

(2011) 04 UK CK 0006
In the Uttarakhand High Court
Case No : Election Petition No. 02 of 2008

Sri Manish Verma

APPELLANT

Vs

Bhagat Singh Koshiyari and six others

RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:

Representation of the People Act, 1951 — Section 100, 100(2), 123(2), 123A(1), 80
Uttar Pradesh State Legislature (Prevention of Disqualification) Act, 1971 — Section 3

Citation : (2011) 1 UD 491

Hon'ble Judges : Brahma Singh Verma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble B.S. Verma, J.

Civil Misc. Application No. 2161 of 2009

1. In this election petition, Mr. S.C.Srivastava, Advocate, Learned Counsel for the petitioner had not appeared for and on behalf of the election petitioner on a number of dates. this Court has observed vide order dated 30-12-2010 that "the court finds from a perusal of the ordersheet that repeated adjournments have been sought by the Learned Counsel for the petitioner. It is quite clear that the petitioner is not interested in the progress of the election petition." The election petition was adjourned to 1st week of March 2011.

2. On 4-3-2011, the election petition was taken up for hearing but on this date too, none was present for the election petitioner. Learned Counsel for the respondent no. 1 -objector was present.

3. Heard the arguments of Mr. B. D. Upadhyay, Advocate, Learned Counsel for the respondent no. 1 - objector on the preliminary objection u/s 86 of the Representation of Peoples Act 1951 (for short the Act).

4. This election petition was filed u/s 80A and 81 of the Act challenging the

election of the respondent no. 1 -returned candidate to the office of Member of Parliament (Rajya Sabha) mainly on the ground that the action of opposite parties is in contravention of Section 100(2) and 123(2) of the Act and in violation of model code of conduct; that the nomination papers were not properly filed and filled in and the authorization by the party was wrongly done; that the election is void as per provisions contained in Section 100 of the Act, the nomination papers of the respondent no. 1 being in clear violation of Section 13 of Allotment of Symbol order and that the issuance of Ordinance dated 19-11-2008 was done in expression violation of model code of conduct by the Election Commission of India.

5. This preliminary objection has been filed on the ground that the copy of the election petition supplied to the respondent no. 1 is not a true copy of the original election petition. Ground no.1 of the preliminary objection reads as under:-

1. That the copy of the election petition supplied to respondent No. 1 is not a true copy of the original election petition as the verification clause of the petition is blank and does not disclose that which paragraphs of the election petition are based on personal knowledge, inspections and information received, record and legal advice and the date when the same was verified.

6. It is also stated in the objection that the election petitioner has not furnished material facts as to disclose complete cause of action and there is non-compliance of the provisions of Section 81(3) and 82 of the Act, hence the election petition may be dismissed at the threshold.

7. On behalf of the election petitioner, reply to the preliminary objection was filed wherein it has been asserted that the defects pointed out by the respondent no. 1 are curable irregularities and are not fatal. The objection of the respondent no. 1 is hyper technical and that the alleged irregularities can be removed by filing amendment application.

8. In this election petition, in paragraph no. 19 the following averments have been made:-"19. That the petitioner is challenging the election of the returned candidate Sri Bhagat Singh Koshiary on the so many ground including that for insuring the victory of Sri Bhagat Singh Koshiary an ordinance was issued on 19/11/2008 at the behest of cabinet decision of council of Minister to insert 28 more bodies in addition to the existing bodies in CLAUSE (x) of Section 3 of the Uttar Pradesh State Legislature (Prevention of Disqualification Act, 1971 (amendment) as applicable to the State of Uttarakhand and thereby amended the Uttaranchal (The U.P. State legislature Prevention of Disqualification Act 1971) when there was no emergency like situation as envisaged in constitution. The cabinet meeting was held on 15/11/2008. The effect of the ordinance was to create "undue influence" over the M.L.A's for this was a bribe to the MLA's that soon they are going to get prime posts casting the votes for Rajya sabha against their independent will."

9. Paragraphs no. 28 and 29 of the election petition read as under: -

28. That by issuing the said ordinance the state govt, has bribed the MLA'S by creating 28 offices on which any member of state legislature without losing the membership of state legislature can be appointed. The Chief Minister is head of the Council of Minister which recommended the Governor to issue the ordinance and only so, the present Chief Minister Sri Khanduri is being made one of the respondent No.2.

29. That this bribe was given only with the sole intention to insure the victory of respondent no.1.

10. In paragraph no. 47, the following averment has been made:-

47. That on account of corrupt practices of opposite party no: 1 & 2 and invalid nomination of the opposite party no: 3 wrongly signed by opposite party no:2 the election of the petitioner is materially affected.

11. According to the Learned Counsel for the returned candidate-respondent no.1, the election petitioner has not filed his affidavit in support of the allegations of corrupt practice and did not furnish particulars thereof, when the election petition was presented before the Court on 29-12-2008 as per mandatory requirement of proviso to Section 83(1)(c) of the Act and as such entire election petition is liable to be dismissed summarily.

12. From a bare perusal of the aforesaid pleadings made in paragraphs referred to herein above, it is clear that the election petitioner has alleged corrupt practice in so many words in the election petition time and again.

13. Learned Counsel also submitted that since there is no ground available to the petitioner as envisaged by Section 100 of the said Act, therefore, the election petition is liable to be thrown out at the threshold.

14. To sum up, the argument of the Learned Counsel for the respondent no. 1 is that the pleadings in the present election petition are entirely vague; that the election petitioner has alleged corrupt practice against the respondent no. 1 in the petition but the election petition was not accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice when the petition was presented before the Court and the particulars thereof; that there is non-compliance of the provisions as contained in Section 83(1) of the Act and that no ground is legally available to the election u/s 100 of the Act to seek the remedy to declare the election of the respondent as void. Learned Counsel for the respondent no.1 has submitted that the election petition is liable to be dismissed in limine for want of mandatory requirement u/s 83(1) of the Act.

15. For a just decision in the matter, a reference to the provision of Section 83 of the Act is necessary. Section 83 of the Act reads as under:-

83. Contents of petition -(1) An election petition-fa) shall contain a concise statement of the material facts on which the petitioner relied;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupted practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

16. In the case of Azhar Hussain Vs. Rajiv Gandhi, , the Apex Court has inter alia held that "there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders can be passed if the mandatory requirement enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with,"

17. At the outset it may be mentioned that the grounds for declaring election to be void have been enumerated in Section 100 of the Act, which reads as under: -

100. Grounds for declaring election to be void.-(1) Subject to the provisions of subsection (2) if the High Court is of opinion-
(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

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

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned by an agent other than his election agent.

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or the High Court shall declare the election of the returned to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied-fa) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the High Court may decide that the election of the returned candidate is not void.

18. It is significant to mention here that in Ground No. 1 of the preliminary objection where has been reproduced above, the respondent no.1 has specifically stated that the copy of the election petition served upon the respondent no. 1 is not the true copy of the election petition presented before the Court. In reply to the preliminary objection (CLMA No. 3196 of 2009), the election petitioner could not dare say that the copy of the election petition supplied to the respondent no. 1 is a true copy of the original election petition rather in paragraph no. 1 of the reply it is stated that the respondent no. 1 has given out defects in paragraphs 1 to 5 in the preliminary objections and has asserted that there is non compliance of section 81(3) and 82 of the Representation of the People Act 1951.

19. In the instant writ petition, the respondent no. 1 has annexed the copy of the notice of the election petition supplied to him. Undisputedly the election petitioner has filed affidavit Form No. 25A pertaining to the allegations of corrupt practice, but no such copy of affidavit was supplied to the respondent no. 1 and even no such copy was made available for service upon the respondent no.1. In such circumstances, it cannot be said that proper compliance of the mandatory provisions of Section 81(3) of the Act has been made by the election petitioner. Needless to mention that for want of supply of copy of affidavit on Form No. 25A pertaining to allegation of corrupt practice, the respondent no.1 has been withheld of all material facts and necessary particulars. The election petitioner had not filed the said affidavit in Form No. 25A at the time of presentation of election petition before this Court on 29-12-2008, rather sought permission of the Court to file it on 2-1 -2009 but the election petitioner has not supplied adequate copies of this affidavit Form 25A for being issued to the respondents including respondent no. 1. It appears that for this reason also, the election petitioner could not deny the allegation of the respondent no. 1 that true copy of election petition was not issued to him. Moreover, the columns of the other affidavit accompanying the election petition as well as verification clause of the election petition supplied for service upon the respondent no. 1 have been left blank. In addition to it, the affidavit on Form No. 25A was taken on record by this Court by order dated 2-1-2009 subject to the objection by the returned candidate.

20. In the above facts and circumstances, it cannot be said that copy of affidavit Form No. 25A pertaining to allegations of corrupt practice and particulars thereof was ever made available to the respondent no. 1 along with copy of the election petition or even subsequent to it. It can be visualized that for this reason proper compliance of mandatory provision of subsection (3) of Section 81 of the Act was not made by the election petitioner.

21. Now the question arises whether the defect is curable or fatal.

22. The Apex Court in the case of Sharif-ud-din Vs. Abdul Gani Lone, while considering Sections 89(3) and 94 of the Jammu & Kashmir Representation of the People Act, which are identical to Section 81(3) and 86 of the Act, has held in paragraph no. 20 as under. We are, therefore, of the view that the requirement that every copy of the election petition which is intended for service on the respondent should be attested by the petitioner under his own signature is a mandatory requirement and then non-compliance with it should result in the dismissal of the petition as provided in Section 94 of the Act. The High Court was, therefore, right in dismissing the petition on the above ground."

23. In Jugal Kishore Patnaik Vs. Ratnakar Mohanty, the Apex Court has observed in paragraph 8 as under:-

8. There are, in our opinion, some broad facts of the case which lend support to the finding of the High Court on issue No. (1) that the election petition was accompanied by an attested copy signed by the respondent. Endorsement dated April 15, 1974 made by an officer of the High Court shows that a copy of the election petition had been filed. We find no cogent reason as to why an officer of the High Court should make a false endorsement on the petition if, in fact, no such copy had been filed. As regards the factum of the attestation of the copy by the respondent under his own signature, we find that the appellant cannot in the very nature of things assert positively that the copy had not been attested by the respondent as, according to him, he did not see that copy. The copy was also not available on the record as the same had been affixed at the residence of the appellant when he, according to the report of the process-server, declined to accept the summons. Before summons was issued to the appellant, the following endorsement was made by an officer of the High Court in respect of the election petition filed by the respondent:

Defect: Nil.

We see no cogent ground to question the correctness of this endorsement which clearly lends support to the inference that the copy filed with the petition had been attested by the respondent and that the petition did not suffer from lack of compliance with the procedural requirement.

24. So far as the Ground of corrupt practice taken in the present petition is concerned, the same is of no help to the election petitioner for the simple reason

that no affidavit in support of the allegation of corrupt practice and particulars thereof as envisaged by Proviso to Section 83(1) of the Act was filed by the election petitioner at the time of presentation of election petition before this Court, rather affidavit on Form 25A was filed subsequently in the Court, which too appears to have lost its sanctity for the reasons stated hereinafter. The election petitioner had not supplied copy of such affidavit for service upon the respondent no. 1. Strangely enough, in the copy of the election petition served upon the respondent no. 1, the verification clause is left blank. There is no attestation on the copy of the election petition under his own signature by the election petitioner, which was intended for service upon the respondent no.1. As such, the mandatory requirement u/s 81(3) of the Act is entirely lacking in the case at hand.

25. The Apex Court in the case of Ravinder Singh Vs. Janmeja Singh and Others, while dealing with the provisions of Section 123(1)(A)(b) and 83(1) of the Act has observed in paragraph no. 9 as under:-

9. Coming now to the charge of corrupt practice, falling u/s 123(1) of the Act, for which material facts and particulars have been detailed in paragraphs 28 to 39 of the election petition, we find that those allegations could not be put to trial either. There is no affidavit filed in support of the allegations of corrupt practice of bribery.

26. The Apex Court has held that "in the absence of proper affidavit, in the prescribed form, filed in support of the corrupt practice of bribery, the allegation pertaining thereto; could not be put to trial- the defect being of a fatal nature."

27. Besides above, from a bare perusal of the affidavit which purports to have been sworn in on 31-12-2008 (though there is no attestation on the cutting and overwriting of the date by the Oath Commissioner), the election petitioner has not appeared and verified the affidavit before the Oath Commissioner and the seal of Mamta Joshi, Oath Commissioner had been put.

28. Furthermore, there is still another circumstance, which goes against the election petitioner. In the affidavit, which purports to have been executed on 31-12-2008 and filed in the Court on 2-1-2009, there is seal of Mamta Joshi, Oath Commissioner but there is a cut mark on the signatures of Mamta Joshi and there is mention of M.A.Khan over the seal bearing the name of Mamta Joshi, oath commissioner. Absence of endorsement of the name of the person swearing the affidavit by the Oath Commissioner coupled with the said fact also casts a reasonable doubt on the proper execution, verification and genuineness of the affidavit Form 25A. Since the affidavit Form 25A had not been verified, therefore, it would lead to no other inference but that there is noncompliance of subsection (3) of Section 81 of the Act. The affidavit Form No. 25A, which was filed by the election petitioner subsequently in the Court in support of allegations of corrupt practice and particulars thereof is no affidavit in the eye of law. It has not been explained by the election petitioner as to how these defects in the affidavit are

curable and not fatal.

29. For the reasons and discussion above, I am of the considered view that the present election petition cannot be put to trial for the simple reason that the election petition does not contain material facts and particulars of corrupt practice as alleged in the election petition, as they are not supported by a proper affidavit. It is a fit case to dismiss the election petition at the threshold for want of mandatory compliance of Section 81(3) of the Act, the defect being fatal.

30. The preliminary objection (No. 2161 of 2009) filed by the respondent no. 1 deserves to be allowed and is hereby allowed.

31. The election petition is accordingly dismissed at the threshold. Costs easy.