
(2010) 07 BOM CK 0184

In the Bombay High Court

Case No : Application In Election Petition No. 4 Of 2010 In Election Petition No. 4 Of 2007

Shri Pradeep Janardhan Khaunte

APPELLANT

Vs

Dayanand Narvekar and 12 others

RESPONDENT

Date of Decision : 27-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17
Evidence Act, 1872 — Section 154(1), 165
Representation of the People Act, 1951 — Section 86

Citation : (2010) 07 BOM CK 0184

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : S.M. Walawaikar, for the Appellant; S.G. Dessai and Shri A. gaonkar, Advocate for Respondent No.1, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard. By application dated 11-6-2010, the applicant seeks recall of PW2/Myra Correia with a view to confront her with the contents of the C.D - Exh.15. The applicant has filed the present application after the closure of the evidence of the Respondent.

2. PW2/Myra Correia is the President of Aldona Block Congress(I) Committee. Initially, she was not cited as a witness. On 20-3-2009, the Respondent made it clear that he was not in possession of the CD which was prepared by Aldona Block Congress(I) Committee. On 3-4-2009, the applicant filed an application for production of the said CD which according to the applicant was then in possession of Pratima Narvekar. After some adjournments, the said Pratima Narvekar appeared before this Court on 24-4-2009 and informed that it is the said PW2/Myra Correia who was the President of Aldona Block Congress(I) Committee. Then the said PW2/Myra Correia was summoned and she appeared before this Court on 26-6-2009 and produced the CD -Exh.15. Thereafter, the

applicant filed additional list of witnesses on 9-7-2009. Applicant's evidence began on 24-7-2009 and was completed on 30-7-2009. PW2/Myra Correia was then summoned as per the additional list and she was examined on 20-8-2009. Thereafter, further evidence of the applicant and that of the Respondent continued from time to time and the Respondent's evidence was completed on 30-4-2010.

3. When the deposition of PW2/Myra Correia was recorded on 20-8-2009 the said Myra Correia had stated before the Court that the said CD -Exh.15 was produced by the said Aldona Block Congress(I) Committee and that she along with other committee members had contacted Mr. Lad of Audio Vision to prepare the said CD - Exh.15 which was one of the hundred CDs given to her. In her examination-in-chief she had stated that she had not seen the actual videographing of the said CD. She had further stated that in the CD Mr. Narvekar is not seen making an effort to vote for him. Likewise, she had stated that workers are not seen distributing T shirts and caps. At that stage, learned Counsel on behalf of the applicant wanted to confront the applicant's witness PW2/Myra Correia with the said CD but as the applicant was ill equipped to show the CD to the witness, it was observed by this Court that "petitioner's counsel is at liberty to take a clip and show this position, and in case he satisfies the Court the witness can be recalled".

4. No permission of the Court was taken to confront the witness. It is in the light of that observation of this Court that the present application for recall has been filed. On behalf of the petitioner/applicant it is stated that the Respondent who was examined had disowned the possession of the said CD, and that he had not even received the CD in question or that he had viewed it, statements which according to the applicant are false statements.

5. According to the applicant, further examination of PW2/Myra Correia, as she has made contradictory statements, is very much essential to bring out the whole truth of the matter in controversy to enable this Court to arrive at a just decision and that no prejudice would be caused to the Respondent, if PW2/Myra Correia, is recalled and allowed to be further examined by the applicant. In support of the application, four clips or, photographs from the said CD have been produced, and according to Shri Walawaikar, the learned Counsel appearing on behalf of the applicant the second photograph shows Mr. Narvekar making an appeal to vote for him which is contrary to what PW2/Myra Correia stated, and the fourth photograph shows T shirts being distributed in bundles from a mini bus. To support his submission, Shri Walawaikar, learned Counsel, has placed reliance on the case of Jodhpur Gums and Chemicals Pvt. Ltd. Vs. Punjab National Bank and Others, and has further submitted that the said PW2/ Myra Correia can be recalled under the provisions of Order 18, Rule 17, C.P.C. In Jodhpur Gums & Cheemicals Pvt. Ltd. v. Punjab National Bank and others(supra) it has been, inter alia, stated that Order 18, Rule 17 authorizes a Court to recall a witness but for a purpose of putting any questions which the Court itself might

think necessary but it does not authorize a party to have a witness, whom he has already cross examined, recalled for the purpose of further cross examination.

6. On the other hand, Shri Dessai, the learned Counsel on behalf of the Respondent has submitted that the fourth photograph does not at all show the distribution of the T shirts and in that, Shri Dessai may be right as the said photograph does not clearly show the distribution of the T shirts.

7. Next, the learned Senior Counsel submits that the CD reflects the achievements of the Respondent for over 25 years and even in case the second photograph does show that the Respondent is pleading for votes, it could be that it was taken at the earlier election. Shri Dessai, learned Senior Counsel further submits that no permission of the Court was taken to contradict PW2/ Myra Correia with the said CD and it would be too late in the day to seek such a permission at this stage. Next, Shri Dessai has referred to Section 165 of the Evidence Act, 1872 and has submitted that power to recall is that of the Court.

8. Be that as it may, the applicant seems to have forgotten that PW2/Myra Correia is the applicant's witness though she is the President of Aldona Block Congress(I) Committee to whom the Respondent also belongs. The applicant with a view to confront her with the CD certainly required the permission of this Court in terms of the relevant provisions of the Evidence Act, 1872 particularly Section 154(1) of the Evidence Act which permission the applicant did not take at all on 20-8-2009, and any Order made on that day by this Court would naturally be subject to the provisions of the Evidence Act, 1872.

9. The Apex Court in Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate, has stated that though the provisions of Order 18, Rule 17, C.P.C. have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. The Apex Court has further held that the power to recall any witness under Order 18, Rule 17, C.P.C. can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, and is meant to clear any ambiguity. The power is to be sparingly used and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties.

10. The petitioner/applicant did examine PW2/Myra Correia as his witness after delaying the proceedings to a great extent. Since the applicant has not been able to confront the Respondent with the said CD, that the applicant has now thought of re-examining applicant's own witness the said PW2/Myra Correia, and in my view it is rather too late in the day to recall PW2/Myra Correia either to seek leave of the Court or to put to her questions in the nature of cross-examination. That ought to have been done at the appropriate stage. The application does not

fit in the law laid down by the Apex Court in Vadiraj Naggappa Vernekar v. Sharad Chand Prabhakar Gogate(supra).

11. Before concluding it has got to be noted that both the parties were time and again reminded of the mandate of Section 86, sub-sections (6) and (7) of the Representation of People's Act, 1951 but without much success. Considering the facts of the case, this is not a fit case to grant the application at this belated stage which will also further delay the proceedings of the election petition. Application dismissed.