

CASE NO.:
Appeal (civil) 4605 of 2000

PETITIONER:
SRI T. PHUNGZATHANG

Vs.

RESPONDENT:
SRI HANGKHANLIAN & ORS.

DATE OF JUDGMENT: 28/08/2001

BENCH:
R.C. Lahoti

JUDGMENT:

R.C. Lahoti, J.

I am in respectful agreement with the order proposed by my learned brother N. Santosh Hegde, J. and place on record my concurrence with the reasoning and conclusion arrived at by him. However, I propose to assign additional reasons in support of the view taken by my learned brother.

The relevant facts have been succinctly stated and relevant provisions of law quoted by my learned brother, yet a quick recap of the facts and relevant statutory provisions, as a prologue to this opinion of mine, would be in order. It is undisputed that the election petition filed by the appellant, putting in issue the election of respondent no.1, alleges commission of corrupt practice by the respondent no.1 and also pleads grounds other than commission of corrupt practice, in support of the relief for declaring the election of returned candidate to be void. The election petition is signed and verified by the petitioner in the manner laid down in the Code of Civil Procedure for the verification of pleadings. The petition is accompanied by an affidavit in Form 25 as required by proviso to sub-section (1) of Section 83 of the Representation of the People Act, 1951 (hereinafter, the Act) and Rule 94-A of the Conduct of Election Rules, 1961 (hereinafter, the Rules). The affidavit so filed has been sworn before a Commissioner of Oaths and bears, to that effect, an endorsement, signature and rubber stamp of the Oath Commissioner administering oath to the deponent in the manner and form contemplated by Form 25. It is also not disputed that the set of the copies which accompanied the election petition at the time of filing and which was delivered to the respondent no.1 alongwith the writ of summons was complete in all respects excepting that the endorsement made by the Oath Commissioner attesting the affidavit to have been sworn by the deponent before him, his signature and rubber stamp do not appear on the copy of the affidavit delivered alongwith the copy of election petition to respondent no.1. On 22.5.2000 an application was filed by respondent no.1 before the learned Designated Election Judge under Sections 83 and 86 of the Act calling for dismissal of the election petition on the ground that the verification on the election petition was defective and material facts and particulars as to the alleged corrupt practice were not given but therein no grievance was raised that the copy delivered to the respondent no.1 was not in conformity with the original and, therefore, the respondent no.1 was prejudiced in his

defence. On 5.6.2000 another application was filed by respondent no.1 wherein such an objection was taken. Soon on receipt of the copy of the application, served on the petitioner out of the Court, the counsel for the election petitioner delivered another set of copy of election petition with affidavit which had the endorsement and rubber stamp of the Oath Commissioner as it was on the original and this was done before the application came up for hearing before the learned designated Election Judge. However, the learned Judge felt that there was non-compliance of Section 83(1)(c) proviso read with Section 81(3) and hence the petition was liable to be dismissed under Section 86(1) of the Act.

Section 83(1) of the Act requires an election petition to plead material facts setting forth full particulars of alleged corrupt practice and to be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. The proviso enacted to sub-section (1) requires that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. Rule 94-A (introduced by an amendment in the Rules w.e.f. 27th February, 1962) requires that an affidavit referred to in the proviso to sub-section (1) of Section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25. Form 25 appended to the Rules requires the election petitioner to verify on solemn affirmation or oath the statements about the commission of corrupt practice and the particulars of such corrupt practice distinctly stating to what extent they are true to his knowledge and to what extent they are true to his information. The form also prescribes the following endorsement to appear below the signature of the deponent on affidavit:-

Solemnly affirmed/sworn by Shri/Shrimati .
 at
 this day of ,
 19 .

Before me,
 Magistrate of the first class/Notary/
 Commissioner of Oaths.

The requirement of Section 83(1) proviso is of an affidavit in prescribed form. An endorsement by the specified officer before whom the affidavit is sworn is not the requirement mentioned in the Section. Rule 94-A can be dissected into two parts: (i) the affidavit shall be in Form 25, and (ii) it shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths. What is prescribed is the form of affidavit. Swearing in before one of the three officers is mode and manner of swearing in the affidavit. The later requirement does not relate to form of affidavit; it prescribes the persons recognised by the Act and the Rules as competent to administer oath to the deponent of affidavit for the purpose of Section 83(1) read with Rule 94-A and suggests, for the sake of convenience and consistency, the manner of endorsement to be made by the magistrate, notary or commissioner of oaths administering oath to the deponent. Such endorsement made by the officer administering oath to the deponent is not an integral part of the affidavit. Preparing, signing and swearing an affidavit are acts of the deponent; administering oath and making an endorsement in proof thereof on the affidavit are acts of the officer administering the oath.

In T.M. Jacob Vs. C. Poulse & Anr., (1999) 4 SCC 274, the Constitution Bench has reaffirmed the law as stated earlier by two Constitution Benches in Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore, (1964) 3 SCR 573 and Ch. Subbarao Vs.

Member, Election Tribunal, Hyderabad, (1964) 3 SCR 213 and has also explained and expanded the principles laid down by the earlier two Constitution Benches. In T.M. Jacobs case, copy of the election petition delivered to the contesting respondent did not show that the verification of the Notary Public required as per Rule 94-A and Form 25 was contained in the original and, therefore, the copy was objected to as being defective and amounting to non-compliance with the requirements of Section 81(3) of the Act. The case was placed before the Constitution Bench specifically for reconsidering the Three-Judges Bench decision in Dr. Shipra Vs. Shanti Lal Khoiwal, (1996) 5 SCC 181 and while doing so the Constitution Bench also noticed another later Three-Judges Bench decision of this court in Anil R. Deshmukh Vs. Onkar N., (1999) 2 SCC 205. The law laid down by the Constitution Bench may be summed up as under:-

(i) The object of serving a true copy of an election petition and the affidavit filed in support of the allegations of corrupt practice of the respondent in the election petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is of substance and not of form. (Para 35)

(ii) The test to determine whether a copy was a true one or not was to find out whether any variation from the original was calculated to mislead a reasonable person. (Para 33)

(iii) The word copy does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it. (Para 34)

(iv) Substantial compliance with Section 81(3) was sufficient and the petition could not be dismissed, in limine, under Section 86(1) where there had been substantial compliance with the requirements of Section 81(3) of the Act. (Para 34)

(v) There is a distinction between non-compliance with the requirement of Section 81(3) and Section 83. A substantial compliance with the requirements of Section 81(3) read with the proviso to Section 83(1) of the Act is enough. Defects in the supply of true copy under Section 81 of the Act may be considered to be fatal, where the party has been misled by the copy on account of variation of a material nature in the original and the copy supplied to the respondent. The prejudice caused to the respondent in such cases would attract the provision of Section 81(3) read with Section 86(1) of the Act. The same consequence would not follow from non-compliance with Section 83 of the Act. (Para 37)

(vi) The argument that since proceedings in election petitions are purely statutory proceedings and not civil proceedings as commonly understood, there is no room for invoking and importing the doctrine of substantial compliance into Section 86(1) read with Section 81(3) of the Act, cannot be accepted and has to be repelled. (Para 38)

(vii) It is only the violation of Section 81 of the Act which can attract the application of the doctrine of substantial compliance as expounded in Murarka Radhey Shyam and Ch. Subbarao cases. The defect of the type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. This clearly emerges from the scheme of Sections 83(1) and 86(5) of the Act. (Para 38)

(viii) A certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86(1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect. It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon the facts and circumstances of each case and no hard and fast formula can be prescribed. The tests suggested in *Murarka Radhey Shyam* case are sound tests and are now well settled. (Para 40)

Dr. Shipras case, (1996) 5 SCC 181, was referred to, doubted and distinguished in *Anil R. Deshmukh*, (1999) 2 SCC 205, which also is a three-Judge Bench decision. Both these decisions were placed before the Constitution Bench in *T.M. Jacobs* case. In *Dr. Shipras* case, the Constitution Bench decisions in *Ch. Subharao* and *Murarka Radhey Shyam* have been just referred to vide para 10 but not dealt with. In *T.M. Jacobs* case the Constitution Bench has clearly held that the view taken in *Dr. Shipras* case must be confined to the fact-situation of that case and cannot be considered to be of general application. The statement of law in *Anil R. Deshmukh* case has been approved wherein the copy of the affidavit delivered to the respondent did not bear the endorsement of attestation or the seal or stamp of the attesting officer found on the original. But for the absence of the notarial endorsement, it was a true copy of the original as it was a xerox copy and was attested as true copy under the signature of the election-petitioner. A copy along with notarial endorsement was later on furnished to the respondent. Applying the theories of substantial compliance and of curability this Court held that the election petition was not liable to be dismissed in limine. In *Harcharan Singh Josh Vs. Hari Kishan*, (1997) 10 SCC 294, the defect in the copy of the affidavit supplied to the respondent was the same as is in the present case and a three-Judge Bench of this Court, solely by relying on *Dr. Shipras* case held that the election petition was liable to be dismissed in limine. In *Dr. Shipra* and *Harcharan Singh Josh* — both three-Judge Bench decisions, this Court has held the defect to be not curable and the concept of substantial compliance having no application in such a case. In *Murarka Radhey Shyams* case and *T.M. Jacobs* case the Constitution Benches have held such a defect to be curable and the test of substantial compliance to be applicable. The very premise on which the decisions in *Dr. Shipra* and *Harcharan Singh Josh* proceed, thus, runs counter to the view taken by Constitution Bench. In view of the Constitution Bench decisions, *Dr. Shipras* case and *Harcharan Singh Joshs* case cease to be good law.

There is another angle from which the point at issue may be examined. In *Murarka Radhey Shyams* case the Constitution Bench has held that where an affidavit is in the prescribed form but there is a mistake in the verification portion of the affidavit such mistaken verification of the oath commissioner cannot be a sufficient ground for dismissal of the election petition summarily as the provisions of Section 83 are not mandatorily to be complied with nor make a petition invalid and such affidavit can be allowed to be filed at a later stage also. Obviously when the defect in the original affidavit is removed at a later stage, copy of such affidavit would also be supplied to the respondent only at such later stage. If the view of the High Court in the order impugned before us is to be upheld, an election-petitioner having filed an affidavit fully satisfying the requirement of Section 83(1) proviso and Rule 94-A in all respects but having made an omission in the copy of the affidavit delivered to the respondent would be placed in a position worse than an election-petitioner whose original affidavit filed with the election petition itself did not satisfy the requirement of Section 83(1) proviso read with Rule

94-A. This could not have been the intendment of law. Such an interpretation would, to say the least, make a mockery of justice. That non-compliance with Section 83 cannot be a ground for dismissal of the election petition under Section 86 and the defect, if any, is curable, has been the view taken by three-Judge Bench in Manohar Joshi Vs. Nitin Bhaurao Patil and Anr. - (1996) 1 SCC 169 and also in H.D. Revanna Vs. G. Puttaswamy Gowda and Ors.- (1999) 2 SCC 217 wherein all the decisions available till then have been considered. In Kamal Narain Sarma Vs. Dwarka Prasad Mishra and Ors. - (1966) 1 SCR 478, affidavit was sworn in before the clerk of Court attached with the office of the District Judge empowered by the District Judge under Section 139(c) of Code of Civil Procedure for the purpose of administration of oaths on affidavits made under the Code of Civil Procedure. The Election Tribunal allowed a fresh affidavit to be filed in place of such affidavit treating it to be defective. On the matter reaching this Court, a Constitution Bench held that an extreme and technical view was not justified. The affidavit was held to be proper and the second affidavit was held to be not necessary.

In the case before us, the copy of affidavit supplied to the respondent no.1 fulfilled the object which the copy is intended to serve. There was no such variation from the original, as was calculated to mislead the respondent. There was no scope of misunderstanding for the respondent. The affidavit satisfied the test of substantial compliance, as propounded in Murarka Radhey Shayam and reaffirmed in T.M. Jacob. The respondent no.1 was not prejudiced. This is clear from the fact that no objection in this regard was taken in the application dated 22.5.2000. In the next application dated 5.6.2000, objection in this regard was taken and immediately the election petitioner made available to the respondent another copy of affidavit without defect. Thus the defect, if any, stood cured as held in Anil R. Deshmukhs case.

For the abovesaid additional reasons I agree with my learned brother that the judgment of the High Court has to be set aside and the case remanded to the High Court for trial and disposal of the election petition on merits.

.....J.
(R.C. Lahoti)

August 28, 2001.