has further submitted that learned trial Court was required to frame specific issue regarding alleged corrupt practice by not mentioning the expenditure incurred in printing the calenders and posters Ex. P-25 to P-27. Further the respondent No. 7 has come forward with alleged corrupt practice, therefore, the burden of proving was on respondent No. 7 to produce the prima facie evidence regarding corrupt practice but respondent No. 7 herself has admitted that she has not verified the number of posters/calenders printed at Roily Printers and alleged expenditure on them. Even number of

posters printed has not been verified by the respondent No. 7. Learned trial Court is not justified in law in shifting the burden of proof on petitioner regarding production of evidence from Rolly Printers about expenditure incurred by petitioner herself and by taking adverse assumption against the petitioner as mentioned in para 44 of the impugned judgment. It is further submitted by learned counsel for the petitioner that for corrupt practice, specific evidence is necessary and issue regarding corrupt practice cannot be decided on the basis of assumptions and preponderance of evidence. Learned counsel for the petitioner has cited the judgment of this Court in the matter of Ashok Bajhal Vs. Mohd. Yakub and Others, , in which it has been held that where the Municipal election has been challenged on the ground of corrupt practice, petition must contain concise statement of material facts with details and particulars of each corrupt practice. Allegations or evidence cannot be vague or flimsy. Further the consent of returned candidate in issuing particular pamphlet or circular must be established by specific pleading.

14. Learned counsel for the petitioner submitted with regard to allegation of corrupt practice that specific issues must have been framed by the learned trial Court. In this regard he has cited the judgment of this Court in the matter of Mangilal Laluji Dhakad Vs. Sashikant Shriniwas, , in which it has been held that for consideration of petition challenging the election under Municipalities Act, the trial Court should have frame separate issues on all the corrupt practices an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices. In cases of election and also in cases of corrupt practice alleged against a returned candidate, it is necessary that the allegations should be specific and evidence on each allegation should be proved specifically. Therefore, framing of necessary issue was necessary ingredient without which neither a proper allegation can be established nor evidence can be led and looked into.

15. Learned counsel for the petitioner has further submitted that considering the similar provisions contained in Representation of People Act, 1951, Hon"ble apex Court has held in the matter of Tukaram S. Dighole Vs. Manikrao Shivaji Kokate, , that a charge of corrupt practice is equated with a criminal charge and therefore, standard of proof therefore would not be preponderance of probabilities as in a civil action but proof beyond reasonable doubt as in a criminal trial. It is further held that if a stringent test of proof is not applied, a serious prejudice is likely to be caused to successful candidate whose election would not only be set aside, but he may also incur disqualification to contest an election for a certain period, adversely affecting his political career. Thus, a heavy onus lies on election petitioner to prove charge of corrupt practice in the same way as a criminal charge is proved.

16. Learned counsel for the petitioner has also drawn attention of this Court towards another judgment of Hon"ble apex Court in the matter of Kamalnath Vs. Sudesh Verma, , in which considering the provisions of sections 123(6) and 77 of

Representation of People Act, 1951, it has been held that for allegation of exceeding prescribed limit for expenditure by candidate, averment only stating duration of use of helicopter and its normal rate of hire, no factual averment of candidate either incurring or authorising anyone to incur the expense on undertaking to reimburse cannot be held to be an assertion of material fact.

17. Learned counsel for the petitioner has also cited the judgment of this Court in the matter of Dilip Parasram Vs. Kamal Nath and Others, , in which it has been held that under sections 77 and 123(6) of the Representation of People Act, 1951, if the allegation not substantiated by cogent evidence meeting standard of proof required, case of corrupt practice u/s 123(6) is not made out.

18. Learned counsel for the respondent No. 7 on the other hand submitted that neither specific issue is required to prove the allegation of corrupt practice nor strict proof is necessary as in the criminal trial. In this regard he has cited the judgment of Hon"ble apex Court in the matter of Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Others, , in which while considering the question of maintainability/preliminary objections in election petition it has been held that the Courts should avoid hypertechnical approach regarding maintainability of election petition. Further the Courts have to guard against such attempts. The Courts are therefore, duty bound to examine allegations of irregularities or illegalities in election process or corrupt practice(s) whenever the same are raised in an election petition within framework of Representation of People Act, 1951 without being unduly hypertechnical in their approach and without being oblivious of ground realities.

19. Learned counsel for the respondent No. 7 has also cited the judgment of this Court in the matter of Natthulal Vs. Shakuntalabai and Another, , in which it has been held that the party having the best evidence in his power and possession, is duty bound to produce it in the Court in order to resolve the controversy and that party should not place reliance on the abstract doctrine of onus of proof that it was not his duty to produce it.

20. Drawing attention of this Court towards above judgment learned counsel for the respondent No. 7 has submitted that the burden of proof was on the petitioner that the calendars and posters were printed on her direction or within her knowledge. But it was respondent No. 7 who has come forward with the allegation of corrupt practice against the petitioner (winning candidate) therefore, primary duty was of respondent No. 7 who was petitioner before the trial Court to establish that the calendars and posters were, got printed by petitioner or her agent or by any other person with her consent or direction. Respondent No. 7 in clear words has admitted that she has not gone to inquire about printing of calendars and posters by Roily Printers. Even she has not inquired about the number of calendars and posters printed, therefore, she cannot level allegation that calendars and posters Ex. P-25 to P-27 have been got printed by petitioner and payment of same has been made but not shown in the statement of expenditure Ex. P-1.

21. In the absence of any evidence regarding number of calendars and posters printed or cost of their printing and further in absence of any evidence that calendars and posters were got printed by petitioner or on her direction, the trial Court is not justified in calculating the amount of expenditure in the absence of any cogent evidence on behalf of respondent No. 7 and further in the absence of specific issue in this regard, the finding against the petitioner is perverse and not maintainable because in the absence of specific allegation and specific issue negative burden of proof cannot be saddled on the shoulder of petitioner. Further the judgment of Hon''ble apex Court cited by learned counsel for the respondent in the matter of Ponnala Lakshmiah (supra), relate to dismissal of petition at preliminary stage, therefore, cannot be applied to the findings of Court on merits, therefore, both the judgment cited by learned counsel for the respondent No. 7 have no application to the present case. On the other hand the judgment passed by this Court in the matter of Natthulal (supra), is applicable in favour of petitioner.

22. Learned counsel for the respondent No. 7 has submitted that the posters alleged to have been printed by petitioner mention an appeal on behalf of husband of petitioner who was her agent also for casting votes in favour of petitioner, therefore, it shall be presumed that posters were got printed by petitioner. In this regard he has cited the judgment of Hon''ble apex Court in the matter of P.C. Thomas Vs. P.M. Ismail and Others, , in which while considering the question of pleading proof regarding corrupt practice in election, it has been held that charge of corrupt practice is to be equated with criminal charge and proof required would be proof beyond reasonable doubt if after balancing evidence adduced there still remains a little doubt in proving the charge, its benefit must go to returned candidate. However, while insisting upon proof beyond reasonable doubt, Courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of electoral process.

23. In the present case, the respondent No. 7 in her election petition has not come forward with a specific allegation and specific evidence that posters and calendars Ex. P-25 to P-27 have been got printed by the petitioner. She has not even got inquired from the Roily Printers that these documents were got printed by petitioner or her agent leaving aside their number and cost, therefore, this judgment is also of not any help to the respondent No. 7 because merely by making allegation of corrupt practice and without any inquiry from the concerned persons, she cannot avail the benefit of judgment cited above because the purity of election process is to be maintained. But in the name of maintaining purity of election process, an election of winning candidate cannot be set aside merely on the ground of allegation of corrupt practice without any inquiry by the respondent No. 7. Further, the burden of proof lies on respondent No. 7 who has challenged the election process on the allegation of corrupt practice in which the

respondent No. 7 has failed as she has admitted that she has not inquired about the person who got the posters/calendars printed, their quality and cost. Learned trial Court has gone one step ahead by imaginary calculating the number of posters and calendars and cost thereof without any proof that the appeal on behalf of husband of elected candidate who was also her agent was published by her or not. Merely an appeal in the name of husband for casting vote to his wife cannot be taken as proof of their publication by husband himself or candidate particularly when it is permissible Under the law that other persons can also publish the posters for election without knowledge of the candidate.

24. Learned counsel for the respondent No. 7 has further raised an objection that under revisional jurisdiction this Court cannot consider findings of learned trial Court based on the evidence. In this regard he has cited the judgment of this Court in the matter of Indrajeet Singh Vs. Jagdish Prasad and Others, , in which it has been held that scope of revision is limited to the extent to see the legality of decision being not contrary to law. Where the finding recorded by the Court below are based on facts and circumstances, it is not contrary to law, hence, revision dismissed.

25. In the present case, framing of specific issue for every allegation of corrupt practice was necessary. In issue No. 1 framed by learned trial Court, there is no specific issue for each corrupt practice and learned trial Court overlooking the evidence has given finding regarding number of posters and cost thereof on the imaginary ground. Even the respondent No. 7, who was petitioner before it had took no chance to get verified the Roily Printers about printing of posters and payment of amount by winning candidate or her agent. Such findings is not maintainable even according to judgment cited by learned counsel for respondent No. 7 in the matter of P.C. Thomas (supra).

26. Learned counsel for the respondent No. 7 has also cited the judgment of Hon"ble apex Court in the matter of Kumara Nand Vs. Brijmohan Lal Sharma, , in which it has been held that mere fact that statement is bad statement not accompanied by particulars as to time, place etc. does not necessarily mean that it is expression of opinion and not statement of fact.

27. In the present case, prima facie, the burden of proof was on respondent No. 7 to prove that documents Ex. P-25 to P-27 have been got printed at the instance of elected candidate, then only the burden should have been shifted on elected candidate to prove that the posters and calendars were printed without her consent or without her knowledge, therefore, this judgment has no application to the facts and circumstances of the present case.

28. Learned counsel for the respondent No. 7 has also cited the judgment of Hon"ble apex Court in the matter of Anil Rishi Vs. Gurbaksh Singh, , in which it has been held that a distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the

question is which party is to begin. But simultaneously, it has also been held that ordinarily burden of proving a fact rests on party which substantially asserts the affirmative of the issue, therefore, this judgment is also not applicable to the respondent's case.

29. Learned counsel for the respondent has also cited the judgment of Hon'ble apex Court in the matter of T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, it has been held as under:

26. The task before an Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election Courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election. Insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law.

30. The aforesaid judgment does not mean that by filing petition on ground of corrupt practice, the Court is duty bound to give judgment in her favour by holding that corrupt practice has been proved.

31. Learned counsel for the respondent No. 7 has also cited the judgment of this Court in the matter of Parasmal Saklecha Vs. Himat Kothari and Others, , in which it has been held that where the election is challenged on ground of corrupt practice, the allegation should be pleaded clearly and with full particulars, especially the ground of corrupt practices cannot be permitted to be tried based on deficient pleadings.

32. In the present case, learned counsel for the petitioner has also cited the judgment of this Court in the matter of Alok Vs. Shri Motilal Vora, , in which it has been held that allegation of exceeding ceiling limit of expenses based on surmises or on incomplete pleadings cannot be inquired into. Therefore, learned trial Court is not justified in law in deciding issue No. 1 against the petitioner by considering the facts which are neither pleaded specifically nor proved specifically. Further the findings regarding expenditure and cost of printing of documents Ex. P-25 to P-27 are based upon the imagination and in the absence of specific allegation regarding cost of one poster, such findings are perverse and they are given above the jurisdiction vested in the Court. Therefore, impugned order dated 29.5.2012 is set aside and the election of the petitioner to the post of President, Nagar Panchayat, Karera, District Shivpuri is declared valid as the respondent No. 7 has failed to prove any corrupt practice by the petitioner.