

CASE NO.:
Appeal (civil) 4402 of 2002

PETITIONER:
BIDESH SINGH

RESPONDENT:
MADHU SINGH AND ORS.

DATE OF JUDGMENT: 23/09/2003

BENCH:
V.N. KHARE CJ & S.B. SINHA

JUDGMENT:
JUDGMENT

2003 Supp(3) SCR 1074

The following Judgment of the Court was delivered :

This is an appeal against the judgment of Jharkhand High Court dismissing the election petition filed by the appellant herein.

The electors of 318 Panki Legislative Assembly Constituency were called upon by the Election Commission to elect a member for the then Bihar Legislative Assembly. 24th January, 2000 was fixed as the last date for filing nomination papers, whereas the date fixed for scrutiny of nomination papers was 25th January, 2000. As per the programme, the polling was to take place on 12th February, 2000. As a result of counting of votes, the respondent No. 1 herein was declared elected having been polled 17095 valid votes whereas the appellant herein was shown to have secured 17058 valid votes. The appellant herein filed an election petition challenging the election of respondent No. 1 herein - returned candidate wherein prayers for setting aside the election of the returned candidate and a further relief that he may be declared elected from 318 Panki Legislative Assembly Constituency after inspection and scrutiny of 258 illegally rejected ballot papers in respect of Booth No. 35, were made.

Respondent No. 1 instead of filing a written statement in the election petition, filed an application purported to be under Sections 81, 83 and 86(1) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") and Rule 94A of the Conduct of Election Rules, 1961 (hereinafter referred to as "the Rules") read with Order 7 Rule 11 & Order 14 Rule 2 of the Code of Civil Procedure for dismissal of the election petition on the ground of maintainability. In the said application, the first respondent, inter alia, contended that the signed copy of the election petition not with the seal of the Oath Commissioner was not served upon him. It was further contended that having regard to the fact that the appellant herein having accepted that the aforesaid 258 ballot papers had been rejected on the third round of counting in respect of Booth No. 35 he is estopped from questioning his election. The appellant herein filed a reply thereto. The Tribunal entertained the said application and by reason of the impugned judgment it although held that the election petition does not suffer on account of any infirmity in the verification in the election petition or in the matter of service of a copy of the election petition upon the respondent with the seal of the Oath Commissioner but proceeded to allow the said application, inter alia, on the ground that the appellant himself had given a certificate to the effect that the third round of counting in Booth No. 35 as regards rejection of 258 ballot papers was correct being in violation of Rule 38(1) and Rule 56(2)(h) of the Rules. The High Court by reason of the impugned judgment held that once the error as specified in clause (h) of Rule 56(2) has been committed the Returning Officer had no other

option but to reject the said ballot papers.

In that view of the matter, the election petition was dismissed. It is against the said judgment of the High Court/Tribunal, the appellant is in appeal before us.

Having heard the learned counsel for the parties, we find that the very approach of the Tribunal in dismissing the election petition at the threshold was erroneous.

Section 86 of the Act provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. It is not disputed that the petition did not suffer on account of a defect in the requirements of Section 81 or Section 82 or Section 117 and, thus, the election petition could not have been dismissed for non-compliance of the aforesaid provisions. What is sought to be stated by the Tribunal is that the election petition lacks material facts and that the election petitioner himself has given a certificate to the Returning Officer that the third round of counting of Booth No. 35 was correct and, therefore, has disentitled himself to raise any such objection.

The jurisdiction of the Tribunal in terms of Section 86 is limited. The election petition, it is trite, cannot be dismissed at the threshold even for non-compliance of Section 83 of the Act. In *Dr. Vijay Laxmi Sadho v. Jagdish*, AIR (2001) SC 600, this Court has stated the law in the following terms :

"An election petition is liable to be dismissed in limine under Section 86(1) of the Act only if the election petition does not comply with either the provisions of 'Section 81 or Section 82 or Section 107 of the Act.' The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Thus an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) of the Act or of its proviso. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

It is not a case where respondent No. 1 contended that the allegations made in the election petition were vague which would cause prejudice to him in the matter of filing written statement. Even if such a case had been made out, the Tribunal must remember the difference between the requirement of pleading as regard an election petition based on under Section 100(1)(d)(iii) and the election petition based on Section 100(1)(b) of the Representation of People Act, 1951. In case of an election petition based on Section 100(1)(d)(iii) is concerned, the election petitioner is required to set out the material facts and particulars in as much as to make out a prima facie case for inspection or scrutiny of the ballot papers. Where the Tribunal finds that the material facts set out in such an election petition is lacking, the election petitioner is entitled to supply necessary material facts and particulars under Order XVII of the Code of Civil Procedure. The question as to whether the election petitioner was estopped and precluded from raising the contentions in his election petition as regards the validity or otherwise of the 258 ballot papers, in our considered opinion, was a matter which could have been gone into only at the trial. The election petition could have been allowed or dismissed by the Tribunal having regard to the provisions contained in Section 100(1)(e) of the Act only after a full-dressed trial and upon giving opportunity to the parties to examine themselves and/or their witnesses in support of their respective cases. In such a proceeding, the parties could even examine the Presiding Officer or other official witnesses as regards the contention

as to whether the said 258 ballot papers were valid or invalid.

Keeping in the view the fact that the Tribunal has exceeded its jurisdiction under Section 86 of the Act, we have no other option but to set aside the impugned order leaving the questions raised by respondent No. 1 in his application open for determination thereof at an appropriate stage.

The Appeal is allowed in the aforesaid terms.

JUDIS