
Sanjay Kumar Das Burma Vs Lalatendu Bidyadhar Mohapatra

Misc. Case No. 93 of 2014

Court: Orissa High Court

Date of Decision: July 24, 2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) - Order 6 Rule 16, Order 7 Rule 11, Order 7 Rule 11(a)#Representation of the People Act, 1951 - Section 100, 100(1)(d)(iii), 117, 123(1)(A), 123(4)

Hon'ble Judges: S. Pujahari, J

Bench: Single Bench

Advocate: Bidyadhar Mishra, Senior Advocate, P. Bharadwaj and S. Satpathy, for the Appellant; Pitambar Acharya, Senior Advocate, S. Rath, B.K. Jena, J. Parida, B.P. Das, P.K. Ray and S.R. Pati, Advocates for the Respondent

Judgement

S. Pujahari, J

This misc. case has been filed by the respondent in the election petition, under Order-6, Rule-16 and Order-7, Rule-11 of

the Code of Civil Procedure, 1908 read with Sections 83, 86 and 87 of the Representation of the People Act, 1951 to strike out the pleadings

and also to reject the election petition on the grounds, inter-alia, that the pleadings in the election petition are vague, scandalous and lacking in

material particulars, and also they do not disclose any cause of action.

2. For the sake of convenience, the petitioner in the misc. case is referred to as the "respondent" and the opposite party-election petitioner as the

"petitioner" hereinafter.

3. Facts relevant for disposal of the misc. case are as follows:--

The petitioner has filed the election petition challenging the election of the respondent to the Orissa Legislative Assembly from 108-Brahmagiri

Assembly Constituency held on 17.04.2014 on the ground of improper counting of votes and adoption of corrupt practice which materially

affected the result of the election. The respondent appeared in the election petition in pursuance of the notice issued and filed his written statement

denying the averments made in the election petition, more particularly the fact that the pleading in the election petition is vague, scandalous, without

any substance and also the election petition does not disclose any cause of action for non-pleading of material facts as well as material particulars.

Rejection of the election petition is sought for also on the ground that there has been non-compliance with Section 83(1)(c) of the Representation

of the People Act, 1951 (for short "the Act") as the same is not accompanied by any affidavit as required under Section 83(1)(c) of the Act, so

also no material fact has been pleaded as required under Section 83(1)(a) of the Act disclosing the cause of action. It has also been pleaded by the

respondent that paragraphs-1, 5, 6, 7, 8, 9, 14 and 15(A) to 15(AH) in the election petition being unnecessary, evasive, frivolous, scandalous and

vexatious, are liable to be struck out and after striking out the aforesaid paragraphs, nothing being left to be decided in the election petition, the

election petition is liable to be dismissed at the threshold.

4. Objection to the misc. case has been filed by the petitioner with the pleadings that the election petition has been presented in conformity with the

provisions contained in Sections 80A, 81, 82, 83 and 84 of the Act, inasmuch as he has pleaded the material facts in detail in paragraphs 15(A) to

15(AH) as to how the election was materially affected and regarding non-compliance with the statutory requirements embodied in Rules 49-A, 49-

E, 49-S and 56-C of the Conduct of Election Rules, 1961. The facts pleaded in the election petition make out a triable case for adducing evidence

and there is no non-compliance with any provisions of the Act and the election petition is in conformity with the requirements of Sections 83 and

86 of the Act. According to the petitioner, the misc. case has been filed only to delay the proceeding and, as such, the same is liable to be

dismissed.

5. In course of hearing, Mr. Bidyadhar Mishra, the learned senior counsel appearing for the respondent elaborated the contentions that a conjoint

reading of Section 83(1)(a)(c) of the Act read with the proviso to Section 83(1) of the Act and Rule-94A of the Conduct of Elections Rules, 1961

read with the contents of Form-25 made the legislative's intention clear that all material facts relied on by the election petitioner in challenging the

election of the returned candidate must be concisely pleaded, and especially when "corrupt practice" is alleged, the said allegation must be detailed

by material particulars and vouched safe by the election petitioner in shape of a separate affidavit in the Form specifically prescribed for the

purpose. According to him, the provisions of the Act and the Rules referred to above have been made so as to discourage filing of cases on vague

or baseless allegations challenging the election of peoples' representatives. According to him, the allegation of "corrupt practice" brought by the

petitioner being bereft of material facts and particulars, the vague and vexatious pleadings are liable to be struck out and consequently, the election

petition is to be rejected in view of Order-7, Rule-11 of the Code of Civil Procedure for nondisclosure of cause of action. He further added that

the election petition having not been accompanied by the affidavit prescribed in the proviso to Section 83(1)(c) of the Act and true copy of the

election petition having not been served on the respondent, the election petition also suffers on that count.

6. On the other hand, Mr. Pitambar Acharya, the learned senior counsel appearing for the petitioner repudiated the contention advanced from the

side of the respondent. It is his submission that the election of the respondent has been challenged mainly on the ground that large scale illegalities

and irregularities were committed during the conduct of poll and counting of votes in utter defiance of the provisions of the Constitution, the Act

and the Rules, more particularly Rules-49E, 49S and 56C of the Conduct of Elections Rules, 1961, attracting the application of Section 100(1)(d)

(iii) and (iv) of the Act along with the allegations on ""corrupt practice"" so as to declare the result of the returned candidate void, and the instances

of such irregularities and illegalities have been concisely stated in the election petition, especially in paragraphs-15(A) to 15(AH). He further

pointed out that there being no mention in the misc. petition regarding non-service of the true copy of the election petition or non-compliance with

Section 81(3) or Section 83(1)(c) of the Act, the argument advanced by the learned senior counsel for the respondent during hearing is irrelevant.

He, however, submitted that the copy of the election petition served on the respondent is a ""true copy"" as per the requirement of Section 81(3) of

the Act, and with reference to the same, the respondent has already filed a comprehensive written statement. His further contention is that the

petition along with the affidavit filed by the petitioner as required under Section 83(1)(c) of the Act are free from any defect, and even assuming the

same to have any defect, the same ipso-facto cannot lead to dismissal of the election petition under Section 86 of the Act inasmuch as Section 86

does not refer to Section 83 of the Act as has been repeatedly held by the Hon"ble Apex Court. According to him, the misc. case being

misconceived both in law and facts and solely intended to delay the trial of the election dispute, is liable to be dismissed.

7. In support of their respective contentions/submissions, the rival sides have cited a number of decisions of the Hon"ble Apex Court so also of this

Court and other High Courts.

8. Section 83 of the Act stipulates, inter-alia, that an election petition shall contain a concise statement of the material facts on which the petitioner

relies and when corrupt practice is alleged, full particulars of such practice 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 shall be set forth in the election

petition. The proviso to Section 83 of the Act stipulates 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 corrupt practice and the particulars thereof. It is enjoined by

Order-7, Rule-11 of the Code of Civil Procedure that the plaint (here, the election petition) shall be rejected where it does not disclose a cause of

action. Order-6, Rule-16 of the Code of Civil Procedure empowers the Court to order for striking out or amendment of any matter in any pleading

which may be unnecessary, scandalous, frivolous and vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit, or

which is otherwise an abuse of the process of the Court.

Learned senior counsel for the respondent has placed heavy reliance on the decisions of the Hon"ble Apex Court in the case of Azhar Hussain Vs.

Rajiv Gandhi, AIR 1986 SC 1253 : (1986) 1 SCALE 573 : (1986) 1 SCC 573 : (1986) 1 SCC 315 Supp : (1986) SCC 315 Supp : (1986) 2

SCR 782 : (1986) 2 UJ 63 and C.P. John Vs. Babu M. Palissery, AIR 2015 SC 16 : (2014) AIRSCW 5649 : (2014) 10 SCALE 439 in support

of his contention regarding rejection of the election petition on the ground of non-compliance with the mandatory requirements of Section 83 of the

Act by the petitioner.

9. In the case of Azhar Hussain (supra), it was held in paragraph-11 that appropriate orders in exercise of powers under the Code of Civil

Procedure can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition

are not complied with. It was further held that whether in an election petition a particular fact is material or not and as such required to be pleaded

is dependent on the nature of the charge levelled and the circumstances of the case. The factual scenario in the said case was that the election

petitioner alleged that gazetted officer appeared on Government controlled news media and made speech praising elected candidate, but it was not

mentioned as to who procured or obtained the services of the gazetted officer, in what manner he obtained the services and what were the facts

which went to show that it was with the consent of the elected candidate. Similarly, the petition also did not disclose the exact words used in the

speech or the time and date of making such speech. Allegations were brought by the election petitioner that objectionable slogans had been

painted, but the petition did not mention the name of the workers allegedly employed by the elected candidate or his agents who printed slogans.

Display of objectionable poster in the constituency was alleged, but neither a copy of the poster was produced, nor name of the workers of the

returned candidate who put up the postures was revealed by the election petitioner. Although it was alleged that books containing objectionable

statements were distributed by the returned candidate, but there was no averment in the election petition to show that the book was published or

distributed with consent or knowledge of the returned candidate. Distribution of pamphlet casting aspersions on personal character of a candidate

was alleged, but the petition lacked particulars as to who had printed/published or circulated the pamphlet or if consent of the returned candidate

was taken for such distribution. In view of the aforesaid omissions and deficiency, their Lordships of the Hon"ble Apex Court upheld the order of

the High Court dismissing the election petition at the threshold in view of Order-7, Rule-11 of C.P.C. as being bereft of material facts and

particulars and not disclosing any cause of action.

10. In the case of C.P. John (supra), the election petitioner levelled allegations of bribery falling under Section 123(1)(A) of the Act and issuance

of pamphlets attracting Section 123(4) of the Act. But, the election petition revealed no details as to on which date and by whom the bribe amount

was promised to be paid and the averments regarding the allegation were not duly supported by affidavit. Similarly, regarding the allegation of

distribution of pamphlets, material facts and particulars were not pleaded so as to ascribe ""corrupt practice"" to the returned candidate. In the facts

and circumstances peculiar to the said case, their Lordships of the Hon"ble Apex Court concurred with the order of the High Court dismissing the

election petition at the threshold under Section 83(1)(c) and 86 of the Act read with Rule-11 of Order-7 of the Code of Civil Procedure, 1908.

11. To reiterate, it is the contention of the learned senior counsel for the petitioner that the petitioner has alleged illegalities and irregularities in the

conduct of the poll and counting of votes in total non-compliance with the provisions of the Constitution of the Act and Rules materially affecting

the result of the election of the returned candidate, and, accordingly, the election of the returned candidate is sought to be declared to be void in

view of Section 100(1)(d)(iii) and (iv) of the Act and no doubt, along with the same, ""corrupt practice"" has also been alleged. Per contra, it is the

contention of the learned senior counsel for the respondent that the allegations brought by the petitioner are within the ambit of ""corrupt practice"".

12. Now, I advert to the averments in the election petition. In paragraph-1 of the petition, the petitioner averred that though the election petitioner

secured majority of valid votes than the respondent, by way of improper reception of votes in favour of the returned candidate, the election of the

petitioner was consciously made to be defeated by the Government Officers entrusted with the task of counting of votes. In paragraphs-15(A) to

15(AH) of the petition, the petitioner has given out booth-wise details in elaboration of his allegations regarding improper reception of votes and

illegalities or irregularities in the counting of votes, so also some instances of ""corrupt practice"" like booth capturing and rigging and pleaded the

same with boothwise in details. The case of the petitioner is thus distinguishable in facts and circumstances from the respective cases involved in

Azhar Hussain and C.P. John, referred to supra.

13. In the case of Virender Nath Gautam Vs. Satpal Singh and Others, AIR 2007 SC 581 : (2007) 1 JT 265 : (2006) 14 SCALE 95 : (2007) 3

SCC 617 : (2006) SCR 413 Supp , the Hon"ble Apex Court in paragraph-28 held that Section 100 enumerates grounds for declaring election to

be void which inter alia includes improper reception, refusal or rejection of any vote or reception of any vote which is void or there is non-

compliance with the provisions of the Constitution or with the Act or rules or orders made under the Act. Their Lordships in the said case in

paragraphs-50 and 54 held as follows:--

50. There is distinction between facta probanda (the facts required to be proved i.e. material facts) and facta probantia (the facts by means of

which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. The

material facts on which the party relies for his claim are called facta probanda and they must be stated in the pleadings. But the facts or facts by

means of which facta probanda (material facts) are proved and which are in the nature of facta probantia (particulars or evidence) need not be set

out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

54. The High Court dismissed the petition inter alia on the ground that paras 8(i) to (iv) lacked in material particulars. Apart from the fact that the

law does not require material particulars even in respect of allegations of corrupt practice but only full particulars and if they are lacking, the petition

can be permitted to be amended or amplified under section 86 of the Act, in the instant case, clause (b) of Section 83(1) had no application and

the petition has been dismissed by the High Court by applying wrong test. On that ground also, the order passed by the High Court is

unsustainable (vide Harkirat Singh v. Amrinder Singh).

14. A three Judge Bench of the Hon"ble Apex Court in the case of D. Ramachandran Vs. R.V. Janakiraman and Others, AIR 1999 SC 1128 :

(1999) 1 CTC 715 : (1999) 2 JT 94 : (1999) 1 SCALE 693 : (1999) 3 SCC 267 : (1999) 1 SCR 983 : (1999) AIRSCW 784 : (1999) 2

Supreme 454 , held as follows:--

8. We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; instead, we proceed to consider the arguments

advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminary objection, the test

is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the

purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether

those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in

the counter.

9. Under Order 6 Rule 16, the court is enabled to strike out a pleading (a) which may be unnecessary, scandalous, frivolous or vexatious; or (b)

which may tend to prejudice, embarrass or delay the fair trial of the suit; or (c) which is otherwise an abuse of the process of the court. We have

already pointed out that it is not the case of the first respondent that the pleading in the election petition is vitiated by all or any one of the aforesaid

defects mentioned in the Rule. Hence striking out part of the pleading in this case was not at all justified.

10. xxxxxxxx xxxxxxxx. It is elementary that under Order-7 Rule 11(a) CPC, the court cannot dissect the pleading into several parts and consider

whether each one of them discloses a cause of action. Under the Rule, there cannot be a partial rejection of the plaint or petition. See Roop Lal

Sathi v. Nachhattar Singh Gill. We are satisfied that the election petition in this case could not have been rejected in limine without a trial.

15. In the case of Mahendra Pal Vs. Ram Dass Malanger and Others, AIR 2000 SC 16 : (1999) 8 JT 468 : (1999) 6 SCALE 655 : (2000) 1

SCC 261 : (1999) 4 SCR 170 Supp , a three Judges Bench of the Hon"ble Apex Court in paragraph-32 observed as follows:--

Our perusal of various paragraphs of the election petition and particularly of the averments contained in paras 10 to 13, 16 and 20, go to show

that sufficient material facts, to provide a cause of action, for trial of the election petition have been provided in the election petition. In various sub-

paras of para 11 of the election petition, particulars of irregularities have also been spelt out. The non-mention of serial numbers of the improperly

counted ballot papers, keeping in view the averments made in para 16 of the petition, could not be a ground to non-suit the election petitioner at

the threshold, without trial more particularly because of the discrepancy between Ex. P-2 and Ex. P-3. Pleadings have to be read as a whole to

ascertain their true import. It is the substance and not merely the form, which is required to be looked into for construing the pleadings. The

intention of the party needs to be gathered from the tenor and terms of his pleadings taken as a whole. These well-settled principles appear to have

been lost sight of by the learned Designated Judge. Construed reasonably, the averments in the election petition, in our opinion, do make out a

case for the petition proceeding to trial. Whether or not a case is eventually made out to justify recount/inspection would depend upon the evidence

led by the parties in support of their pleadings at the trial.

16. On the question of striking out of pleadings, a three Judges Bench of the Hon"ble Apex Court in the case of Sathi Vijay Kumar Vs. Tota Singh

and Others, (2006) 14 SCALE 199 : (2006) 13 SCC 353 : (2006) 10 SCR 433 Supp held as follows:--

33. At the same time, however, it cannot be overlooked that normally a court cannot direct parties as to how they should prepare their pleadings.

If the parties have not offended the rules of pleadings by making averments or raising arguable issues, the court would not order striking out

pleadings. The power to strike out pleadings is extraordinary in nature and must be exercised by the court sparingly and with extreme care, caution

and circumspection (vide *Roop Lal Sathi v. Nachhattar Singh Gill*, *K.K. Modi v. K.N. Modi*, *United Bank of India v. Naresh Kumar*).

17. In the case of *Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Others*, AIR 2012 SC 2638 : (2012) 6 JT 356 : (2012) 3 RCR(Civil)

770 : (2012) 7 SCC 788 : (2012) AIRSCW 3824 : (2012) 4 Supreme 246 , the Hon"ble Apex Court in paragraph-9 viewed as follows:--

9. We may also gainfully refer to the decision of this Court in *H.D. Revanna v. G. Puttaswamy Gowda* where this Court held that an election

petition can be dismissed for non-compliance with Sections 81, 82 and 117 of the Representation of the People Act, 1951 but it may also be

dismissed if the matter falls within the scope of Order 6 Rule 16 or Order 7 Rule 11 CPC. A defect in the verification of the election petition or the

affidavit accompanying the election petition was held to be curable, hence, not sufficient to justify dismissal of the election petition under Order 7

Rule 11 or Order 6 Rule 16 CPC. The following passage in this regard is instructive: (SCC p.223, para 14)

14..... the relevant provisions in the Act are very specific. Section 86 provides for dismissal of an election petition in limine for non-compliance

with Sections 81, 82 and 117. Section 81 relates to the presentation of an election petition. It is not the case of the appellant before us that the

requirements of Section 81 were not complied with..... Sections 82 and 117 are not relevant in this case. Significantly, Section 86 does not refer to

Section 83 and non-compliance with Section 83 does not lead to dismissal under Section 86. This Court has laid down that non-compliance with

Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 or Order 7 Rule 11 CPC. Defect in

verification of the election petition or the affidavit accompanying the election petition has been held to be curable and not fatal.

The question of rejection of election petition under Order-7, Rule-11 of the Code of Civil Procedure with a reference to Section 83 of the Act

again came up before the Hon"ble Apex Court very recently in the case of *Ashraf Kokkur Vs. K.V. Abdul Khader*, AIR 2015 SC 147 : (2014)

AIRSCW 4913 : (2014) 9 SCALE 780 . In paragraph-22 of the said decision, their Lordships have held that the inquiry under Order 7 Rule

11(a) of the Code of Civil Procedure is only as to whether the facts as pleaded disclose a cause of action and not complete cause of action. The

said paragraph-22 is quoted hereunder:--

22. After all, the inquiry under Order 7 Rule 11(a) CPC is only as to whether the facts as pleaded disclose a cause of action and not complete

cause of action. The limited inquiry is only to see whether the petition should be thrown out at the threshold. In an election petition, the requirement

under Section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression ""material facts"" plainly means facts

pertaining to the subject-matter and which are relied on by the election petitioner. If the party does not prove those facts, he fails at the trial.

In the subsequent paragraphs of the aforesaid decision, reference has also been made to a number of earlier decisions of the Hon"ble Apex Court.

In paragraph-24, a reference has been made to V.S. Achuthanandan Vs. P.J. Francis and Another, AIR 1999 SC 2044 : (1999) 2 JT 347 :

(1999) 2 SCALE 222 : (1999) 3 SCC 737 : (1999) 2 SCR 99 : (1999) 1 UJ 621 : (1999) AIRSCW 1760 : (1999) 3 Supreme 243 , as

follows:--

24. In V.S. Achuthanandan v. P.J. Francis, a three-Judge Bench of this Court has taken the view that only because full particulars are not given,

an election petitioner is not to be thrown out at the threshold. To quote para 15: (SCC p. 747).

15..... An election petition was not liable to be dismissed in limine merely because full particulars of corrupt practice alleged were not set out. It

is, therefore, evident that material facts are such primary facts which must 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.

Again at para 16 of V.S Achuthanandan case, it was held that : (SCC p.748)

16..... So long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is

weak and not likely to succeed is no ground for striking it out. The implications of the liability of the pleadings to be struck out on the ground that it

discloses no reasonable cause of action are generally more known than clearly understood.... the failure of the pleadings to disclose a reasonable

cause of action is distinct from the absence of full particulars.

(emphasis supplied)

In paragraph-29 of the aforesaid decision, a word "caution" has been sounded by the Hon"ble Apex Court as follows:--

29. Finally, as cautioned by this Court in Raj Narain v. Indira Nehru Gandhi, it was held that: (SCC p. 858, para 19)

19. Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of

chess. Provisions of law are not mere formulate to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a

juristic principle. It is the duty of the court to ascertain that principle and implement it.

(emphasis supplied)

Ultimately, while allowing the appeals of the election petitioners preferred against the orders of the High Court, the Hon"ble Apex Court in

paragraph-30 have held as follows:--

30. Guided by the settled principles of law referred to above, we are of the view that the election petition having disclosed a cause of action, it

should not have been thrown out at the threshold. The impugned order and judgment are hence set aside. The appeals are allowed. The election

petition is remitted to the High Court for trial in accordance with law. There is no order as to costs.

18. Being guided by the authoritative pronouncements referred to above and having regard to the averments made by the petitioner in the election

petition, I do not find any reason to invoke Order-6 Rule-16 or Order-7 Rule-11 of the Code of Civil Procedure to the case of the petitioner

inasmuch as no part of the pleadings in the election petition is found liable to be struck out, and the facts pleaded therein make out a triable case.

Needless to say, the respondent has already filed his statement of defence vis-à-vis the grounds of challenge embodied in the election petition.

19. The contention next advanced on behalf of the respondent in course of hearing is that the affidavit filed by the petitioner being not in

accordance with Form-25 of the Conduct of Election Rules, 1961 amounts to non-compliance with the proviso to Section 83(1) of the Act, and

there has also been non-compliance with sub-section (3) of Section 81 of the Act inasmuch as true copy of the petition along with the affidavit has

not been supplied to the respondent. Learned senior counsel for the respondent has filed the copy of the petition along with the copy of the

affidavit served on him to show that the endorsement of the oath commissioner is absent in the copy of the affidavit. In this context, as it appears,

although in the petition filed, the affidavit filed purportedly in compliance with the proviso to Section 83 of the Act, has been duly sworn before the

Commissioner of Oath, the said endorsement of the oath commissioner is absent from the copy which was served on the respondent. But, the

copy so served on the respondent has been attested by the petitioner to be true copy. It is not the case or contention of the respondent that the

copy which was served on him is materially different from the original or misleading in nature. Although the question of non-compliance with

Section 81(3) or proviso to Section 83(1) of the Act has not formed the ground of challenge in the misc. petition specifically, I have examined the

contentions advanced in course of hearing, with reference to the principles enunciated in that behalf by the Hon"ble Apex Court. The learned

senior counsel for the respondent has placed much reliance on the decision of the Hon"ble Apex Court in the case of Dr. (Smt.) Shipra, etc. etc.

Vs. Shanti Lal Khoiwal, etc. etc., AIR 1996 SC 1691 : (1996) 4 JT 67 : (1996) 3 SCALE 369 : (1996) 5 SCC 181 : (1996) 3 SCR 1175 :

(1996) 2 UJ 228 and on the decision of the Bombay High Court in the case of Purushottam Vs. Returning Officer, Amravati and Others, AIR

1992 Bom 227 .

20. On the other hand, the learned counsel for the petitioner has placed reliance on a Constitution Bench decisions of the Hon"ble Apex Court in

the case of T.M. Jacob Vs. C. Poulse and Others, AIR 1998 SC 2939 : (1999) 3 JT 72 : (1999) 2 SCALE 597 : (1999) 4 SCC 274 : (1998) 2

SCC 31 : (1999) 2 SCR 659 : (1999) AIRSCW 1156 : (1998) AIRSCW 2564 : (1999) 4 Supreme 59 .

21. The constitution Bench of the Hon"ble Apex Court in the case of T.M. Jacob (supra), dealing with the principles settled in Dr. Shipra's case

and also Purushottom's case, have held as follows:--

The election petition did not suffer from any defect which could attract the provisions of Section 86(1) of the Act.

(1) The defect found in the "true copy" of the affidavit in Dr. Shipra case was not merely the absence of the name of the Notary or his seal and

stamp but a complete absence of "notarial endorsement" of the verification as well as absence of an "affirmation" or "oath" by the election

petitioner. It was in that context that the Bench had found in Dr. Shipra case that the returned candidate would have got the impression, on a

perusal of the "true copy" of the affidavit, that there was no duly sworn and verified affidavit filed in support of the allegations of corrupt practice by

the election petition. It was precisely on account of this "fatal" defect that K. Ramaswamy, J. opined that "the principle of substantial compliance

cannot be accepted in the fact situation". Thus the judgment in Dr. Shipra case is confined to the "fact situation" as existing in that case and has no

application to the established facts of the present case and the wide observations made therein were made in the context of the facts of that case

only. The defect found in the present case is almost identical to the defect which had been found in the copy of the affidavit supplied to the first

respondent in Anil R. Deshmukh case.

Anil R. Deshmukh Vs. Onkar N. Wagh and Others, AIR 1999 SC 732 : (1999) 1 JT 135 : (1999) 1 SCALE 103 : (1999) 2 SCC 205 : (1999)

1 SCR 188 : (1999) 1 UJ 326 : (1999) AIRSCW 338 : (1999) 1 Supreme 153 , applied

Dr. (Smt.) Shipra, etc. etc. Vs. Shanti Lal Khoiwal, etc. etc., AIR 1996 SC 1691 : (1996) 4 JT 67 : (1996) 3 SCALE 369 : (1996) 5 SCC 181 :

(1996) 3 SCR 1175 : (1996) 2 UJ 228 , explained, limited and distinguished.

CIT v. Sun Engg. Works (P) Ltd., Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., AIR 1993 SC 43 : AIR 1992 SC 43

: (1992) 107 CTR 209 : (1992) 198 ITR 297 : (1992) 5 JT 543 : (1992) 2 SCALE 591 : (1992) 4 SCC 363 : (1992) 1 SCR 732(1) Supp :

(1992) 1 SCR 732 Supp : (1992) 64 TAXMAN 442 , relied on Purushottam Vs. Returning Officer, Amravati and Others, AIR 1992 Bom 227 ,

referred to

(2) The object of serving a "true copy" of an election petition and the affidavit filed in support of the allegations of corrupt practice on the

respondent in the election petition is to enable the respondent to understand the charge against him to that he can effectively meet the same in the

written statement and prepare his defence. The requirement is, thus, of substance and not of form. The expression "copy" occurring in Section

81(3) of the Act does not mean an exact copy but only one so true that no reasonable person could by any possibility misunderstand it as not

being the same as the original. It means a copy which is substantially so and which does not contain any material or substantial variation of a vital

nature as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition.

Indeed a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of Section

81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation. (Paras 35, 33, 34 and 36)

Ch. Subbarao Vs. Member, Election Tribunal, Hyderabad, AIR 1964 SC 1027 : (1964) 6 SCR 213 ; Murarka Radhey Shyam Ram Kumar Vs.

Roop Singh Rathore and Others, AIR 1964 SC 1545 : (1964) 3 SCR 573 , relied on

K. Kamaraja Nadar Vs. Kunju Thevar and Others, AIR 1958 SC 687 : (1959) 1 SCR 583 , cited

The legislative intent appears to be quite clear, since it divides violations into two classes - those violations which would entail dismissal of the

election petition under Section 86(1) of the Act like non-compliance with Section 81(3) and those violations which attract Section 83(1) of the

Act, i.e., non-compliance with the provisions of Section 83. It is only the violation 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. It is not every minor variation in form but only a vital defect in

substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section

86(1) to follow. A certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an

election petition under Section 86(1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect. It is, however,

neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon

the facts and circumstances of each case and no hard and fast formula can be prescribed.

(Paras 38 and 40)

Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Others, AIR 1964 SC 1545 : (1964) 3 SCR 573 ; Ch. Subbarao Vs.

Member, Election Tribunal, Hyderabad, AIR 1964 SC 1027 : (1964) 6 SCR 213 , relied on

In the present case the copies of the election petition and the affidavit served on the appellant bore the signatures of Respondent 1 on every page

and the original affidavit filed in support of the election petition had been properly signed, verified and affirmed by the election petition and attested

by the Notary. There has, thus, been a substantial compliance with the requirements of Section 81(3) read with the proviso to Section 83(1)(c) of

the Act. Non-mention of the name of the Notary or the absence of the stamp and seal of the Notary in the otherwise true copy supplied to the

appellant could not be construed to be an omission or variation of a vital nature and thus the defect, if at all it could be construed as a defect, was

not a defect of any vital nature attracting the consequences of Section 86(1) of the Act. The prejudice caused to the respondent in such cases

would attract the provisions of Section 81(3) read with Section 86(1) of the Act. The same consequence would not follow from non-compliance

with Section 83 of the Act. (Paras 37, 39 and 40)

Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Others, AIR 1964 SC 1545 : (1964) 3 SCR 573 , applied

(3) A comparison of the original Annexure XV with the copy thereof served on the appellant indicates that both the documents were identical in

nature. The objection thus was not based on any factual matrix. (Para 41)

[Quoted from placitum]

22. In view of the principles settled by the Constitution Bench in T.M. Jacob's case which has been followed in subsequent cases, the contention

of the respondent regarding non-supply of the true copy or non-compliance with the proviso to Section 83 of the Act is not tenable much less to

affect the maintainability of the election petition. It be further added that proviso to Section 83(1) of the Act comes into play when ""corrupt

practice"" is pleaded as the only ground for rejection of an election of the returned candidate. From the facts pleaded by the petitioner in the

election petition, as it appears, he has challenged the election mainly on the ground of illegalities and irregularities in the conduct of the poll and

counting of votes and non-compliance with the provisions of the constitution, the Act, the Conduct of Election Rules, 1961 etc. so as to attract

Section 100(1)(d)(iii) and (iv) of the Act along with the ""corrupt practice"" and also the election petition filed along with the affidavit is also in

compliance with the proviso to Section 83(1) of the Act. The petitioner, as already held, has been able to make out a triable case on those grounds

to challenge the election of the returned candidate. At the cost of repetition, it be stated that the respondent has already filed his statement of

defence challenging the grounds taken by the petitioner in the election petition and the issues will be resolved at the final hearing of the case.

23. For the whole analysis of the facts and circumstances and also keeping in view the settled principles of law as referred to above, the

contentions of the respondent are not acceptable.

24. In the result, the misc. case being bereft of merit stands dismissed.