
(2000) 10 BOM CK 0053

In the Bombay High Court

Case No : Election Petition No. 7 of 1999

Shantaram Sitaram Chavan

APPELLANT

Vs

Khan Mohammed Araf Naseem

RESPONDENT

Date of Decision : 16-10-2000

Acts Referred:

Representation of the People Act, 1951 — Section 123(3), 123(4), 86

Citation : (2001) 3 ALLMR 8 : (2001) 2 BomCR 557

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

Bench : Single Bench

Advocate : B.D. Joshi, for the Appellant; Bipin Joshi, for the Respondent

Final Decision : Dismissed

Judgement

T.K. Chandrashekhar Das, J.—In this petition, the petitioner challenges the election of the respondent, who has been declared elected in the Legislative Assembly Constituency No. 49 in Kurla. The election was held to the Maharashtra Legislative Assembly on 11-9-1999, counting of votes were held on 6-10-1999 and the result was declared on the same day. The petitioner contested the election as a candidate of Shivsena and the respondent contested the election as a candidate of Indian National Congress. The respondent secured 87,066 votes and the petitioner secured 64,045 votes whereby the respondent was declared elected with a margin of 23,021 votes.

2. The election of the respondent was challenged by the petitioner on the ground of corrupt practices falling under sections 123(3) and 123(4) of the Representation of People Act, 1951.

3. The respondent filed written statement denying the allegations contained in the petition. On the basis of the pleadings, this Court has framed the following issues?

i) Whether the petition is required to be summarily dismissed at the threshold for non-compliance of mandatory provisions of sections 81, 83 and 86 of R.P. Act,

1951?

ii) Whether the petition discloses any cause of action on the basis of pleadings and on averments made in the petition and whether the petition is required to be summarily dismissed under Order VII, Rule 11 of C.P.C. in absence of material facts and or material particulars required for constituting the alleged corrupt practice under sections 123(3) and 123(4) of R.P. Act, 1951?

iii) Whether the petition is required to be summarily dismissed at the threshold for non-disclosure of material facts and or material particulars of as regards the alleged corrupt practice averred in the petition?

iv) Whether the petition is required to be summarily dismissed for non-supply to the respondent copies of documents which forms integral part of petition and whether the copy of the petition, as supplied to the respondent, is incomplete?

v) Whether the concise statement of facts as filed by the petitioner is in accordance with the forms and rules under the R.P. Act, 1951?

vi) Whether the petitioner proves that on 29th August, 1999 Shri Balasaheb Mhatre delivered an election speech with the consent of the returned candidate at Varsha Nagar, Ambedkar Society, near proposed water tank, Vikhroli Park Site, Mumbai at around 8 p.m.?

vii) Whether the petitioner proves that during the said speech with the consent of the respondent, Shri Balasaheb Mhatre made statement of fact which were false and which were believed by him to be false and which were not believed by him to be true and that the said statement of facts related to the personal character and conduct of the petitioner at the election?

viii) Whether the petitioner proves that on 1st September, 1999 Shri Balasaheb Mhatre delivered an election speech with the consent of the returned candidate at Anandgadh Naka, Vikhroli Park Site, Mumbai at around 8 p.m.?

ix) Whether the petitioner proves that during the said speech with the consent of the respondent Shri Balasaheb Mhatre made statement of fact which were false and which were believed by him, to be false and which were not believed by him to be true and that the said statement of facts related to the personal character and conduct of the petitioner at the election?

x) Whether the petitioner proves that Shri Balasaheb Mhatre acted as an agent and supporter of the respondent and with the consent of the respondent have committed corrupt practice under the provisions of section 123(4) of the Representation of People Act, 1951?

xi) Whether the petitioner proves that due to the corrupt practice committed by Shri Balasaheb Mhatre with the consent of the respondent, the result of the election, in question in so far as it concerns the respondent has been materially affected?

xii) Whether the petitioner proves that on 10th September, 1999 at about 1.30 p.m. calls were given from all the masjids in the said constituency appealing the muslim voters to vote for the respondent since he was muslim?

xiii) Whether the petitioner proves that the respondent has committed a corrupt practice u/s 123(3) of the Representation of People Act, 1951?

xiv) Whether the petitioner proves that due to the said corrupt practice committed by the agent of the respondent with the consent of the respondent, the result of the election in question in so far as it concerns the respondent has been materially affected?

xv) Whether the petitioner proves that the respondent through his agents with his consent committed corrupt practice within the meaning of section 123(4) and 123(3) of the Representation of People Act, 1951 as set out in paras 6, 7 and 11 of the Election Petition?

4. The respondent also filed a Chamber Summons Bearing No. 289/2000 wherein the respondent has prayed to dismiss the election petition at the threshold without trial u/s 86 of the Representation of the Peoples Act. The Chamber Summons and the written statement, issues have been considered and the following order is passed?

"The issue Nos. (i) to (v) are treated as preliminary issues and posted for hearing on 26-6-2000 at 2.45 p.m."

5. The petitioner alleged corrupt practices coming u/s 123(4) of the Representation of the Peoples Act as stated in paragraphs 3 to 10 and he alleges corrupt practices u/s 123(3) in para 11 of the petition.

6. The corrupt practices coming u/s 123(4) can be treated in short thus?

a) Petitioner alleges that one Balasaheb Mhatre who is the local leader of the Indian National Congress is an agent and supporter and main campaigner of the respondent. The aforesaid Balasaheb Mhatre delivered election speeches which contained false and malicious statement of facts which were believed to be false and not believed to be true by the respondent and that statement of facts related to the personal character and conduct of the petitioner. He alleges that those allegations have materially affected the election of the respondent.

b) He further alleges that on 20-8-1999 Balasaheb Mhatre delivered an election speech with the consent of the respondent at Varsha Nagar, Ambedkar Society near proposed water tank, Vikhroli Park Site in the premises of Municipal Ward No. 202 at around 8 p.m. While delivering the speech the aforesaid Mhatre as an agent and supporter of the respondent had contended in Exh. B and English translation of which is at Exh. B-1. In Exh. B-1 he has alleged that some of the residents of the area are given rooms in the Municipal Corporation School contrary to the policy of the Municipal Corporation and that if any school is closed down then the said premises should be given to some educational institution for

school. Mr. Mhatre has stated that he had made an application on the basis of that policy but the petitioner who is a sitting M.L.A. has involved in corrupt practices and given through him three rooms for one person. It is also alleged in the speech that the petitioner was demanding money. It is also alleged that the M.L.A. moving around naked on the road, and he does not have clothes to put on, even the people have taken out the photograph while he was moving around naked. Mr. Mhatre has appealed the people that if the people again elect the petitioner as a M.L.A., he would enter his house and he would not spare even his mother and sister by outraging their modesty. Mhatre calculated the petitioner as a man of such character and he has taken up the contract during five years of the housing board. Mhatre alleged that his contract is for five lakhs and he spent only one lakh and remaining amount will be in his pocket. He also alleged that the petitioner gets "Hapta" from Municipal offices.

c) The petitioner again alleges that another speech was made by the aforesaid Mhatre on 1-9-1999 at Anandgad Naka Park Site, Vikhroli, in the premises of Municipal Ward No. 200, 201 and 202 at 8 p.m. in the aforesaid constituency. The petitioner alleges that the speech delivered by Balasaheb Mhatre was in the presence of respondent and with the consent of respondent and the speech was attended by large number of persons in the said area and the petitioner produced the extract of the speech in Marathi which is produced as Exh. C and the English translation is at Exh. C-1. In that speech, Mhatre has alleged that the representative of the people is romping on the road by consuming liquor and create nuisance in the public street. He also in his public speech stated that the petitioner is trying to demolish Sandesh Vidyalyaya wherein 6000 students are studying and trying to spoil the career of the students. Mhatre also levelled allegations of corruption stating that petitioner has collected property by corrupt means by giving contract to his son-in-law and near relatives.

d) The petitioner also alleged in para 11 that in the constituency there are 90,000 Muslims out of them 34,000 Muslims voters had casted their votes. He says that there are about 40 mosques in the said constituency and Muslim persons regularly attend the Friday Namaz in these mosques. He alleged that on 10-9-1999 at about 1.30 p.m. calls were given by the Chief of each Masjid appealing the Muslims voters to vote for the respondent since he is a Muslim. It is also alleged that a loud speaker announcement had made appealing the Muslim voters to remember 1992 riots/violence in Mumbai and, therefore, they should vote Muslim candidate and all Muslims should put their stamp on the symbol of respondent i.e. Palm of the Hand. It is also alleged that this appeal was given by the consent of the respondent and the respondent has admitted before his volunteers that he had arranged to give call from masjid appealing the Muslim voters to vote for him since he was a Muslim candidate.

7. These are, in short, the allegations of corrupt practices levelled against the respondent by the petitioner coming u/s 123(3) and 123(4) of the Representation of People Act.

8. The learned Counsel for the respondent has contended that the petitioner has not properly pleaded the corrupt practices as envisaged u/s 123 of the Representation of People Act. The allegations are vague and general. The allegations made about the speech by Mhatre are also the general allegations and that Mhatre as an agent and supporter of respondent and no materials have been produced nor any relevant allegations have been made in the petition that Mhatre is an agent or has made a speech with the consent of the petitioner. The Counsel for the respondent submits that Exh. B and C claimed to be the full speech of Mhatre and only the extract of the alleged speech has been produced along with the election petition. Moreover even though the petitioner claims that the Election Commissioner has recorded the speech in video and police has also taken the video tape, no such video tape has been produced along with the election petition nor such video tape has been supplied to the respondent. The petitioner did not disclose as to the source from which he got extracts of the speech which was recorded in video. The Counsel for the respondent submits that the allegation contained in the election petition alleging corrupt practice is not complete and no cause of action arises to maintain the election petition out of the pleadings stated therein.

9. I find substance in the argument of the learned Counsel for the respondent. It is important to note that nowhere in the petition it is stated how the petitioner came to know of the speech or whether it is obtained from any of his supporters or whether he has obtained the copy of the video tape alleged to have been taken by the police or the election committee. This aspect has not been specifically pleaded in the petition. That is a material fact which the petitioner should have placed in the election petition. If the material facts are not supplied in the petition, it can be stated to be fatal on the ground that no cause of action has been disclosed in the petition. Therefore, it is liable to be dismissed in view of the decisions of the Supreme Court on this point. In the context of this contention, I have to refer to certain decisions of the Supreme Court cited by the parties.

10. In Kumara Nand Vs. Brijmohan Lal Sharma, , the Supreme Court has laid down the factors to be proved in an election petition which is founded on corrupt practices u/s 123(4) of the Representation of the People Act, 1951. In para 17, it is observed thus:

"(17). This takes us to the next point, namely, that it should have been proved that Avinash Chander who recited the poem at the meeting believed the statement to be false or did not believe it to be true and that on this point Avinash Chander was not even questioned though he appeared as a witness. The High Court has held that the belief of Avinash Chander is immaterial, and that it is the belief of the appellant that matters. We are of opinion that this view of the High Court is correct.

Section 123(4) runs thus :-

"(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

The sub-section requires; (i) publication of any statement of fact by a candidate (ii) that fact is false, (iii) the candidate believes it to be false or does not believe it to be true, (iv) the statement is in relation to the personal character or conduct of another candidate; and (v) the said statement is one being reasonably calculated to prejudice the prospects of the other candidate's election."

In our case, except for a bald statement that Mr. Balasaheb Mhatre as agent and supporter of the respondent and that in the meeting the respondent was present and appreciated the speech, no material to indicate the ingredients pointed out by the Supreme Court has been pleaded in the petition. The petitioner even did not plead as to how he procured the statement of facts and allegations contained in the speech. He has only stated that the Police and Election Commission had recorded in video. Moreover, only an extract of the speech is provided by the petitioner in Exhibits B and C. In such situation, news paper report or video cassette should have been produced by the petitioner. This can be shown as a material defect in the election petition. The allegation is general, vague and lacks specificity. It can be seen like a theoretical unimaginative essay without legal basement. It is not enough that some material is supplied and some of it can be supplied at the time of trial. The Supreme Court had succinctly laid the essential material required to be pleaded in an election petition based on corrupt practice.

11. In V.S. Achuthanandan Vs. P.J. Francis and Another, , the Supreme Court observed thus?

"It is, therefore, evident that material facts are such primary facts which just be proved at the trial by a party to establish existence of a cause of action. Whether in an election petition a particular fact is a material fact or not, and as such, required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon, and in the light of the special circumstances of the case. In Shri Udhav Singh Vs. Madhav Rao Scindia, , the Court held: (S.C.C. p. 523, paras 42-43).

"In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are "material facts" which must be pleaded, and failure to plead even a single material fact" amounts to disobedience of the mandate of section 83(1)(a).

"Particulars", on the other hand, are "the details of the case set up by the party". "Material particulars" within the contemplation of Clause (b) of section 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance

with the requirements of Clause (a). "Particulars" serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative."

On a close examination of the pleadings, I fail to see the pleadings of the petitioner satisfying the parameter laid down by the Supreme Court. The Election Petition contains no essential facts which could clothe the petition with a cause of action and which will call for an answer from the returned candidate. The latest decision of the Supreme Court in *Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu*, , has catalogued as to what are the material facts to be pleaded without which an Election Petition is liable to be dismissed at the threshold. In para 24, the Supreme Court held thus :---

"24. It will be thus seen that an election petition is based on rights, which are purely the creature of statute, and if the statute renders and particular requirement mandatory, the Court cannot exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the Court has to find out whether these averments disclose a cause of action or a triable issue as such. Sections 31, 83(1)(c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme. When so read if the Court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition."

12. In reply to this argument the learned Counsel for the petitioner submits that all those materials, if anything lacking, can be supplied at the time of trial and he further submitted that all these defects, if at all exist, can be cured at the time of trial. To substantiate his contention he also cited the case of *V. Narayanaswamy v. C.P. Thirunavukkarasu* (supra). It is true that in the said case it has been held that the material particulars can be cured by amendment as these defects are curable. I do not agree to the submission made by the learned Counsel for the petitioner that what are lacking in the petition are the material particulars. I find that this is a fatal defect which touches upon the very cause of the case. In the absence of supply of the source of information pleaded clearly in the pleadings, it cannot be said that it is only a material particular. If the petitioner wants to reply upon the speech made by Mhatre it is incumbent upon the petitioner to plead on what occasion and from whom he came to know about the speech made by Mhatre and whether Mhatre had made the speech at the instance of the respondent, etc.

13. The Counsel for the respondent also pointed out another cardinal defect in the verification of pleadings and affidavit. In the verification of pleadings he stated that the allegation in para 1 to 10 and 12 to 15 are true to his knowledge whereas in the affidavit only reference was made to the allegation contained in para 4, 5, 6, 9 and 10. Therefore it is clear that the verification and affidavit are in variance. In short there cannot be a situation in certain paragraphs of verification where knowledge is attributed to the same paragraph in the affidavit

wherein information has been attributed. Therefore, it is clear that variance in the verification and the affidavit is fatal to the election petition as held in Narayanaswamy's case (supra), in para 24 again which reads as follows :---

"A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture of the Court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practices must fail. Where several paragraphs of the election petition alleging corrupt practices remain un-affirmed under the verification clause as well as the affidavit, the un-sworn allegations could have no legal existence and the Court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the Court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in section 83 of the Act on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner 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."

With this defect also the Election Petition is liable to be dismissed at the threshold.

14. Apart from the reasons stated above, I find another reason to dismiss the Election Petition. Section 123(4) deals with corrupt practice of a publication by a candidate. Publication normally is understood as to those materials which are published by writing or painting or picturing it. It is doubtful that a speech made

by Mr. Mhatre amounts to publication which includes the petitioner's allegation that the speech was reported in certain newspapers or video cassettes containing such speech has been played. But no newspapers or video cassettes were produced before the Court. Looking at the different words used in sections 123(3), 123(3-A), 123(3-B) and 124(4), such as "appeal by", "promotion of", "propagation of" and "publication by" respectively, would sufficiently indicate that those acts of the returned candidate or his agent are corrupt practices. Reading in the context of those phrases used in the Act, a speech made in a meeting without being printed or published in media, or video being recorded and played, it cannot be said to be a publication. On the other hand, "speech" can very well come under the word, "appeal". Therefore, unless there is a clear and unambiguous pleading about publication, mere allegation of speech cannot be said to be a corrupt practice falling u/s 123(4). With this ground alone, the Election Petition is liable to be dismissed.

15. Another allegation made in the petition is with regard to the corrupt practice falling u/s 123(3) of the Representation of the People Act. This is stated in para 11 of the petition. The allegation contained in paragraph 11 is that there are 90,000 Muslim voters in the constituency and out of them 34,000 Muslim voters casted their votes during the election. It is alleged that there are 40 mosques in the constituency and these mosques are fitted with loud speakers attached on the top of the mosque giving azans. The petitioner alleged in the petition that on 10-9-1999 at about 1.30 p.m., i.e. before one day of the polling the speakers fitted outside the Masjid for giving azans calls were given by the Chief of each Masjid appealing the Muslim voters from the said loudspeakers to remember the 1992 riots in Mumbai and, therefore, they should vote for Muslim candidate who is none other than the respondent. This pleading alleging corrupt practices as regards the appeal made on the ground of religion, also does not contain any material facts. The pleadings are general and vague and they did not contain even the names of the people who are alleged to have made that call. Another important aspect is that it is practicably impossible to simultaneously give a call by one person through different loudspeakers fitted in 40 mosques situated in different parts of the city. So this allegation suffers from the lack of specificity and, therefore, those pleading also do not afford any cause of action for the petitioner. Therefore, in the circumstances, I find that the allegation of corrupt practices as envisaged u/s 123(3) would also be assailed of not being properly pleaded. I hold, therefore, for the foregoing reasons, the objection raised by the respondent with regard to the maintainability of the petition raised in the aforesaid issue has to be held in favour of the respondent.

16. In the result, the election petition is liable to be dismissed. I do so, with costs. Costs quantified at Rs. 2,000/- (Rupees two thousand only).

17. Parties to act on the ordinary copy of this Order issued by P.A. and authenticated by the Associate of this Court.