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**(2012) 05 GAU CK 0029**

**Gauhati High Court**

**Case No:** Misc. Case No. 3012 of 2011 in Election Petition No. 3 of 2011

Mazibur Rahman

APPELLANT

Vs

Salma Jesmin and Others

RESPONDENT

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**Date of Decision:** May 7, 2012

**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), 100(1)(d), 100(1)(d)(iii), 100(1)(d)(iv)

**Citation:** (2012) 3 GLD 54 : (2012) 2 GLT 907

**Hon'ble Judges:** Brojendra Prasad Katakey, J

**Bench:** Single Bench

**Advocate:** J. Mollah, Mr. A. Bhanu, Mr. S. Islam, Mr. D. Mazumdar, Mr. A.K. Talukdar, Mr. S. Banik, Mr. R. Sarma and Mr. T. Saikia, for the Appellant; N. Dutta, Mr. S. Bharali and Mr. P. Mahanta, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

B.P. Katakey, J.

By this application, the applicant, under Order 6 Rule 16 of the CPC (CPC), has prayed for striking out the pleadings in the election petition as well as for rejection of the same for want of cause of action, under Order 7 Rule 11 CPC. The opposite party No. 1 (herein after referred to as the election petitioner) has filed the election petition u/s 80, 80A read with Section 81 of the Representation of People Act, 1951 (in short the 1951 Act) calling in question the election of the applicant (herein after referred to as the returned candidate) to the Legislative Assembly of the State of Assam from No. 85 Rupahihat Legislative Assembly Constituency, result of which was declared on 31.05.2011, on the ground that the result of the election, in so far as it concerns the returned candidate, has been vitiated by discrepancies, incorrect

totaling at the time of counting of votes, malfunctioning of control unit of electronic voting machines (EVM) of Polling Station No.6, non-closure of control unit of the EVM of Polling Station No. 43 after completion of poll, amounting to non-compliance of the provisions of 1951 Act and the Conduct of Election Rules, 1961 (in short the 1961 Rules) and improper rejection of 18 postal ballots, thereby constituting the grounds for declaring the election of a returned candidate void within the meaning of Section 100(1)(d)(iii) & (iv) of the 1951 Act. The election petitioner has pleaded the aforesaid grounds in paragraph No. 5 of the election petition, elaborating the same in the other paragraphs of the election petition. In paragraph 6 the election petitioner has pleaded the violation of the provisions of 1951 Act as well as the 1961 Rules in the matter of counting of postal ballots contending that at the time of counting the rejected postal ballots were not separately bundled for sealing and neither the election petitioner nor her election agent or any of the counting agent of the election petitioner was asked to put their seal in the rejected postal ballots, thereby violating the provisions in Rule 54A of the 1961 Rules. It has also been pleaded that though at the end of the counting of the postal ballots, only 1 (one) postal ballot was declared to have been rejected by the Returning Officer, while preparing the Form No. 20, prior to declaration of the result, the election petitioner was told by the Returning Officer that 19 postal ballots were rejected and those were found to be recorded as tender votes in final Form 20 issued by the Returning Officer, thereby violating the Rule 42 of the 1961 Rules. The election petitioner, therefore, has pleaded that though only 1 (one) postal ballot was declared to have been rejected, 19 postal ballots eventually found to be rejected by the Returning Officer as reflected in the Form 20.

2. In paragraph 7 of the election petition it has been pleaded that while the first round of counting was going on in table No. 6, the EVM of Polling Station No. 6 failed to display any result when the result button was pressed and thereafter for about 20 minutes the control unit of the said EVM could not display the result in spite of various efforts, which results in suspension of the counting without sealing the control unit of the EVM and keeping the same in an unsealed condition for about 25 minutes during the period of suspension of the counting, thereby violating the provisions of 1961 Rules requiring sealing of the control unit of the EVM during the period of suspension of the counting.

3. The election petitioner in paragraph 8 has pleaded about malfunctioning of the control unit of the EVM in respect of Polling Station No. 43 contending that in round No. 4 at table No. 1 when the control unit was turned on, a red light blinked for sometime and then went off and thereafter as repeated pressing of the result button failed to show any result the Asstt. Returning Officer (ARO) and the technician came. It has also been pleaded that as despite pressing of the button of the control unit repeatedly by the technician nothing has happened, the technician removed the front flap of the control unit and the battery was replaced by another one and thereafter when the result button was again pressed then also the display

failed to show any result and a beep sound was heard. It has also been pleaded that when again the result button was pressed the display showed invalid and thereafter the technician pressed the closed button and the result button, then it displayed a purported result. The election petitioner further pleaded in the said paragraph that the technician then informed all concerned that the same happened as the closed button was not pressed after the end of the poll. It has been pleaded by the election petitioner that non-pressing of the closed button on the control unit of the EVM, after the end of the poll, which is necessary so that no farther recording of votes in the machine is possible, amounts to violation of 1961 Rules and leaving the EVM open for further voting. According to the election petitioner the EVM of Polling Station No. 43 lost its sanctity and the purported result of Polling Station No. 43 cannot be taken into account.

4. In paragraph 9 of the election petition, the election petitioner pleaded the violation of the 1961 Rules alleging discrepancies in Part-I and Part-II of Form No. 17C of Polling Station in question as regards the total votes polled, resulting in incorrect totaling in the round wise statements calculated on the basis of such wrong figures in Form No. 17C and projected in the black board. It has also been pleaded that because of such discrepancies the counting agents of the election petitioner refused to put their signatures in Form No. 17C after the 9th round, in view of the persistent failure of the Returning Officer/ Asstt. Returning Officer to correct such material discrepancies and the incorrect totaling. It has also been pleaded that even the result of the 10th and 11th round was not put up in the black board.

5. In paragraph 10 of the election petition the election petitioner has pleaded about not making random verification of the EVM and thereafter preparation of another statement in a proforma stipulated by the Election Commission and non-availability of the record with the Returning Officer or the Election Commission as regards the round wise statement mandatorily required to be prepared, amounting to violation and/or non-compliance of the provisions of 1951 Act, 1961 Rules as well as the instruction of the Election Commission to the Returning Officer as regards the procedure laid down for counting of votes.

6. The election petitioner in paragraph 11 of the election petition has pleaded that the Returning Officer did not follow the procedure laid down by the Election Commission in the instruction issued to the Returning Officer read with the provisions of Rule 63 of 1961 Rules in not waiting for few minutes, after announcement of total number of votes polled by each candidate as entered in the final result sheet (Form No. 20), and ascertaining from the election agent of the election petitioner as to the time required for making the application for recount in writing and by signing the final result sheet in Form No. 20 without waiting for the written application for recount to be filed.

7. In paragraph 12 the election petitioner has pleaded about the intimation of the order dated 13.05.2011 rejecting the prayer for recount, on 21.05.2011. In paragraph 13 the election petitioner has pleaded about the illegality committed by the Returning Officer in rejecting the prayer for recount made on 13.05.2011. In paragraph 14 it has been pleaded by the election petitioner that despite the application filed, copies of documents mentioned in the said paragraph have not been furnished to her though required under Rule 93(2) of the 1961 Rules.

8. I have heard Mr. D. Mazumdar, learned counsel for the returned candidate and Mr. N. Dutta, learned Sr. counsel appearing for the election petitioner. The proforma opposite parties have not entered appearance despite service.

9. Mr. Mazumdar, learned counsel for the returned candidate referring to the aforesaid pleadings in the election petition filed by the election petitioner has submitted that there being no allegation of rejection of 18 postal ballots in paragraph 6 of the election petition and also there being no allegation that those 18 postal ballots were counted in favour of returned candidate, apart from any pleadings that such improper rejection of postal ballots has materially affected the result of the returned candidate, the pleadings in paragraph 6 of the election petition does not disclose any cause of action for trial of the election petition, in as much as the election of the returned candidate can be declared as void by the High Court u/s 100(1)(d)(iii) of the 1951 Act provided the result of the returned candidate is materially affected by such alleged improper rejection of the postal ballots. It has also been submitted that the difference of votes between the election petitioner and the returned candidate being 233, even if the allegation made in the election petition relating to the improper rejection of 18 postal ballots are taken at its face value, it does not materially affect the result of the returned candidate.

10. Relating to the pleadings in paragraphs 7 and 8 of the election petition, the learned counsel submits that though the election petitioner has pleaded non-sealing of the control unit of the EVM in respect of the Polling Station No. 6 and leaving it for unsealed condition for about 25 minutes alleging suspension of counting as well as malfunctioning of the control unit of the EVM in respect of Polling Station No. 43, alleging non-pressing of the closed button on the control unit at the end of the poll after the last voter has recorded his vote, thereby violating the provisions of 1951 Act and the 1961 Rules, the election petitioner has not even made a whisper that during the period of alleged suspension of counting of votes as well as after the end of the poll, the EVMs were misused by anyone or those EVMs were used for casting votes during the suspension of counting or at the end of the poll. It has also been submitted that the election petitioner has also not pleaded that the votes, which were shown to be polled by the returned candidate vis-a-vis the election petitioner, are the result of any misuse or use of the EVMs during the period of suspension of counting or at the end of the poll. The learned counsel, therefore, submits that even assuming that the allegation of suspension of counting and

non-pressing of the closed button on the control unit in respect of the EVMs used in Polling Station Nos.6 and 43, respectively, are taken as correct, in the absence of any allegation and the material facts pleaded to demonstrate that the result of the returned candidate has been materially affected as a result of such alleged action and/or inaction on the part of the election officials, the election of the returned candidate cannot be declared as void on the ground enumerated in Section 100(1)(d)(iv) of the 1951 Act, which authorizes the High Court to set aside the election of a returned candidate only if the violation of the provisions of 1951 Act or the 1961 Rules or the orders passed by the Election Commission materially affects the result of the returned candidate. The learned counsel further submits that in the absence of the pleadings regarding materially affecting the result of the returned candidate because of such alleged action or inaction amounting to violation of the 1951 Act and the 1961 Rules, such allegation deserves to be strike out and the election petition deserves to be dismissed u/s 86 of the 1951 Act for noncompliance of the mandatory requirement of sub-section (1) of Section 83 of the said Act.

11. Referring to the pleadings in paragraphs 9 and 10 of the election petition, the learned counsel also submits that no material fact has been pleaded by the election petitioner relating to materially affecting the result of the returned candidate because of alleged discrepancies in Part-I and Part-II of Form No. 17C and not putting up the result of the 10th and 11th round in the black board as alleged. According to the learned counsel, mere pleading that non-compliance of the provisions of 1951 Act and the 1961 Rules and also the instruction of the Election Commission to the Returning Officer as regards the procedure laid down for counting of votes has materially affected the result of the election in so far as the returned candidate is concerned, is not sufficient, unless the material fact to demonstrate how the result of the returned candidate has materially affected are pleaded so that the returned candidate is not caught by surprise and can answer the allegation properly. It has been submitted that material facts, to demonstrate that the result of the returned candidate has been materially affected because of such discrepancies, having not been pleaded the election petition deserves to be dismissed for non-compliance of the mandatory provisions of Section 83(1) of the 1951 Act. It has also been submitted by the learned counsel that because of the aforesaid discrepancies the counting of votes polled by the candidates has not been affected and there was no wrong in counting of votes.

12. The learned counsel referring to the averments made in paragraphs 11 and 12 has submitted that since it is a settled position of law that in an election petition no roving enquiry can allowed to be made to find out the fault, the allegations made in paragraphs 11 and 12 of the election petition do not make out any ground for recount of votes and as such there is no triable issue in the election petition, which, therefore, deserves to be dismissed at the threshold. The learned counsel further submits that the prayer made in the election petition for directing a fresh poll in respect of Polling Station No. 43 also cannot be allowed in view of the provisions

contained in Section 98 of the 1951 Act, which empowers the High Court either to dismiss the election petition or declare the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. The learned counsel submits that such prayer for re-poll in respect of a particular Polling Station, therefore, cannot be granted by the High Court and hence the election petition is nothing but an abuse of the process of the Court.

13. The learned counsel in support of his contention has placed reliance on the decisions of the Apex Court in [Samant N. Balkrishna and Another Vs. V. George Fernandez and Others](#), in [Bhabhi Vs. Sheo Govind and Others](#), in [Azhar Hussain Vs. Rajiv Gandhi](#), in [Hari Shankar Jain Vs. Sonia Gandhi](#), in [Mayar \(H.K.\) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others](#), in [Virender Nath Gautam Vs. Satpal Singh and Others](#), in [Ram Sukh Vs. Dinesh Aggarwal](#), in [Laxmi Kant Bajpai Vs. Hazi Yaqoob and Others](#), in [Govind Singh Vs. Harchand Kaur](#), and in [Nandiesha Reddy Vs. Mrs. Kavitha Mahesh](#).

14. Mr. Dutta, learned Sr. counsel appearing for the election petitioner referring to the provisions of Order 6 Rule 16 as well as Order 7 Rule 11 CPC, which are applicable to the trial of the election petition by Section 87 of the 1951 Act, has submitted that the Court can strike out the pleadings in the election petition by invoking the jurisdiction under Order 6 Rule 16 CPC provided any of the grounds stipulated therein exist, namely, when such pleadings are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of the Court. The learned Sr. counsel submits that in the event any of the grounds enumerated in the said provision of law does not exist, the pleadings in the election petition cannot be strike out. It has also been submitted that similarly for the purpose of rejection of the election petition at the threshold, under Order 7 Rule 11 CPC, any of the grounds stipulated therein must exist. The learned Sr. counsel submits that though according to the returned candidate the election petition does not disclose any cause of action, the cause of action being a bundle of facts, reading of the pleadings in the election petition as a whole discloses a cause of action for trial of the same and hence the prayer of the returned candidate for rejecting of the election petition deserves to be dismissed. The learned Sr. counsel further submits that once the cause of action exist, the question whether the relief can be granted or not, cannot be gone into at the present stage, which naturally has to be decided by the Court at the end of the trial.

15. Referring to various decisions of the Apex Court, it has been submitted by the learned counsel that it is a settled position of law that the plaint has to be read as a whole to find out the cause of action and the pleadings in a particular paragraph cannot be read in isolation of the pleadings in other paragraphs. In the instant case, according to the learned Sr. counsel, reading of the pleadings in the election petition in its entirety discloses the violation of the provisions of the 1951 Act, 1961

Rules and the Election Commission's instruction to the Returning Officer and as such it cannot be said that the election petition does not disclose any cause of action to go for trial.

16. The learned Sr. counsel also submits that while in paragraph 5 the discrepancies and the grounds for declaring the result of the returned candidate as void are pleaded, in other paragraphs, namely, in paragraphs 6 to 11 those grounds are elaborated giving details of what actually happened at the time of counting of votes, which results in violation of the provisions of 1951 Act, 1961 Rules and the Election Commission's instruction. The pleadings in all these paragraphs, according to the learned Sr. counsel, are intrinsically interlinked, which also demonstrate how the result of the returned candidate has been materially affected because of such discrepancies, irregularities and illegalities. It has also been submitted that in all paragraphs of the election petition it is not required to be pleaded that the result of the returned candidate has been materially affected because of the narration of facts including improper rejection of postal ballots, when the election petitioner has pleaded that because of the happenings narrated in all the paragraphs of the election petition the result of the returned candidate has been materially affected.

17. The learned Sr. counsel further submits that the pleadings in none of the paragraphs of the election petition are either unnecessary, scandalous, frivolous or vexatious, or tend to prejudice, embarrass or delay the fair trial of the election petition, or otherwise an abuse of the process of the Court, so as to strike out the same under Order 6 Rule 16 CPC as contended by the returned candidate.

18. Mr. Dutta also submits that the allegations made in paragraphs 7 and 8 of the election petition discloses the loss of sanctity of the EVMs of Polling Station Nos.6 and 43 and also the result in respect of the said Polling Stations and as such it is not required to plead that the EVMs in respect of those Polling Stations were misused or the votes were cast during the period of suspension of counting in respect of EVM in Polling Station No. 6 and after the end of the poll in respect of the EVM of Polling Station No. 43. According to the learned Sr. counsel since sanctity of the election is lost, the result of the returned candidate has naturally affected.

19. Relating to the submission made by the returned candidate that the prayer for directing re-poll in respect of a Polling Station cannot be granted by the High Court, in view of the provisions contained in Section 98 of the 1951 Act, it has been submitted by the learned Sr. counsel that the High Court can obviously grant such prayer if it is found that there are discrepancies in the poll in respect of a particular Polling Station. It has also been submitted that while considering an application filed under Order 6 Rule 16 read with Order 7 Rule 11 CPC, the question whether a relief claimed in the election petition ultimately can be granted or not cannot be gone into, when it is found that the pleadings in the election petition discloses a cause of action for trial of the same. The learned Sr. counsel also submits that reading of the pleadings in the election petition as a whole also discloses the cause of action for

trial of the same relating to the relief claimed for recount of the votes polled and hence the election petition cannot be dismissed at the threshold for want of cause of action and it must be tried.

20. The learned Sr. counsel in support of his contention has placed reliance on the decisions of the Apex Court in *Udhav Singh Vs. Madhav Rao Scindia* reported in AIR 1976 SC 744, in [Roop Lal Sathi Vs. Nachhattar Singh](#), in [K.K. Modi Vs. K.N. Modi and Others](#), in [D. Ramachandran Vs. R.V. Janakiraman and Others](#), [Mahendra Pal Vs. Ram Dass Malanger and Others](#), in [Mayar \(H.K.\) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others](#), in *Sathi Vijay Kumar Vs. Tola Singh & Ors.* reported in (2006)13 SCC 353 and a Single Bench judgment of this Court dated 21.07.2010 passed in El.Pet. No.02/2006 (*Sri Atul Bora Vs. Sri Akan Bora*).

21. I have considered the submissions of the learned counsel for the appearing parties and perused the pleadings in the election petition.

22. Chapter-II of Part-VI of 1951 Act provides for presentation of the election petition calling in question any election on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector, within the time specified in subsection (1) of Section 81 of the said Act. Section 83(1)(a) of the 1951 Act provides that an election petition shall contain a concise statement of the material facts on which the petitioner relies. Chapter-III provides for trial of the election petition. Sub-section (1) of Section 86 requires the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. Section 87(1) provides that the election petition shall be tried, as nearly as may be, in accordance with the procedure applicable under the CPC to the trial of suits, subject to the provisions of the 1951 Act and the Rules made thereunder. Hence by virtue of the said provision, the provisions of the CPC as applicable to the trial of a suit is applicable to the trial of an election petition. Consequently the provisions of Order 6 Rule 16 and Order 7 Rule 11 CPC are also applicable to the trial of an election petition since those provisions are also applicable to the trial of suits. Therefore, the pleadings in an election petition can be struck out under Order 6 Rule 16 CPC and the election petition can also be dismissed under Order 7 Rule 11 CPC for non-disclosure of cause of action, even though Section 86 of the 1951 Act provides dismissal of the election petition for non-compliance of the provisions of Section 81 or Section 82 or Section 117 of the said Act only.

23. Order 6 Rule 16 CPC, which provision is applicable in the trial of an election petition by virtue of Section 87 of the 1951 Act, empowers the Court to strike out or amend any matter in any pleading at any stage of the proceedings, if such pleadings are (a) unnecessary, scandalous, frivolous or vexatious, or (b) tend to prejudice, embarrass or delay the fair trial of the suit, or (c) otherwise an abuse of the process of the Court. Order 7 Rule 11 CPC mandates the Court to reject the election petition where it does not disclose a cause of action. The pleadings in the election petition,



therefore, can be struck out only on the grounds enumerated in Order 6 Rule 16 CPC and not on any other grounds. Similarly, the election petition can be rejected under Order 7 Rule 11 CPC only on the ground enumerated therein and not otherwise. For the purpose of ascertaining as to whether the election petition discloses a cause of action, the Court is to examine the pleadings in the election petition only and taking such pleadings at its face value.

24. Section 83(1) of the 1951 Act, as noticed above, requires pleading of material facts in the election petition on which the election petitioner relies. The said provision being mandatory, an election petition, where material facts are not pleaded, deserves to be dismissed. Even lack of pleading of a single material fact, which is necessary, may be fatal. The material facts, however, can be supplied by the election petitioner even after filing of the election petition but before the time specified in sub-section (1) of Section 81 of the 1951 Act for filing of the election petition expires.

25. "Material facts" means the entire bundle of facts, which would constitute a complete cause of action, which must be concisely stated in the election petition. While failure to plead material facts is fatal, absence of material particulars can be cured at a later stage by proper amendment, provided the amendment does not have the effect of widening the scope of the election petition by introducing particulars in regard to a corrupt practice not previously alleged or pleaded within the period of limitation in the election petition. Material facts are those facts which can be considered as material supporting the allegations made, in other words they must be such facts as would offer basis for the allegations made in the petition and would constitute the cause of action as understood in the CPC. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad, as cause of action means every fact which would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. The requirement to plead material facts is to make the opposite party understand the case he will have to meet. The election petitioner, therefore, must pleads primary facts which must be proved at the trial by a party to establish the cause of action. Unless all necessary facts, which constitute material facts, are pleaded there is no question of allowing the election petitioner to lead evidence on such fact, as no amount of evidence can cure the defects in the pleadings. Whether in an election petition a particular fact is material or not, depends on the nature of the allegation levelled as well as the circumstances of the case. Mere repetition of the words of the statute does not amount to proper statement of facts. [Samant N. Balkrishna (supra), Bhabhi (supra), Azhar Hussain (supra), Hari Shanker Jain (supra), Virender Nath Gautam (supra), Ram Sukh (supra), Laxmi Kant Bajpai (supra), Govind Singh (supra), Nandiesha Reddy (supra)]

26. It is a settled position of law that the pleadings in a plaint are to be read as a whole to find out the cause of action. Reading of pleadings in one paragraph in

isolation of the pleadings in other paragraphs and dismissing the suit for want of cause of action is not permissible. Cause of action being the bundle of facts, the entire pleadings in the election petition is to be read as a whole to scrutinize as to whether the cause of action exist to go for trial. The Apex Court in *Mayar (H.K.) Ltd. (supra)* has held that likelihood of success of plaintiff cannot be a ground for rejection of the plaint so long as the plaint discloses some cause of action which requires determination by the Court. It has further been held that the plaint is to be read as a whole to find out the cause of action.

27. The Apex Court in *D. Ramachandran (supra)* has held that the plaint cannot be rejected under Order 7 Rule 11 (a) CPC by dissecting the pleadings in several parts and then holding that it does not disclose a cause of action. It has also been held that partial rejection of the plaint/election petition, under Order 7 Rule 11 CPC is not permissible and where the plaint discloses no cause of action it is obligatory upon the Court to reject the plaint as a whole under Order 7 Rule 11 (a) CPC. Similar view has also been taken by the Apex Court in *Room Lal Sathi (supra)*. In *Udhav Singh (supra)* the Apex Court has opined that a pleading has to be read as a whole to ascertain its true import and it is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. It has also been held that although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole. The same view has also been reiterated by the Apex Court in *Mahendra Pal (supra)*. In *Hari Shanker Jain (supra)* the Apex Court has opined that for the purpose of ascertaining as to whether the election petition discloses a cause of action, the Court is to examine the election petition irrespective of any written statement or denial. It has further been opined that the Courts have always frowned upon vague pleadings which leave a wide scope to adduce any evidence. No amount of evidence can cure the basic defect in the pleadings.

28. In *Azhar Hussain (supra)* the Apex Court has opined that the whole purpose of conferment of the power under Order 6 Rule 16 read with Order 7 Rule 11 CPC i.e. either to striking out unnecessary, scandalous, frivolous or vexatious pleadings or to dismiss the election petition in limine, is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the Court. It has been opined that the sword of Damocles need not be kept hanging over the head of the returned candidate unnecessarily without point or purpose. The Apex Court further observed that such hanging sword of election petition on the returned candidate would not keep him sufficiently free to devote his wholehearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. The appreciation of time and attention demanded by his elected office would be diverted to matters pertaining to the contest of the election petition if such

unnecessary litigation is allowed to continue and it would also amount to compelling him to engage advocate or advocating himself in such litigation instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office and instead of resolving their problems, which also may not permit to act with full freedom. The Court, therefore, held that it has to exercise the power to strike out the pleadings or reject the election petition if it is warranted in the facts and circumstances of the case. The Apex Court has also reiterated the same view in its subsequent judgment in *Sathi Vijay Kumar* (supra).

29. As noticed above, the grounds on which the election petition has been filed for declaring the result of the returned candidate as void are as enumerated in Section 100(1)(d)(iii) & (iv) of the 1951 Act. The High Court can declare the election of a returned candidate as void, under the aforesaid provisions of law, if the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper reception, refusal or rejection of any vote or the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of 1951 Act or of any Rules or orders made under the Act. Pleading of the material facts to demonstrate that the result of the returned candidate has been materially affected is a must u/s 83(1) read with Section 100(1)(d) of the 1951 Act. Unless the material facts to demonstrate that the result of the returned candidate has been materially affected so as to declare the election of the returned candidate as void u/s 100(1)(d)(iii) & (iv) are pleaded, such pleadings in the election petition have to be strike out by invoking the power under Order 6 Rule 16 CPC being an abuse of the process of the Court, as no relief can be granted without the pleadings of all material facts relating to materially affecting the result of the returned candidate, u/s 100(1)(d)(iii) & (iv). It is, however, true that when the election petition discloses cause of action, the election petition cannot be dismissed on the mere fact that in the opinion of the trial Judge the election petitioner may not ultimately succeed.

30. The term "abuse of the process of the Court" occurring in Order 6 Rule 16 CPC has not been defined in the CPC. According to the Black's Law Dictionary (Seventh Edition), the term "abuse of process" means:-

The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope. - Also termed abuse of legal process; malicious abuse of process; malicious abuse of legal process; wrongful process; wrongful process of law."

The Supreme Court Practice 1995 published by Sweet & Maxwell explains the phrase "abuse of the process of the court" as under:-

This term connotes that the process of the court must be used bonafide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being

used as a means of vexation and oppression in the process of litigation.... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

The Apex Court in *K.K. Modi* (supra) has opined that the Court should stop such proceedings summarily, which is an abuse of the process of the Court, which jurisdiction, however, is to be exercised sparingly and in special cases and when the Court is satisfied that there is no chance of the suit succeeding.

31. Having regard to the requirement of the law as well as judicial pronouncements, as discussed above, I shall now deal with the pleadings in the instant election petition. The election petitioner has secured 44208 valid votes as against the respondent No. 1, who secured 44441 valid votes and hence difference of votes is 233.

32. The election petitioner, as discussed above, in paragraphs 5, 7 and 8 has pleaded the suspension of counting of votes for about 25 minutes and leaving the control unit of EVM of Polling Station No. 6 in unsealed condition during that period of suspension as well as non-pressing of the closure button on the control unit at the end of the poll in respect of the EVM of Polling Station No. 43. The petitioner, however, has neither pleaded that the said EVMs were misused or used for recording votes during the aforesaid period of suspension of counting of votes, in respect of Polling Station No. 6, and after the end of the poll in respect of Polling Station No. 43 nor that the result shown in the said EVMs are the result of such use or misuse. As discussed above, the result of the returned candidate can be declared as void by the High Court u/s 100(1)(d)(iv) of the 1951 Act only if the election petitioner succeeds in proving that the election of the returned candidate is materially affected by any non-compliance with the provisions of the Constitution or of the 1951 Act or of any Rules or Orders made under the 1951 Act. Non-compliance of the same, which does not materially affect the result of the returned candidate, cannot be the ground for declaring the election of the returned candidate void. The allegation of the election petitioner being violation of Section 100(1)(d)(iv) of the 1951 Act, he is mandatorily required to plead material facts u/s 83(1)(a) of the said Act as to how, because of keeping the EVMs in an unsealed condition or non-pressing of its closure button of the control unit at the end of the poll, the result of the returned candidate has been materially affected, the same being the condition precedent for declaring the result of the returned candidate as void.

33. Merely because the EVMs were kept in an unsealed condition or closure button on the control unit at the end of the poll was not pressed, it would not lost the sanctity of the election, unless of course, as discussed above, it is pleaded that those EVMs were used for recording the votes after the end of the poll. No facts, which are material to demonstrate the use of the EVMs after the end of the poll, are pleaded. Without such pleadings no amount of evidence can allowed to be led, as for leading

evidence the necessary facts have to be pleaded in the election. The Court, however, if the material facts are pleaded, at the stage of consideration of the application under Order 6 Rule 16 CPC cannot go into the question whether the election petitioner would ultimately succeed, as it would depend on adducing cogent, reliable and trustworthy evidence to the satisfaction of the Court.

34. Hence, if the pleadings in paragraphs 7 and 8 read with the relevant pleadings in paragraph 5 of the election petition are allowed to remain, it would mean keeping the sword of Damocles hanging over the returned candidate unnecessarily, as there is no chance of the election petition succeeding on the basis of such pleadings in the said paragraphs. The said pleadings in the said paragraphs, therefore, are nothing but an abuse of the process of the Court within the meaning of Order 6 Rule 16 CPC and hence the same are strike out. The decision of the Single Bench of this Court in Atul Bora (*supra*), in view of what has been discussed above, cannot be applied.

35. As discussed above, the election petitioner in paragraph 6 has pleaded about improper rejection of the valid postal ballots. In paragraphs 9, 10 and 11 the election petitioner has pleaded about the discrepancy in counting and thereby violating the provisions of 1951 Act, 1961 Rules as well as the instruction of the Election Commission to the Returning Officer as regards the procedure laid down for counting of votes, apart from improper rejection of the application filed for recount of votes. Though the allegation of the improper rejection of 18 postal ballots, even if taken as correct, may not alone materially affect the result of the returned candidate keeping in view the difference of 233 valid votes, such allegation is also cited as a ground for recount of votes together with the pleadings in paragraphs 9, 10, 11, 13 and 14 of the election petition. For the purpose of ascertaining as to whether the pleadings in those paragraphs read with the related pleadings in paragraph 5 are required to be struck down under Order 6 Rule 16, it has to be seen whether any of the grounds enumerated in the said provision of law exist. The reading of the pleadings in those paragraphs together it cannot be said that those are unnecessary, scandalous, frivolous or vexatious or tend to prejudice or embarrass or delay the fair trial of the election or otherwise an abuse of the process of the court. It also cannot be said that the material facts in that regard i.e. for recount are not pleaded as required u/s 83(1) of the Act. Reading of the pleadings in those paragraphs together also discloses the cause of action to go for trial relating to the prayer for recount of votes. At this juncture, the Court, however, is not authorized to ascertain as to whether on the basis of such pleadings the election petitioner would ultimately succeed, as the election petitioner may not succeed if no cogent, reliable and trustworthy evidence could be adduced to the satisfaction of the Court to record a finding in favour of the election petitioner relating to the prayer for recount. The question whether the prayer for recount as claimed in the election petition can eventually be granted, on the basis of the material facts pleaded and evidence to be adduced, is to be considered at the appropriate time and not at this stage. In view of the aforesaid discussion, the

miscellaneous application is partly allowed to the extent of striking out the pleadings in paragraphs 7 and 8 as well as related pleadings in paragraph 5 of the election petition. No costs.