
(2009) 08 BOM CK 0188

In the Bombay High Court

Case No : Application in Election Petition No. 2 of 2009

Shri Somnath Zuvarkar

APPELLANT

Vs

Shri Atanasio Monserrate

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Representation of the People Act, 1951 — Section 100(1)(c), 100(1)(d)(i), 100(1)(d)(ii)

Citation : (2009) 08 BOM CK 0188

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

Bench : Single Bench

Advocate : Ryan Menezes, for the Appellant; A.N.S. Nadkarni with Shri M.S. Sonak, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard. The Petitioner has filed an application for amendment of the election petition, to incorporate certain grounds, as set out in the application.

2. However, Shri Ryan Menezes, the learned Counsel on behalf of the Petitioner, submits that there is nothing new in the amendment and the petition is sought to be amended only by way of clarification. Shri Menezes, submits that the petition was filed only on one ground, namely u/s 100(1)(d)(i) of the R. P. Act, 1951(Act, for short) on account of improper acceptance of Respondent's nomination as a member of U.G.D.P. at 2.55 p.m. on 15-5-2007 being the last date of acceptance of nominations, which has materially affected the result of the election. Shri Menezes submits that there is no factual change sought to be brought about by the amendment and it is only to state facts more clearly or more elaborately, and in fact the amendment application does not change the pleadings of the petition or the grounds urged in support thereof. Learned Counsel submits that Grounds II-A, II-B, II-C, II-D and II-E of the proposed amendment correspond to what is stated by the Petitioner in paras 23, 24, 13 and 24, 17 and 24 and 20,

respectively, and there is nothing new in the amendment sought to be carried out inasmuch as the Petitioner will also not be required to lead any further evidence consequent to the proposed amendment.

3. On the other hand, Shri A. N. S. Nadkarni, the learned Senior Counsel appearing on behalf of the Respondent, points out to para 2 of the Petitioner's application and submits that the Petitioner is trying to take additional ground in terms of Section 100(1)(d)(ii) of the Act with a view to overcome Form B submitted by the Respondent showing the Respondent as a Member of U.G.D.P. and which in terms of para 13 of the Election Symbols(Reservation and Allotment) Order, 1968(Order, for short) has to be taken as conclusive proof that the Respondent was a candidate set up by that party. Learned Senior Counsel submits that the Petitioner, with a view to overcome the deeming provision of para 13 of the said Order is seeking the amendment of the petition. Learned Senior Counsel further submits that in case the amendment is allowed, the Respondent will be required to file additional written statement and will also be required to give further evidence, and, therefore the proposed amendment after the evidence was complete, ought not to be allowed. Learned Senior Counsel has placed reliance on the case of K.D. Deshmukh Vs. Amritlal Jayaswal, wherein the Apex Court has held that an amendment application filed long after the expiry of limitation of 45 days urging totally new ground cannot be allowed. Shri Nadkarni has also pointed out that in the trial of the petition, the Petitioner's attention was drawn to the objection taken by him before the Returning Officer, and the Petitioner had conceded that the name of the Respondent was shown in Form B as a primary Member of U.G.D.P. In rejoinder, Shri Menezes, submits that the Petitioner has clarified in the rejoinder filed by him, that the Petitioner is not taking any new ground but seeking the amendment only by way of clarification and the classifications sought to be added to the petition by proposed amendment squarely fall within the scope of the ground taken by the Petitioner.

4. The petition has been pending before this Court for some time. The petition was filed by the Petitioner, a defeated candidate at the election on the said petition, to incorporate certain grounds, as set out in the application. ground of improper acceptance of Respondent's nomination as a member of U.G.D.P. when the Respondent was a member of I.N.C. till 2.30 p.m. on that day when he submitted his resignation from I.N.C. which was accepted at 3.30 p.m. by the Speaker.

5. The Petitioner completed his evidence on 28-11-2008 and thereafter the case was fixed on 12-12-2008 for the Respondent's evidence. The Respondent did not lead evidence of his own, but completed his evidence on 6-2-2009. Thereafter, the petition was adjourned and on 8-4-2009 the Petitioner's Counsel chose to withdraw from the petition and on 17-4-2009 Shri Menezes, the present Counsel for the Petitioner put up his appearance on behalf of the Petitioner, and thereafter the present application came to be filed on or about 24-6-2009.

6. The application for amendment needs to be rejected for reasons more than

one:-

Firstly, on behalf of the Petitioner, no explanation has been put forward as to why the application could not be filed earlier. It is obvious that the Petitioner has not been diligent enough to file the application earlier. Therefore in terms of the proviso to Order 6, Rule 17, C.P.C, as amended, it needs to be rejected.

7. The Petitioner himself has stated in the application that the proposed amendment is to take additional ground which goes to the root of the matter. The only known method in law to change a plea taken or a stand taken by a party is by way of amendment and not by way of an explanation by filing rejoinder. If the Petitioner's case is that the Petitioner is taking additional ground, the same is clearly barred by limitation as stated by the Apex Court in *K. D. Deshmukh v. Amritlal Jayaswal*(supra). That was a case where the election petition was filed u/s 100(1)(c) on the ground that the nomination was improperly rejected and by amendment it was sought to be brought u/s 100(1)(d)(i) on the ground of improper acceptance. The Apex Court therefore held that application for amendment filed beyond 45 days of declaration of result seeking addition of a totally new ground could not be entertained. This is on Petitioner's own showing.

8. Assuming it is clarificatory as now contended, where is the question of clarifying the pleadings now, after both the parties have understood them and have led evidence in support of their respective cases?

9. In para II A of proposed amendment the Petitioner contends that it would have been physically impossible for the Respondent to become a member of the U.G.D.P. when its office is situated at one hours distance from Panaji. In para II B the Petitioner contends that there is nothing to establish that the Petitioner's name came to be entered in the rolls of U.G.D.P. in order to satisfy the mandatory requirement of para 13 of the Order, and, therefore it was clear that the Respondent's name was not entered in the roll of members of U.G.D.P. In para II C it is again contended that the Respondent has not produced any documentary evidence to show that the Respondent's name was borne on the rolls of U.G.D.P. Shri Nadkarni points out that the Petitioner in his objections Exh.5 had admitted that the Respondent was issued Form B by U.G.D.P. showing the Respondent as a primary member of the said party a fact which was also admitted by the Petitioner in cross-examination and had further admitted that the Petitioner had not taken objection on the ground that the Respondent was not a primary member of U.G.D.P. Amendment of pleadings are allowed if they are necessary for the purpose of determining the real questions in controversy between the parties. The parties have already led their evidence on contentions sought to be raised by way of amendment, and, therefore from whatever angle one looks at the application the same needs to be rejected.

10. Application is rejected. At the request of the Petitioner, three weeks are granted to enable him to approach the Apex Court.