

**(1963) 05 AHC CK 0011**

**Allahabad High Court**

**Case No:** First Appeal No. 384 of 1962

Brij Mohan Das Agarwal

APPELLANT

Vs

Z.A. Ahmad and Others

RESPONDENT

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**Date of Decision:** May 24, 1963

**Acts Referred:**

- Constitution of India, 1950 - Article 329
- Representation of the People Act, 1951 - Section 80, 81, 83, 83(1), 85

**Citation:** AIR 1964 All 523

**Hon'ble Judges:** R.S. Pathak, J; B. Dayal, J

**Bench:** Division Bench

**Advocate:** G.C. Dwivedi, V.K.S. Chowdhry, for the Appellant; M.A. Ansari, K.L. Misra and V.B. Singh, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Pathak, J.

This is an appeal under the Representation of the People Act, 1951 against an order dismissing an election petition.

2. The first respondent, Z.A. Ahmad, was declared elected on February 28, 1962 to the U.P. Legislative Assembly from the Kopaganj Assembly Constituency in the district of Azamgarh. An election petition challenging the validity of his election was presented by the appellant, who was one of the contesting candidates and had received the next highest number of votes in the election. The election petition was referred by the Election Commission to the Election Tribunal, Azamgarh for trial. The petition contained a number of allegations of corrupt practices, and it is admitted that when presenting it before the Election Commission no affidavit in support of these allegations was filed with it.

3. In his written statement and also by a separate application, the first respondent raised a preliminary objection to the maintainability of the election petition

contending that as no affidavit in support of the allegations of corrupt practices and their particulars had been filed along with the petition the provisions of Section 83 of the Act had been contravened and therefore the petition was liable to be dismissed. It was also pleaded that in any event for want of the affidavit the allegations of corrupt practice should not be tried.

4. The requisite affidavit was filed by the appellant before the Election Tribunal on July 24, 1962 together with an application stating that the omission to file it with the election petition was inadvertent, that the amendment of the rules was not known and the form prescribed for the affidavit had not yet been published. This application was opposed by the first respondent.

5. The Election Tribunal framed an issue on the question whether the election petition was liable to be dismissed on the ground that it had not been accompanied by the affidavit, and coming to the conclusion that it was so liable, it passed an order dismissing the election petition. Against this order the present appeal has been filed.

6. We have heard learned counsel for the parties, and, in our judgment, this appeal must be allowed.

7. Section 83 of the Representation of the People Act, 1951 provides: "83. Contents of petition.

(1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(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 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 corrupt 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."

8. The proviso requiring the filing of an affidavit in support of the allegations of a corrupt practice and its particulars was added by the Representation of the People (Amendment) Act, 1961.

9. Learned counsel for the appellant contends that the Election Tribunal was not bound to dismiss the election petition because of the failure of the petitioner to file the affidavit at the time of presenting the petition. He urges that the requirement that the affidavit should accompany the petition was not mandatory, and that it could be filed subsequently before the Election Tribunal. On the other hand, it is contended for the first respondent that the omission to comply with this requirement is fatal to the petition. It is said that as Article 329(b) of the Constitution prohibits the questioning of such election except by an election petition presented in the manner provided by law, every requirement in the statute relating to the manner of presenting the petition must be construed as a, mandatory, requirement. Our attention has also been invited to Section 80 of the Act which declares that no election shall be called in question except by aft election petition presented in accordance with the provisions of Part VI of the Act. On the basis of these two provisions, Article 329(b) of the Constitution and Section 80 of the Act, the first respondent seeks to establish that failure to strictly comply with the provisions of Sections 81, 82, 83 and 84 exposes the petition to dismissal as an incompetent, petition.

10. Article 329(b) of the Constitution, it is true, provides that an election to a House of the State Legislature can, be called in question only by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The authority to whom the election petition must be presented and the manner of presentation have Been left to legislative enactment, and a petition questioning the election must comply with the enactment. But the statute framed may contain provisions, some of which call for strict or exact compliance and others merely for substantial compliance, and that, as we understand it, is the difference between the mandatory provisions of a statute and its directory provisions. See *Woodward v. Sarsons* (1875) 10 CP 733 at p. 746. The function of designating the authority and setting out the manner of presenting an election petition having been left to the Legislature, it was open to the Legislature to determine in its wisdom how best to accomplish this task. To our mind, the Legislature was free to include both mandatory and directory provisions, and we cannot accede to the contention that Article 329(b) contemplated the enactment of only mandatory provisions.

11. The contention that an election could not be questioned unless all the requirements of the statute relating to the presentation of an election petition were complied with was raised in [Jagan Nath Vs. Jaswant Singh and Others](#), and reliance was placed upon the provisions of Section 80 of the Act. In that case, the question arose whether the omission to implead one of the candidates, as required by Section 82 of the Act, was fatal to the petition. The Supreme Court, repelling the contention, observed:

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however, has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it."

12. It will be noticed that the language of Section 80 of the Act is analogous to that of Article 329(b) of the Constitution.

13. The object behind the enactment of the proviso appears to be the prevention of frivolous allegations of corrupt practices. To ensure that the election petition was not encumbered by such frivolous allegations and that the petitioner was invested with a sense of responsibility when filing the election petition, the Legislature inserted this provision requiring an affidavit in support of the allegation of the corrupt practice and its particulars. To our mind, the object with which the proviso was enacted could be equally served whether the affidavit was filed along with the petition or subsequently when the petition came on for trial before the Election Tribunal. That an affidavit has to be filed appears to us to admit of no doubt. But we find ourselves unable to hold that the object can be effectuated only if it is filed along with the petition. It would, it seems to us, serve its purpose just as adequately if it was filed before the Election Tribunal before any effective proceedings were taken by the Tribunal for the trial of the petition, for example before issues were framed and evidence recorded,

14. We are inclined to this view for another reason also. Before the amendment of Sections 85 and 90 in 1956 non-compliance with the provisions of Sections 81, 83 and 117 was liable to be visited with the penalty of dismissal of the petition. After amendment, however, Section 85 of the Act now authorises the Election Commission to dismiss the petition in case of non-compliance with the provisions of Sections 81, 82 and 117, and Section 90(3) empowers the Tribunal to dismiss an election petition which does not comply with the provisions of Sections 81 and 82. Neither the Election Commission nor the Tribunal have any power now, under Sections 85 and 90 to dismiss a petition for non-compliance with Section 83. Parliament, therefore, expressly intended by re-writing Sections 85 and 90 to exclude non-compliance with the provisions of Section 83 from the penalty provided in those Sections, and this is one circumstance which may also legitimately lead to the conclusion that the provisions of Section 83 are not intended to be mandatory. It was on the basis of similar reasoning that the Supreme Court held in [Jagan Nath Vs.](#)

[Jaswant Singh and Others](#), that the omission in that case to comply with Section 82 (which was not then mentioned in Section 85) was not fatal to the petition. It observed;

"From the circumstance that Section 82 does not find a place in the provisions of Section 85 the conclusion follows that the directions contained in Section 82 were not considered to be of such a character as to involve the dismissal of a petition in limine...."

and further that

".....It is not possible to accept the view that in spite of the provisions of Section 85 failure to comply strictly with the provisions of Section 82 has the same consequences as are contained in Section 85."

15. In support of his contention that the affidavit must accompany the petition at the time of presentation to the Election Commission learned counsel for the first respondent relied upon a decision of the Supreme Court in the [The State of Uttar Pradesh Vs. C. Tobit and Others](#), The decision in that case, however, was influenced by the consideration that there were certain requirements which must be satisfied before a Court could entertain a criminal appeal. It was observed that a certified copy of the judgment and order under appeal must accompany the memorandum of appeal to enable the Court to determine upon examining the memorandum of appeal whether there was sufficient ground for interfering or for dismissing, the appeal summarily, and also in order to decide whether the execution of the order should be stayed.

16. Learned counsel also relied upon the decision in [Dr. N.B. Khare Vs. Election Commission of India](#), . That was a case where Dr. Khare had filed a petition alleging violation of certain provisions of the Constitution and contending that the election of Sri Rajendra Prasad as President was, therefore, invalid. The only questions, it appears to us, which were decided by the Supreme Court were whether Dr. Khare's petition could be said to fall outside the purview of the Presidential and Vice-Presidential Elections Act, 1952 and of Order XXXVII-A of the Supreme Court Rules, and whether the said Act and Rules were void. The Supreme Court repelled both the contentions, and held that Dr. Khare could not found his right to maintain the petition outside the said Act of 1952. It was in this context that it observed:

"The petitioner must strictly bring himself within the four corners of that statute and has no rights apart from it."

17. We were then referred to the decision of the Supreme Court in [Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others](#), , where it was held that an appeal under the CPC was incomplete, defective and income patent if the decree under appeal was not filed. The Court observed that the requirement that the decree should be filed along with the memorandum of appeal was mandatory, but this

observation was based upon the circumstance that the appeal was provided against the decree and the period of limitation for filing the appeal commenced to run from the date of the decree under appeal.

18. In our opinion, none of the cases cited on behalf of the first respondent can truly apply the facts before us.

19. We are, therefore, of the view that it was not mandatory that the affidavit required by the proviso to Section 83(1) should accompany the election petition when the petition was presented before the Election Commission, and that it was open to the Election Tribunal to receive the affidavit when the petition had been transferred to it for trial.

20. We are supported in this view by the decision of a Bench of this Court in *Sardar Singh v. Election Tribunal*, Civil Misc. Writ No. 2733 of 1962, D/- 21-9-1962 (All) where it was held that an election petition could not be dismissed merely on the ground that the requisite, affidavit had not been filed along with it.

21. The result is that the appeal is allowed, the order of the Election Tribunal dismissing the election petition is set aside and the case is remanded to the Election Tribunal for disposal in accordance with law. There shall be no order as (sic)COSTS,.