

AFR

Reserved on 04.01.2023

Delivered on 20.01.2023

Court No. - 34

Case :- WRIT - C No. - 39558 of 2022

Petitioner :- Lokendra Singh

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Kshitij Shailendra, Sandeep Kumar

Counsel for Respondent :- C.S.C., Ajay Dubey, Kamini Pandey (Dubey)

Hon'ble Saurabh Shyam Shamsery, J.

1. Petitioner is a returned candidate (Pradhan) wherein Respondent-3 (Election Petitioner) was a runner up in election and the margin of victory was 16 votes.
2. Election petitioner filed an election petition under Section 12-C of U.P. Panchayat Raj Act, 1947 (*hereinafter referred to as "Act, 1947"*), however, it was not supported by an affidavit of election petitioner though it was filed in his presence. Petitioner submitted written submission with specific assertion that election petition was liable to be rejected being filed without any affidavit of election petitioner.
3. On the basis of pleadings in election petition, Election Tribunal framed 18 issues and Issue No. 15 relates to effect of non filing of affidavit in support of election petition.
4. Petitioner filed preliminary objection to consider and decide Issues No. 11, 12, 13, 15 and 16. However, objections were rejected vide order dated 21.04.2022 passed by Election Tribunal that election petition was listed for evidence, therefore, objections are not maintainable.
5. At this stage, petitioner approached this Court by filing Writ-C No. 13760 of 2022 which was disposed of vide order dated 16.05.2022 with direction to Election Tribunal to decide Issues No. 12, 15 and 16 at first instance.

6. Subsequent to above order election petitioner filed affidavit in support of election petition on 17.05.2022.

7. In compliance of above order, the referred Issues No. 12, 15 and 16 were considered and decided by Election Tribunal vide order dated 16.06.2022 whereby preliminary objection raised by petitioner was accepted that election petition was not accompanied by an affidavit, which was a mandatory requirement under Order 6 Rule 15(4) CPC and it being a non-curable defect, rejected election petition.

8. Being aggrieved election petitioner filed Civil Revision No. 41 of 2022 which was allowed vide impugned order dated 15.11.2022 passed by Additional District Judge, Court No. 1, Agra with observation that Election Tribunal has not taken note of affidavit of election petitioner filed subsequently on 17.05.2022 which has duly affirmed the contents of election petition. Consequently, order impugned therein was set aside and election petition was restored for hearing.

9. Sri Kshitij Shailendra, learned counsel for petitioner, vehemently urged that election petition must be accompanied by an affidavit. Both forms part of election petition. There is no dispute that in the present case at first instance election petition was filed without any affidavit in its support and it being a non-curable defect, could not be cured by a subsequent affidavit. Learned counsel referred Order 6 Rule 15(4) of CPC that, “*the person verifying pleading shall also furnish an affidavit in support of his pleadings.*” He placed reliance on a judgment passed by Rajasthan High Court in **Heera Singh Chouhan vs. C.D. Dewal and others**, AIR 2004 (Raj) 34, para 25, which is reproduced as under:

“25. Thus, it can safely be said that the present case does not fall within the category where the defect can be cured. The question can be seen from another point of view that the petitioner is a law knowing person being a lawyer, the defect was pointed out by the respondent at the earliest possible stage. An application has been moved on behalf of the petitioner that he may be permitted to file

additional affidavit and in anticipation of the permission, the affidavit has been filed. Curiously the affidavit is not self-contained and oath taken relates to certain paragraphs of the election petition regarding which no oath has been taken by the petitioner on the day when the additional affidavit was sworn. Thus on that day it cannot be said that there was an oath taken by the deponent about contents of the petition delineating corrupt practice when the affidavit was sworn. Thus, even if the attempt on the part of the election-petitioner is considered to be an attempt to cure the defect then this attempt falls short of meeting the requirement of law, because along with affidavit the contents of corrupt practice were also required to be sworn. Those contents were neither reproduced in the affidavit nor any supplementary petition was filed stating that on that day those contents were sworn. Thus, there were no oaths taken of the relevant facts along with additional affidavit. Facts contained in the petition on the day when the additional affidavit was sworn were not stated on oath. When the lawyer does this kind of compliance of law then the Hon'ble Supreme Court has described such attempts in the following words :

"It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the defect.

The casual approach of the appellant is not only visible from the manner in which verification was done, but also from the fact that he has mentioned two different districts to which he claims to be belonging. The explanation that the same was given by mistake is too shallow when considered in the background that he is stated to be a practising advocate. An advocate is supposed to know the importance of verification and the desirability of making a statement of correct facts in any petition and more in case of an election petition. An election petition is intended to bring into focus any illegality attached to an election. It essentially and basically puts a

question mark on the purity of the election, casts doubt on the fairness thereof and seeks a declaration that the mandate of the people has been obtained by questionable means. In a democracy the mandate has sacrosanctity. It is to be respected and not lightly interfered with. When it is contended that the purity of electoral process has been polluted, weighty reasons must be shown and established. The onus on the election petitioner is heavy as he has to substantiate his case by making out a clear case for interference both in the pleadings and in the trial. Any casual or negligent cavalier approach in such serious and sensitive matter involving great public importance cannot be countenanced or glossed over too liberally as for fun."

10. Learned counsel also placed reliance on a judgment passed by Bombay High Court in **Ashok Tapiram Patil alias A. T. Nana Patil vs. Gurumukh Mehrumal Jagwani and others**, (2006) 6 BomCR 832, para 24, which is reproduced as under:

"24. In view of the facts and circumstances discussed above and considering the ratio laid down by the Apex Court in its various decisions rendered in various cases, referred to above, present election petition filed by the petitioner is an incomplete petition, which cannot be said to be a petition in the eye of law. As laid down by the Apex Court, its dismissal under Section 86 of the Representation of the People Act, 1951 is not warranted. However, this petition cannot be treated to be a petition in the eye of law. The affidavit filed in support of allegations of corrupt practices needs to be ignored as the same is filed after expiry of period of limitation. After exclusion of that affidavit, filed subsequently, this petition can be said to be a petition without disclosing cause of action. Hence, such a petition needs to be rejected exercising the powers under Order-VII, Rule 11 of the Code of Civil Procedure. The application (Exhibit-9) preferred by the respondent No. 1 needs to be allowed and the election petition filed by the petitioner needs to be rejected under Order-VII, Rule 11 of the Code of Civil Procedure."

11. Per contra, Sri M.S. Pipersenia, Advocate assisted by Ms. Kamini Pandey, learned counsel appearing for election petitioner/Respondent-3, submitted that there was no requirement of an affidavit under Section 12-C of Act, 1947. The only requirement prescribed under Section 12-C(3) is that, “*this application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.*” He further submits that non filing of affidavit could not be a ground to reject election petition when defect, if any, was cured by filing an affidavit subsequently. Learned counsel placed reliance on this Court’s judgments in **Jaibir Singh vs. District Judge and others, 1996(3) AWC 1771 (Para 2)** and **Ram Sewak Singh vs. State of U.P. and others, 2014(123) RD 95 (Para 10)**, which are reproduced as under:

Jaibir Singh (supra)

“2. Learned Counsel for the Petitioner submitted that since there is a technical error, hence the election petition should have been dismissed for breach of Rule 3. In this connection, I may mention that I have taken the view in Jai Bhagwan v. Vth Addl. District Judge Writ Petition No. 27884 of 1996 decided on 29.8.1996. That there is difference between how this Court functions under the Representation of People Act acting as an Election Tribunal and how this Court decides a writ petition under Article 226. When this Court acts itself as an Election Tribunal then, of course, it is bound by all the technicalities of election law. However, when this Court exercises its discretionary jurisdiction under Article 226, the Court is not bound to interfere merely because there is a technical violation of law by the authority concerned. It is settled law that writ Jurisdiction is discretionary Jurisdiction and this Court is not bound to interfere for technical violations of the law.”

Ram Sewak Singh (supra)

“10. In the present case, election petition was transferred before the Sub Divisional Officer, Kaushabmi by District Magistrate/Collector i.e. the competent authority under section 192 (as earlier Rule 25 of U.P. panchayat Raj Rules stood deleted in 1994 itself). Thus this Court is of the view that the law laid down in the case of Kedar Nath (supra) would have no application to the facts of the present case. Further case of Ansar Ahmad (supra) cited by learned Counsel for the petitioner is an authority on the issue that an election petition under section 12-C of the Act has to be filed in a prescribed manner. There could be no dispute to this proposition. But it nowhere holds that issue of non deposit of security deposit, in an election petition, is only to be tried as a preliminary issue, especially when there is a dispute as to whether a deposit in a "Zila Nidhi" would ensure to the benefit of election petitioner, which was an issue dependant on evidence.”

12. Heard learned counsel for parties and perused the material available on record.

13. Challenge to an election of a returned candidate is a serious affair wherein election petitioner has to set up a case to set aside election on legal grounds and for that pleadings plays an important role. Though no specific format is prescribed for election petition under Act, 1947 as well as Rules framed thereunder, however, principle and procedure prescribed under Code of Civil Procedure has to be followed and every pleading including an election petition has to be affirmed by an affidavit of election petitioner and for that a specific provision was inserted by Act 46 of 1999 w.e.f. 01.07.2002 under Order 6 Rule 15 being sub-rule (4) that *“the person verifying the pleading shall also furnish an affidavit in support of his pleadings.”* This provision is mandatory in nature and it has the effect of fixing responsibility on deponent as to truth of the facts stated in pleadings.

14. In first round of litigation this Court has directed to consider and decide issues including issue of non filing of affidavit alongwith election petition. Therefore, defect, if any, cannot be deemed to be cured due to filing of a subsequent affidavit filed a day after this Court directed to consider referred issues at first instance. Election Tribunal has rightly considered the case ignoring the affidavit filed later on. Therefore, there was no illegality committed by Election Tribunal in rejecting election petition without taking note of subsequent affidavit. The approach of Revisional Court that Election Tribunal ought to have taken note of subsequent affidavit, was not correct. Subsequent affidavit and specifically the affidavit filed after the order passed by this Court on 16.05.2022 could not be taken note of, therefore, Revisional Court has committed error while allowing revision only on the ground that Election Tribunal has not taken note of subsequent affidavit.

15. In **Ashok Tapiram Patil alias A. T. Nana Patil (supra)** Bombay High Court held that election petition must be accompanied with an affidavit in support of pleadings of election petitioner. Filing of an affidavit is a mandatory requirement which gives sanctity to an election petition wherein election of a returned candidate is under challenge. Therefore, the defect of non filing an affidavit in support of election petition at the stage of filing of election petition cannot be cured by way of filing subsequent affidavit and result of non compliance of a mandatory requirement of filing affidavit under Order 6 Rule 15(4) CPC, the consequence would fall, therefore, Election Tribunal has rightly rejected election petition at preliminary stage.

16. So far as reliance placed by learned counsel appearing for election petitioner/Respondent-3 is concerned, it would not help him as in one of the case, i.e., in **Ram Sewak Singh (supra)** objection was considered when case was at the stage of argument whereas in the present case preliminary objection has been considered at the very beginning of trial. In **Jaibir Singh (supra)** the issue was only of deposit of fee which may not be a mandatory requirement. However, as discussed above, filing of an affidavit in support of election petition is a mandatory provision which was not complied with

and it being non-curable, therefore, filing of subsequent affidavit would have no consequence.

17. In view of above, writ petition is allowed. Impugned order dated 15.11.2022 passed by Additional District Judge, Court No. 1, Agra in Civil Revision No. 41 of 2022, is hereby set aside and the order dated 16.06.2022 passed by Election Tribunal, is confirmed.

Order Date :-20.01.2023

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