

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ELECTION PETITION No. 41 of 2019

Between:-

PANKAJ SANGHVI

.....PETITIONER

(BY SHRI ABHINAV DHANODKAR, ADVOCATE)

AND

SHANKAR LALWANI

.....RESPONDENT

(BY SHRI HARSHWARDHAN SHARMA, ADVOCATE)

.....
Reserved for order on : **13.07.2022**

Passed on : **27.09.2022**
.....

This petition coming on for order this day, the court passed the following:

ORDER

01. Heard on **I.A.No.9524/2019**, which is an application filed by the respondent Shankar Lalwani under Order 7 Rule 11 of the

C.P.C. read with Section 100 (2) Representation of People's Act, 1951 (hereinafter referred as the Act of 1951) for dismissal of the Election Petition.

02. The aforesaid application has been filed by the respondent alleging that the Election Petition is liable to be dismissed as it has been filed beyond the period of 45 days as prescribed under Section 81 of the Act of 1951. It is submitted that the result of the Parliamentary election of 2019 were declared on 23.5.2019; whereas the election petition was presented before this Court on 8.7.2019, which is on 47th day. It is also submitted that there is non-compliance of mandatory provisions of Section 83 (1) (c) of the Act of 1951, as proper affidavit has not been filed in support of the Election Petition and in fact two affidavits have been filed which is not the requirement of the law and thus, on this account also, the petition is liable to be dismissed.

03. It is also alleged that there is non-compliance of mandatory provisions of Section 81(3) of the Act of 1951, as the identical copy of the petition has not been supplied to the respondent as the copy of the petition is not signed by the petitioner on each page and every page and it has not been attested as the true copy of the petition.

04. Another ground is non-joinder of the necessary party. It is alleged that the petition has been filed by the petitioner only on the ground of Section 100(1)(d)(iv) of the Act 1951, which provides

that an Election Petition can be filed if there is non-compliance of any provisions of the Constitution or of the Act of 1951 or any Rules or order made under the said Act; whereas in the petition, the petitioner has made allegations against the Returning Officer for not following the instructions issued by the Election Commission of India for mandatory counting and matching the results of VVPATS and CUs from randomly polling stations. And other allegations have also been levelled against the Returning Officer. In such circumstances, the Returning Officer is necessary and proper party for disposal of this petition and in his absence the petition deserves to be dismissed.

05. The respondent has also contended that no cause of action has accrued to the petitioner to file this election petition as the petition itself is vague, as the total margin of votes with which the respondent has won the election are 547754 votes and there is no pleadings in this regard as to how the alleged non-compliance of the Election Commission's order could have materially affected the elections specially when the petitioner has alleged deliberate negligence against the Returning Officer without impleading him as a party. Thus, it is submitted that the election petition being without substance is liable to be dismissed at this stage only as the trial of the Election Petition before this Court would only lead to wastage valuable time of this Court.

06. Reply to the aforesaid application has been filed by the

election petitioner-Pankaj Sanghvi, rebutting the grounds raised and the allegations levelled in the aforesaid application.

07. So far as the issue of delay in filing the election petition is concerned, Shri Abhinav Dhanodkar, learned counsel for the petitioner has drawn the attention of this Court to the fact that the 45 days from the date of declaration of election would be on 08.07.2019; whereas the petition has been filed on 09.7.2019 as on 08.7.2019, there was Sunday and the petition was filed on the next working day i.e. on 09.7.2019, the Monday, thus, it is submitted that the petition was well within limitation.

08. In respect of the other grounds raised by the respondent are concerned, it is submitted that petitioner has pleaded all the relevant facts in the election petition in accordance with law and the affidavits filed are also duly signed and properly verified in accordance with the Act of 1951 and the signed copies of the election petition have been sent along with the process fee and thus, no case for interference is made out.

09. Heard the counsel for the parties and also perused the record.

10. So far as the objection raised by the respondent that the petition has been filed after the prescribed period of limitation of 45 days is concerned, it is found that it has been filed within 45 days from the date of election, for the reasons that the 45 days from the date of presentation of the election petition would be on

8.7.2019 as the election results were declared on 23.5.2019; whereas the petitioner has been filed on 9.7.2019 and since on 8.7.2019 there was Sunday, the petition has been filed on the next working day i.e., on Monday falling on 09.7.2019. Thus it is held that the petition has been filed within limitation.

11. Regarding non-joinder of necessary party as the contention of the respondent is that the petitioner has not made the returning officer as a party, this Court is of the opinion that the Returning Officer is not a necessary party although he can be a witness. Thus, the aforesaid ground is not available to the respondent.

12. So far as objections regarding accrual of the cause of action and the lack of pleadings as to how the election of the returned candidate would be materially affected is concerned, wherein it is alleged that the petitioner has neither pleaded the violation of any law nor any documentary proof has been attached to show the violation of any of the provision falling within the ambit of Section 100(1)(d)(iv) of the People's Act, for this purpose, it is necessary to re-produce the averments made in the election petition. The relevant extracts of the same are reproduced as under:-

“15. That, Rule 56-D of the Rules was introduced by way of an amendment w.e.f. 14.08.2013 i.e. pursuant to introduction of the system of VVPAT, and the same reads as follows:

“56-D. Scrutiny of paper trail. -

(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting

agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling, stating or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub -rule 92) shall be in writing and shall contain the reasons there for.

(4) If the returning officer decides under sub -rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall-

(a) do the counting in the manner as may be directed by the Election Commission;

(b) if there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in the Form 20 as per the paper slips count;

(c) announce the amendments so made by him; and

(d) complete and sign the result sheet.”

16. That, the Commission had issued instruction/order dated 13.10.2017 for verification of VVPAT paper slips-Pilot Testing. Such instructions required mandatory verification of VVPAT paper slips randomly selected 01 (on G) polling station per Assembly Constituency on a 'pilot' basis. This mandatory verification of VVPAT of 01 (one) polling station (randomly selected) will be in addition to the provision of Rule 56-D of the Rules. The relevant portion of such instruction/order dated 13.10.2017 is quoted hereunder:

“ For this 'pilot verification of VVPAT paper slips of randomly,selected 01 (one) polling station per Assembly Constituency, the following procedure shall be followed:

1. The verification of VVPAT paper slips

of randomly selected 01 (one) polling station for each Assembly Constituency shall be taken after the completion of the last round of counting of votes recorded in the EVMs.

2. The random selection of 01 (one) polling station per Assembly Constituency shall be done by Draw of lots, by the Returning Officer concerned, in the presence of candidates/their agents and the General Observer appointed by the Commission for that Assembly Constituency.

3. The draw of lots must be conducted immediately after the completion of the last round counting of votes recorded in the EVMs (Control Units) in the designated Counting Hall for the particular Assembly Constituency.

4. A written intimation regarding the conduct of draw of lots for the random selection of 01 (one) polling station for verification of VVPAT Slips shall be given by the Returning Officer to the Candidates/their election agents well in advance.

5. The following procedure shall be followed for the conduct of draw of lots:-

a. White colour paper cards of postcard size shall be used for conducting the draw of lots.

b. Total number of such paper cards should be equal to total number of polling stations in the Assembly Constituency.

c. The paper cards shall have pre-printed Assembly Constituency number, AC name and date of polling on the top, and the polling station number in the centre. Each digit of the polling station number shall be at least 1" X 1" (1 inch by 1 inch) size and printed in black ink.

d. The paper cards to be used for draw of lots should be four-folded in such a way that polling station number is not visible.

e. Each paper card shall be shown to the candidates/their agents before folding and dropping in the container.

f. The paper cards shall be kept in the big container and must be shaken before picking up 01 (one) slip by the Returning Officer.

A copy of aforesaid instruction/order dated 13.10.2017 which has been downloaded from the official website of the Commission is filed herewith as Annexure-P/9.

17. That, the method and procedure of random selection of one polling station per Assembly Constituency was also provided in detail by draw of lots in the aforesaid instruction/order dated 13.10.2017, the relevant portion of which is already quoted.

18. That, the verification of VVPAT paper slips in accordance with the aforesaid instructions dated 13.10.2017 was made as a general procedure applicable to all the elections, to say mandatory, in respect of one polling station per Assembly Constituency, randomly selected and, more so, as a suo moto action without requiring application from any candidate or otherwise. This process is in addition to the process stipulated under Rules 56-D of the Rules, which is done in case of a disputed, raised by way of filing application in writing by any candidate or his election agent to the Returning Officer.

19. That, the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 273/2019 [**N. Chandrababu Naidu &ors. Vs. Union of India & anr.**] along with other connected writ petitions passed an order dated 08.04.2019 increasing number from one polling station per Assembly Constituency to five polling station per Assembly constituency for verification of VVPAT paper slips. Pursuant to the aforesaid directions of the Hon'ble Supreme Court, the Election Commission of India issued instructions dated 21.05.2019 for mandatory counting and matching result of VVPATs &

CUs from 5 (five) randomly selected polling stations in each State Legislative Assembly Constituency for auditing and testing if any EVM records votes differently vis-à-vis the slips printed by the corresponding VVPAT attached to it. Clauses 4 (a) to 4 (e) of such instructions are quoted hereunder for ready reference, which read as under:-

“4. Mandatory Verification of VVPAT Slips:

a) The Purpose of mandatory counting and matching result of VVPATs and CUs from 5 randomly selected polling stations is to audit and test if any EVM records votes differently vis-à-vis the slip printed by the corresponding VVPAT attached to it. However, there are multiple scenarios owing to human error or non-adherence to the extant instructions by the polling staff during actual polls in which the total VVPAT slip count may vary from the CU count. A few illustrative scenarios are cases where VVPAT slips are not fully removed from VVPAT after mock poll or CRC not done in CU after mock poll or other such cases of human error.

b) In case there is any mismatch between electronic candidature -wise result of Control Unit and the candidate-wise VVPAT slips manual count, recounting of the VVPAT slips of that particular VVPAT shall be conducted till the recount is tallied with the EVM count or one of the previous VVPAT slips count. However, in all such cases before taking up the recount, VVPAT slip pertaining to the candidates whose result of CU count and VVPAT count is not tallying, counting supervisor shall recheck the elections symbols of each VVPAT slip carefully of each bundle one-by-one and ensure that all bundles contain the VVPAT slip of the candidate concerned only. Recount shall be taken up, only after following the above process.

c) Even after following the above process, if the electronic count of the Control Unit and VVPAT slips manual count still do not tally, the VVPAT slip count will prevail as per Rule 56(D)(4)(b) of the Conduct of Elections

Rules, 1961 and result sheet shall be amended and final result announced accordingly.

d) Detailed report in respect of all cases of mandatory VVPAT Slip verification, as well as VVPAT slip count done under Rule 56 D shall be submitted to be Commission through the CEO immediately after the completion of the counting process in the prescribed format.

e) A thorough analysis/enquiry shall be conducted in due course in all cases where the VVPAT slip count failed to tally with the electronic result of the CU and the exact reasons, technological procedural, systematic, human error or lapses in compliance shall be ascertained and appropriate action(s) take by the Commission.

20. That, the aforesaid instruction/order of the Commission dated 21.05.2019, which has been downloaded from the official website of the Commission is filed herewith as **Annexure-P/10.**

21. That, the aforesaid order/instruction also provide for deleting the data of Mock poll from the controlling unit and removal of mock-poll slips from the VVPAT paper slips from the drop box of the VVPAT and in failure to do so, the procedure has been prescribed in para 2(a) thereof and the same is quoted hereunder: -

“a) In all pre-identified cases (on poll day, during scrutiny of documents on P+ 1 day etc), where mock poll is either not erased from the Control Unit or VVPAT paper slip pertaining to mock poll not removed (fully or partially), the 'concerned Control Unit (s) shall be kept aside during counting of votes i.e., these polling stations will not be taken up for counting during the regular round-wise counting of the Control Units. The Table allocated to such polling stations shall be kept vacant during the relevant round of counting. The list of all pre-identified

polling stations shall be shared with the contesting candidates before the commencement of process of counting.”

22. That, the Returning Officer did not follow the instructions issued by the Commission mandatory counting and matching result of VVPATs and CUs from randomly selected polling stations to audit and test if any EVM records votes consistently or differently vis-a-vis the slips printed by the corresponding VVPAT attached to it. likewise, the Mock poll from the Controlling Units (CU) was not deleted as also the mock polls slips from VVPATs were not removed and, therefore, such data had become a data of the entire election, which has materially affected the result of 26 Parliamentary Constituency, Indore

23. That, the Returning Officer did not exhibit the paper cards used for draw of lot for random selection of one polling station in each Assembly Constituency. The Officer present at the scene showed only one paper card as to how other cards would be. He did not show other paper cards or did nothing by which he could exhibit to the candidate or his election agent that such paper card corresponding to all the polling stations of the Assembly Constituency. A box full of paper cards which were pre-folded was brought into the room from somewhere and used for draw of lots and accordingly polling station was picked up for random verification. The procedure followed was in utter disregard of the aforesaid instruction/order dated 13.10.2017 of the Commission contained in Annexure-P/9.

24. That, the Election Commission of India is having power of overall superintendence, direction and control of election under Article 324 of the Constitution of India. The instructions/orders issued by the Election Commission of India thus have statutory force and are required to be mandatorily followed in

the entire election process.

25. That, the instructions/orders issued by the Election Commission of India dated 21.05.2019, contained in Annexure-P/10, were not followed by the Returning Officer, due to which the result of election of the returned candidate i.e. respondent herein, has been materially affected.

26. That, the result of the returned candidate has been materially affected as random checking of Five Polling booths in one Assembly Constituency with VVPAT was not done with Controlling Unit (CU),so as to verify that paper slip of VVPAT matches with the total number of votes recorded in CU and this amounts to non-observance of the mandatory' requirement as directed by the Hon'ble Supreme Court as also the Commission. The data shifting in favour of returned candidate could not be and cannot be ruled out inasmuch as the adequate safeguard directed to be followed by Hon'ble Supreme Court as also the Commission was not given effect to in letter and spirit.

27. That, since the result of respondent is being materially affected on account of non-compliance of the instructions/ orders dated 13.10.17 and 21.05.2019 issued by the Election Commission of India, contained in Annexure P-09 and P-10 therefore, the same is liable to be declared as null and void under Section 100(1)(d)(iv) of the Act.

28. That, as per the requirement of law the petitioner has deposited security amount in the sum of Rs.2000/- vide receipt dated 18.07.2019, a copy of which is filed herewith as **Annexure-P/11.**

29. That, the petitioner further states that this petition is within limitation.

30. An affidavit in support of this application is filed

herewith.

PRAYER

In the facts and circumstances of the present case following reliefs has been prayed for:-

(i) That, this Hon'ble Court may kindly be pleased to call for the entire records from the office of District Election Officer in respect of 26 Lok Sabha Constituency, Indore (M.P.)

(ii) That, this Hon'ble Court may kindly be pleased to declare the election of the respondent from 26 Lok Sabha Constituency, Indore (M.P.) as null and void;

(iii) Any other relief to which this Hon'ble Court may deem fit and proper in the interest of justice may also be granted;

(iv) Cost of the petition."

13. A close scrutiny of the election petition reveals that the entire election petition has been filed with general objections only about the non compliance of the rules and guidelines issued by the Election Commission which are not at all case-centric in nature. In other words, there is no reference of any violation of guidelines issued by the Election Commission of India *regarding* any specific polling booth of the 26 Loksabha Constituency, or any specific electronic voting machine, or any specific polling officer and in the presence of any specific election agent of the petitioner before whom such irregularity or non-compliance has taken place, but what is averred in the election petition is the various rules, instructions and orders which the Returning Officer is required to follow, regarding the operation of the electronic voting machine.

This court is of the considered opinion that the election petition is drafted in such a manner that the objections raised therein can be copied and pasted in just about every other election petition, questioning the election of any other Parliamentary seat anywhere in India. In such circumstances, when the pleadings of the Election Petition being vague and lacs the material facts, its outcome appears to be a forgone conclusion.

14. Reference in this regard may be had to the judgment rendered by the Apex Court in the case of **Madiraju Venkata Ramana Raju vs. Peddireddigari Ramachandra Reddy, reported in (2018) 14 SCC 1**. The relevant extract of the said judgment reads as under:

“**38.** It is well settled that the election petition will have to be read as a whole and cannot be dissected sentence-wise or paragraph-wise to rule that the same does not disclose a cause of action. Cause of action embodies a bundle of facts which may be necessary for the plaintiffs to prove in order to get a relief from the Court.

The reliefs claimed by the appellant are founded on grounds inter alia ascribable to Section 100(1)(d)(i). Further relief has been claimed to declare the appellant as having been elected under Section 101 of the 1951 Act. The cause of action for filing the election petition, therefore, was perceptibly in reference to the material facts depicting that the nomination form of Respondent 1 was improperly accepted by the Returning Officer.

39. On reading the election petition as a whole, we have no hesitation in taking a view that the High Court misdirected itself in concluding that the election petition did not disclose any cause of action with or without Paras 2 and 9 to 11 of the election petition.

Indeed, the pleadings of the election petition should be precise and clear containing all the necessary details and particulars as required by law. “Material facts” would mean all the basic facts constituting the ingredients of the grounds stated in the election petition in the context of relief to declare the election to be void. It is well

established that in an election petition, whether a particular fact is material or not and as such required to be pleaded, is a question which depends on the nature of the grounds relied upon and the special circumstances of the case. Particulars, on the other hand, are the details of the case set up by the party. The distinction between “material facts” and “full particulars” has been delineated in *Mohan Rawale v. Damodar Tatyaba*. This judgment has been adverted to in the reported decision relied on by the parties. The Court noted thus: (SCC pp. 397-99, paras 10-18)

“10. We may take up the last facet first. As Chitty, J. observed, “There is some difficulty in affixing a precise meaning to”

the expression “discloses no reasonable cause of action or defence”. He said: “In point of law ... every cause of action is a reasonable one.” (See *Republic of Peru v. Peruvian Guano Co.*) A reasonable cause of action is said to mean a cause of action with some chances of success when only the allegations in the pleading are considered. *But 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 quite often more known than clearly understood. It does introduce another special demurrer in a new shape. The failure of the pleadings to disclose a reasonable cause of action is distinct from the absence of full particulars.* The distinctions among the ideas of the “grounds” in Section 81(1); of “material facts” in Section 83(1) (a) and of “full particulars” in Section 83(1)(b) are obvious. The provisions of Section 83(1)(a) and (b) are in the familiar pattern of Order 6 Rules 2 and 4 and Order 7 Rule 1(e) of the Code of Civil Procedure. There is a distinction amongst the “grounds” in Section 81(1); the “material facts” in Section 83(1)(a) and “full particulars” in Section 83(1) (b).

11. Referring to the importance of pleadings a learned author says: ‘Pleadings do not only define the issues between the parties for the final decision of the court at the trial, they manifest and exert their importance throughout the whole process of the litigation. They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he has pleaded. They determine the range of the admissible evidence which the parties should be prepared to adduce at the trial. They delimit the relief which the court can award. ...’ [See: Jacob: “*The Present Importance of Pleadings*” (1960) *Current Legal Problems*, at pp. 175-76.]

40. In *Harkirat Singh*, this Court once again reiterated thus: (SCC p. 526-28, paras 46-48)

“46. From the above provisions, it is clear that an election petition must contain a concise statement of “material facts” on which the petitioner relies. It should also contain “full particulars” of any corrupt practice that the petitioner alleges including a full statement of names of the parties alleged to have committed such corrupt practice and the date and place of commission of such practice. Such election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”) for the verification of pleadings. It should be accompanied by an affidavit in the prescribed form in support of allegation of such practice and particulars thereof.

47. All material facts, therefore, in accordance with the provisions of the Act, have to be set out in the election petition.

If the material facts are not stated in a petition, it is liable to be dismissed on that ground as the case would be covered by clause (a) of sub-section (1) of Section 83 of the Act read with clause (a) of Rule 11 of Order 7 of the Code.

48. The expression “material facts” has neither been defined in the Act nor in the Code. According to the dictionary meaning, “material” means “fundamental”, “vital”, “basic”, “cardinal”, “central”, “crucial”, “decisive”, “essential”, “pivotal”, “indispensable”, “elementary” or “primary”. Burton’s Legal Thesaurus (3rd Edn.), p. 349.] The phrase “material facts”, therefore, may be said to be those facts upon which a party relies for its claim or defence. In other words, “material facts” are facts upon which the plaintiff’s cause of action or the defendant’s defence depends. What particulars could be said to be “material facts” would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.”

(emphasis supplied)

Again in paras 51 and 52, this Court observed thus: (SCC pp. 527-28)

“51. A distinction between “material facts” and “particulars”, however, must not be overlooked. “Material facts” are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. “Particulars”, on the other hand, are details in support of material facts pleaded by the party. They amplify,

refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative.

“Particulars” thus ensure conduct of fair trial and would not take the opposite party by surprise.

52. All “material facts” must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.”

(emphasis supplied)

15. In the aforementioned facts and circumstances of the case, taking into account the lack of pleadings regarding the material facts, this Court is of the considered view that this is a fit case to invoke the powers conferred on this Court by Order 7 Rule 11 of CPC to reject the plaint at the threshold only. Accordingly, the application I.A.No.9524/2019 is hereby allowed and the Election petition is hereby dismissed.

No costs.

(SUBODH ABHYANAKAR)
JUDGE

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