

CASE NO.:
Appeal (civil) 598 of 2007

PETITIONER:
Umesh Challiyil

RESPONDENT:
K.P.Rajendran

DATE OF JUDGMENT: 26/02/2008

BENCH:
A.K.MATHUR & ALTAMAS KABIR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 598 OF 2007

A.K. MATHUR, J.

1. This appeal is directed against the order dated 6.12.2006 passed by the learned Single Judge of the Kerala High Court whereby the learned Single Judge has rejected the election petition filed by the appellant on the preliminary objection raised by the respondent that affidavit in form No.25 was not affirmed, as such the affirmation was not duly certified as per law nor did it disclose its source of information. It was also observed that despite the fact that objections were taken and the defects could have been cured, no steps were taken to remove these defects. Hence, learned Single Judge dismissed the election petition as it was not properly affirmed as under Sections 83 & 85 of the Representation of the People Act, 1951 (hereinafter to be referred to as the Act of 1951) read with Rule 94A of the Conduct of Election Rules, 1961 (hereinafter to be referred to as the Rules of 1961).

2. Brief facts which are necessary for disposal of this appeal are that an election was held on 29.4.2006 to the Kerala Legislative Assembly from No.67 Kodungalloor Assembly Constituency. It was alleged in the election petition filed by the appellant that the election be declared void on the ground of corrupt practice committed either by the respondent's election agent or by some other person with the consent of the respondent or his election agent. The election petition was registered and notice was issued. The respondent was the elected candidate and he raised a preliminary objection on the maintainability of the election petition. The preliminary objections were that the affidavit in Form 25 was not affirmed, as such, the affirmation was not duly certified; the verification of the election petition was defective; the sources of information as regards the allegations of corrupt practices of which the appellant did not have personal knowledge; the allegations in the election petition were vague and lacked pleadings as regards the material particulars. It was contended by the petitioner/ appellant (herein) that there were no illegality in the verification nor the affidavit in form No.25 was defective. It was submitted that the accusations were specific and they were not vague and the facts mentioned in the election petition were duly sworn by proper affidavit.

3. The first preliminary objection was upheld by learned Single Judge that the affidavit which has been filed along with the

election petition was not duly verified and the affidavit was not in the form as required under Form No.25 nor was it in conformity with Section 83 of the Act of 1951. Secondly, the verification of the election petition was not in the manner which is required under the Code of Civil Procedure, 1908 (hereinafter to be referred to as CPC). Section 83 of the Act of 1951 states what are the contents of the election petition. Section 83 reads as under:

" 83. Contents of petition.- (1) An election petition \026 (a) shall contain a concise statement of the material facts on which the petitioner relies; (b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings : Provided 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. (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

As per Section 83, a concise statement of material facts should be given in the petition and if the allegations are of corrupt practice then the a full statement, as far as possible, all names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice has to be disclosed and it shall be signed by the petitioner and verified in the manner laid down in the CPC for verification of the pleadings . It further provided that where the allegations are of 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 in Form No.25.

4. Now, coming to the question with regard to the verification, the verification which is required as per the provisions of the CPC under Order 6 Rule 15 that the pleadings shall be verified and it should specify with reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information which he received is believed to be true. The format of the verification is contained in Form No.25 under Order 6 Rule 15, CPC. Relevant portion of the form No.25 reads as under :

" FORM 25
(See rule 94A)

I, \005\005\005\005\005\005 , the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati\005\005\005. (respondent No\005\005\005.in the said petition) make solemn affirmation/ oath and say-

(a) that the statements made in paragraphs \005. Of the accompanying election petition about the commission of the corrupt practice of*\005\005 and the particulars of

such corrupt practice mentioned in paragraphs \005\005. Of the same petition and in paragraphs\005\005\005. Of the Schedule annexed thereto are true to my knowledge;

(b) that the statements made in paragraphs \005. of the said petition about the commission of the corrupt practice of*\005\005.and the particulars of such corrupt practice given in paragraphs\005\005 of the said petition and in paragraphs\005\005.of the Schedule annexed thereto are true to my information

)

(d)

etc.

Signature of deponent

Solemnly affirmed/ sworn by Shri/ Shrimati\005\005\005

At\005\005\005\005\005\005\005\005\005.this \005\005\005\005\005\005\005.day\005\005\005. of \005\005\00519

Before me,

Magistrate of the first class/Notary/
Commissioner of Oaths.

* Here specify the name of the corrupt practice."

5. Now, what has been stated in the verification of the election petition reads as under :

" I, Umesh Challiyill, aged 45 years, S/oC A Krishnan, Challiyill House, Arakulam West, Kodungalloor, the petitioner herein, do hereby declare that the averments made in paragraphs 1, 2 and 4 are within my personal knowledge and paragraphs 3 and 5 to 8 are within my knowledge, information and belief and no part thereof is false and nothing which is relevant has been concealed.

Verified today this the 26th day of June, 2006 at Ernakulam.

Sd.
Advocate

Sd.
Petitioner

I, Umesh Challiyill , aged 45 years, S/o CA Krishnan, Challiyill House, Arakulam West, Kodungalloor, the petitioner herein, do hereby declare that this is the true copy of the election petition. Verified this the 26th day of June, 2006 at Ernakulam.

Sd
Advocate

Sd.

Petitioner."

In this affidavit instead of writing " that I believe to be true" what has been stated , " no part thereof is false and nothing which is relevant has been concealed." This verification has been found by learned Single Judge to be defective. It is true it is not in same words as was required in form No.7 under Rule 82 of the Rules of High Court of Kerala, 1971 framed in exercise of power under Article 225 of the Constitution of India. After going through the affidavit filed by the appellant and the format of the concluding portion of the

affidavit, we fail to appreciate that in what way the verification can be found to be bad except that it has not used the word, "true" it is expressed in other way, "no part thereof is false and nothing which is relevant has been concealed." Instead of saying, "true" it has been put up in other way round, "no part thereof is false and nothing which is relevant has been concealed", which conveys the same meaning as was used, "I believe the same to be true". We fail to appreciate the distinction between the two. But the substance and the essence has been conveyed. Therefore, the view taken by learned Single Judge that the verification is not in the form as required under Form No.7 under Rule 82 of the Rules of the High Court of Kerala, 1971 and therefore, it is a major defect in the constitution of the election petition and therefore, it should be rejected under Section 86 of the Act of 1951, we do not agree with this observation. What one is required to do is to make proper verification disclosing the contents of which paragraphs are within his personal knowledge, and the averments in which paragraphs are within his knowledge, information or the information derived from other source and he believes the same to be true. Therefore, both the phraseology convey the same meaning except that instead of using the words, "that the averments in paragraphs 1,2 and 4 are within his personal knowledge and the averments in paragraphs 3 and 5 to 8 are within his knowledge, information and that the averments are true" he has stated, "no part thereof is false and nothing which is relevant has been concealed". Practically the same sense is conveyed and it is not such a defect which could entail dismissal of the election petition.

6. Secondly, the affidavit which has been filed is required under the proviso to Section 83 of the Act of 1951 that in the matter of 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. That affidavit has also been produced before us and the contents of the affidavit read as under :

" AFFIDAVIT FILED UNDER SECTION 83 OF
THE REPRESENTATION OF THE PEOPLE ACT 1951 READ
WITH RULE 94A OF THE CONDUCT OF ELECTION RULES
1961

I, Umesh Challiyil, aged 45
years, S/o CA Krishnan, Challiyil House, Arakulam
West, Kodungalloor, the petitioner in the
accompanying election petition calling in
question the election of Shri K P Rajendran
(respondent in the said petition) make solemn
affirmation and say-

(a) that the statements made in paragraphs 1, 2
and 4 of the accompanying election petition
about the commission of corrupt practice of
putting up the poster as seen in the
photograph Annexure A and the publication
and distribution of Annexures C and D by the
election agent of the respondent and other
agents of the respondent containing
statements of facts which are false and
which the election agent and other agents
believed to be false or do not believe to be
true in relation to the personal character
and conduct of Shri Umesh Challiyil, the
United Democratic Front Candidate of
Kodungalloor Assembly constituency, namely me
which are statements reasonably calculated

to prejudice the prospects of the election of the said Sri Umesh Challiyil, namely me and the particulars of such corrupt practice mentioned in paragraph 4 of the same petition falling under Section 123(4) of the Representation of the People Act, are true to my knowledge.

(b) That the statements made in paragraphs 3 and 5 to 8 of the accompanying election petition about the commission of corrupt practice of publication and distribution of Annexure C & C in all the segments and the areas within the Kodungallur Assembly Constituency the particulars of which are as mentioned in detail in paragraphs 3,5 to 8 by the Election agent and other agents of the respondent making statement of facts which are false and which he and they believed to be false or do not believe to be true in relation to the personal character and conduct of Sri Umesh Challiyil, namely me the candidate of the United Democratic Front in the Kodungallur Assembly Constituency reasonably calculated to prejudice the prospectus of the election of the said Sri Umesh Challiyil, namely me and thereby a corrupt practice falling under Section 123(4) of the Representation of the People Act and have been committed and the detailed particulars of such practice mentioned in the aforesaid paragraphs of the same petition are true to my information.

All the facts are true and correct.
Dated this the 26th day of June, 2006.

Solemnly affirmed by Shri Umesh Challiyil at Ernakulam on this the 26th day of June, 2006.

Sd.
Deponent.

Before me.

Sd.
26/06/06
Magistrate of the First Class/
Notary/ Commissioner of Oaths.

Stamp of C.A.MAHEED
ADVOCATE & NOTARY
D.H.ROAD ERNAKULAM
KOCHI -16."

Here also the defect as pointed out by learned Single Judge was that the appellant had not signed and affirmed in the manner inasmuch as there is no certification of the Notary that it was solemnly affirmed by the appellant before him. This objection was based on the fact that after the signature of the deponent the only words occurring before the signature of the Notary are, " Before me". The words, "Solemnly affirmed by Shri Umesh Challiyil at Ernakulam on this the 26th day of June, 2006." Occurred above the signature of the deponent. Therefore, it was contended that the affidavit does not bear the certification by the Notary as to the affirmation by the deponent

since such certification ought to be by the Notary after the signature of the deponent. This affidavit was also found to be defective by the learned Single Judge. But in our view, this too is a defect of very minor nature. It may be a bona fide mistake on the part of the deponent as well as the Notary but basically it conveys the sense that the affidavit has been solemnly affirmed by Umesh Challiyil at Ernakulam. This affirmation also does not in any way go to the root of the matter so as to render the entire election petition not properly constituted entailing the dismissal of the same. Both the defects which have been pointed out by learned Single Judge were too innocuous to have resulted in dismissal of the election petition on the basis of the preliminary objection. The Courts have to view it whether the objections go to the root of the matter or they are only cosmetic in nature. It is true that the election petition has to be seriously construed. But that apart the election petition should not be summarily dismissed on such small breaches of procedure. Section 83 itself says that the election petition should contain material facts. Section 86 says that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 of Section 82 or Section 117. But not of defect of the nature as pointed out by the respondent would entail dismissal of the election petition. These were the defects, even if the Court has construed them to be of serious nature, at least notice should have been issued to the party to rectify the same instead of resorting to dismissal of the election petition at the outset.

7. Learned counsel for the respondent has tried to justify and support the order of the learned Single Judge and submitted that in fact these objections were raised by the respondent in his counter and the appellant had sufficient opportunity to have cured them and in that connection, learned counsel for the respondent pointed out that the election petition was presented on 22.6.2006 and the first date of hearing was 30.8.2006. The appellant should have cured these defects but the same was not done. Therefore, there was no option with the learned Single Judge but to dismiss the election petition. We fail to appreciate this argument of learned counsel for the respondent for the simply reason how can the appellant who bona fide felt that his election petition in all respect is complete will entail such a serious consequence of dismissal of the election petition on such minor omissions. In case, learned Single Judge found that the election petition was not in the format then after recording his finding, learned Single Judge should have given an opportunity to the appellant to amend or cure certain defects pointed out by the Court. It may be relevant to mention, these are not the grounds mentioned in Section 86 of the Act for dismissal of election petition. But nonetheless even if it is to entail serious consequence of dismissal of the election petition for not being properly constituted, then too at least the appellant should have been given an opportunity to cure these defects and put the election petition in proper format. But learned Single Judge in stead of giving an opportunity has taken the easy course to dismiss the election petition which in our opinion, was not warranted.

8. Learned counsel for the appellant has invited our attention to various decisions of this Court in which this Court has considered the similar effect of the case at hand. The first is *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Ors.* ([1964] 3 SCR 573). In this case with regard to the defect in the verification, this Court observed as follows:

" We agree with the view expressed by the Election Tribunal and we do not think that the defect in the verification due to inexperience of the Oaths Commissioner is such a fatal defect as to require the dismissal of the

election petition."

Similarly, other defects were of minor nature , like proper copies of the election petition were not served or the election petition does not bear the signature at one or two places in the election petition. This Court observed that such defects are not so fatal which may result in dismissal of the election petition.

9. Similarly, in H.D.Revanna v. G.Puttaswamy Gowda & Ors. [(1999) 2 SCC 217], it was observed as follows:

" The provisions in the Representation of the People Act, 1951 are very specific. Section 86 provides for dismissal of an election petition in limine for non-compliance with Sections 81, 82 and 117. Section 81 relates to the presentation of an election petition. It is not the case of the appellant that the requirements of Section 81 were not complied with. Sections 82 and 117 are not relevant in the instant case. Significantly, Section 86 does not refer to Section 83 and non-compliance with Section 83 does not lead to dismissal under Section 86. The Supreme Court has laid down that non-compliance with Section 83 may lead to dismissal of the petition if the matter falls within the Scope of Order 6 Rule 15 or Order 7 Rule 11 CPC. Defect in verification of the election petition or the affidavit accompanying the election petition has been held to be curable and not fatal"

10. In Sardar Harcharan Singh Brar v. Sukh Darshan Singh & Ors. [(2004) 11 SCC 196], this Court held as follows:

" In the present case, the grounds of corrupt practice and the facts necessary to formulate a complete cause of action had been stated. Even the particulars had been given. However, if the Court felt that the particulars as given in the petition were deficient in any manner the petitioner could be directed to supply the particulars and make the deficiency good. In any case, deficiency in particulars could not have been a ground for dismissing the petition at the threshold. Only the non-supply of particulars though ordered by the Court could have led to either striking off of the pleadings or refusal to try the related instances of alleged corrupt practice."

Similarly, their Lordships have further observed that Section 86 which contemplates dismissal of the election petition does not cover non-compliance of Section 83 of the Act and therefore, consequences of Section 86 does not follow.

11. As against this, learned counsel for the respondent inviged our attention to a decision of this Court in Azhar Hussain v. Rajiv Gandhi [1986 (Supp.) SCC 315]. There also this Court held that though Section 83 is not mentioned in Section 86, but since the election petition could be summarily dismissed under Order 6 Rule 16 and Order 7 Rule 11, in case of petitioner's failure to furnish any of the material facts and particulars in violation of Section 83 of the Act which are essential for disclosing the cause of action

relating to conditions of corrupt practice. The dismissal of the election petition is not on account of Section 83 but on account of failure of compliance of Order 6 Rule 16 and Order 7 Rule 11, CPC. But that is not the case before us.

12. In Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar & Ors. [(2005) 2 SCC 188], it was held that where the defects in copies were curable/ non-vital in nature the election petition cannot be dismissed at the threshold for non-compliance with Section 81(3) on the basis of such defects. In Ram Prasad Sarma v. Mani Kumar Subba & Ors. Etc. [(2003) 1 SCC 289], it was held that verification in support of the allegations of corrupt practice accompanying the petition by Oath Commissioner was not integral part of the petition. Mere absence of the stamp and name of Oath Commissioner in the true copy of the affidavit would not amount to vital or material deviation from the original nor would it mislead the returned candidate when averment was made in the affidavit that it was being sworn in support of the allegations of corrupt practice and election petitioner had put his signature thereof. Their Lordships held that in such a situation the election petition is not liable to be dismissed at the threshold.

13. In R.P.Moidutty v. P.T.Kunju Mohammad & Anr. [(2000) 1 SCC 481] their Lordships have expressed that heavy onus lies on the election petitioner seeking setting aside of the election of a successful candidate to make out a clear case for such relief both in the pleadings and at the trial. The mandate of the people should not be interfered lightly and it emphasized that under Section 83 of the Act ordinarily it would suffice if the election petition contains a concise statement of the material facts relied on by the petitioner but in the case of corrupt practice the election petition must set forth full particulars thereof including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice, the date and place of the commission of each such practice. An election petition is required to be signed and verified in the same manner as is laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. But this case has nothing to do with regard to the defective pleadings. This case only emphasized that the election petition should not be lightly dealt with. In this case also objection of improper verification was pressed into service but neither the verification in the election petition nor the affidavit was cured and on the contrary the same was pressed into service and pursued by the election petitioner by arguing the matter before the Court. The election petitioner persistently pursued the election petition without rectification, therefore, this Court dismissed the petition on that ground. It was therefore, observed as follows:

" The object of requiring verification of an election petition is to clearly fix the responsibility for the averments

and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition, it can be cured. In the present case the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. Unless the defect in verification was rectified, the petition could not have been tried. For want of affidavit in the required form and also for lack of particulars, the allegations of corrupt practice could not have been enquired into and tried at all. In fact, the present one is a fit case where the

petition should have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings. The affidavit filed by the petitioner in support of the election petition as required by Rule 94-A also does not satisfy the requirement of the proviso to sub-section (1) of Section 83 of the Act and Form 25 appended to the rules."

In this case, the election petition was dismissed not on the threshold but after going through the whole trial. It was observed at paragraph 35 of the judgment as follows :

" 35. All the averments made in paras 1 to 17 of the petition have been stated to be true to the personal knowledge of the petitioner and in the next breath the very same averments have been stated to be based on the information of the petitioner and believed by him to be true. The source of information is not

disclosed. As observed by the Supreme Court in F.A.Sapa v. Singora the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition, it can be cured (see Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore and A.S.Subbaraj v. M. Muthiah). In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried. For want of affidavit in the required form and also for lack of particulars, the allegations of corrupt practice could not have been enquired into and tried at all. In fact, the present one is a fit case where the petition should have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings."

Therefore, this case is entirely different where trial was gone into and it was clearly found that the verification was not in proper form. Therefore, that evidence cannot be taken into consideration. The petitioner even did not rectify the defect. The Court found that the averments could not be looked into. Therefore, this case is distinguishable on the facts and as successive judgments which have been quoted above have consistently taken the view that such defects cannot be taken as a ground for dismissing the election petition and such defects are curable.

14. However, in fairness whenever such defects are pointed then the proper course for the Court is not to dismiss the petition at the

threshold. In order to maintain the sanctity of the election the Court should not take such a technical attitude and dismiss the election petition at the threshold. On the contrary after finding the defects, the Court should give proper opportunity to cure the defects and in case of failure to remove/ cure the defects, it could result into dismissal on account of Order 6 Rule 17 or Order 7 Rule 11 CPC. Though technically it cannot be dismissed under Section 86 of the Act of 1951 but it can be rejected when the election petition is not properly constituted as required under the provisions of the CPC but in the present case we regret to record that the defects which have been pointed out in this election petition was purely cosmetic and it does not go to the root of the matter and secondly even if the Court found them of serious nature then at least the court should have given an opportunity to the petitioner to rectify such defects.

15. As a result of the above discussion, the view taken by learned Single Judge of the High Court is not correct and we set aside the order dated 6.12.2006 passed by the learned Single Judge in E.P.No.6 of 2006 and remit this matter back to the High Court of Kerala for proceeding with the election petition of the appellant. There would be no order as to costs.

Appeal allowed.