

PETITIONER:
KAMAL NARAIN SHARMA

Vs.

RESPONDENT:
SHRI PANDIT DWARKA PRASAD MISHRA AND OTHERS

DATE OF JUDGMENT:
17/08/1965

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1966 AIR 436 1966 SCR (1) 478

ACT:
Conduct of Election Rules, 1961, Rule 94A-Affidavit required under-Affidavit sworn before clerk of Court appointed Commissioner of Oaths under s. 139(c) of the Code of Civil Procedure-Affidavit whether sworn before proper authority under r. 94A.

HEADNOTE:
An election petition was filed by the appellant against the first respondent challenging his election on May 4, 1963 to the Madhya Pradesh Legislative Assembly. A number of allegations including those of corrupt practice were made against the first respondent in the petition. The affidavit filed in support of the allegations of corrupt practice as required by Rule 94A of the Conduct of Election Rules, 1961, was sworn by the petitioner before the Clerk of Court in the District Court of Jabalpur. The first respondent in his objections before the Election Tribunal raised the question whether the affidavit under Rule 94A was sworn before a proper authority. The Election Tribunal accepted the objection but allowed the appellant to file a second affidavit sworn before a proper authority. The orders of the Tribunal were challenged by the first respondent before the High Court under Art. 226 and Art. 227 of the Constitution and the High Court, holding that the fresh affidavit could not be called and that there was no proper affidavit, quashed the orders of the Tribunal and directed the Tribunal to pass an order according to law. The appellant appealed to this Court on certificate of fitness granted by the High Court. Although the appellant had conceded before the High Court that his first affidavit was not proper he was allowed to withdraw his concession in this Court. It was contended on behalf of the appellant that the clerk of Court before whom his first affidavit had been sworn had been duly appointed ex-officio Commissioner of Oaths under s. 139(c) of the Code of Civil Procedure and an affidavit sworn before him complied with r. 94A. The respondent however contended that a Commissioner of Oaths appointed under s. 139(c) was for

the purpose of affidavits under the Civil Procedure Code only, just as a Commissioner appointed under s. 539 of the Criminal Procedure Code could swear affidavit under that Code only.

HELD : There is no analogy between an affidavit sworn under s. 539 Cr. P. C. and the affidavit sworn here. An affidavit sworn by a district Clerk of Court may not be good for the purpose of the Code of Criminal Procedure and vice-versa but that is because the restriction is to be formed in s. 139 of the one Code and s. 539 of the other. Rule 94A makes no such condition and makes receivable an affidavit before a Commissioner of Oaths without specifying of what kind. In this view of the matter the affidavit sworn before the District Clerk of Court who undoubtedly was a Commissioner of Oath could only be excluded by taking an extreme and technical view which was not justified. [484 B-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 437 of 1965.
479

Appeal from the judgment and order dated April 15, 1964 of the Madhya Pradesh High Court in Misc. Petition No. 90 of 1964.

M. S. Gupta, for the appellant.

G. S. Pathak, Y. S. Dharmadhikari and A. G. Ratnaparkhi, for respondent No. 1.

The Judgment of the Court was delivered by Hidayatullah, J. This appeal arises from an election petition filed after the last General Election to the Madhya Pradesh Legislative Assembly, in respect of the election from the Kasdol Legislative Assembly constituency held on May 4, 1963. The first respondent was declared elected and the appellant challenged his election alleging several acts of corrupt practices, publication of false statements, filing of false accounts etc. The election petition was supported by an affidavit sworn before K. S. Moghe, Officer for Administering Oaths on Affidavits, Jabalpur. Moghe was the Clerk of Court in the District Court, Jabalpur. The first respondent objected that the affidavit was not sworn before the proper authority as required by rule 94-A of the Conduct of Election Rules, 1961, and it was, therefore, prayed that the election petition should be dismissed or the allegations about corrupt practices should be struck out. The Election Tribunal, by an order dated October 31, 1963 accepted the objection but allowed the filing of a proper affidavit and a fresh affidavit was taken on record. No action was taken against that order. It appears that the Election Tribunal had framed two issues for determination. They were:

"Issue No. 18 : Whether the affidavit filed by the petitioner in support of his petition is bad in law, as not properly sworn before a competent Officer duly authorised to attest and authenticate an affidavit and does not also comply with the provisions of Section 83 of the Representation of the People Act and the Rules made thereunder. If so, whether the petition is liable to be dismissed on this ground."

"Issue No. 20 : Whether the various alleged acts of corrupt practices mentioned in the petition are duly supported by an affidavit as

required under Section 81(3) of the Representation of People Act ? If not, what is its effect on this petition?"

480

On February 14, 1964 the first respondent filed an application drawing attention to the latter part of issue No. 20 and asked inter alia for a finding whether the election petition was not liable to be dismissed when the affidavit was not proper. The Tribunal by an order passed on February 24, 1964 rejected the last contention and held that as a fresh affidavit was filed the petition could proceed to trial.

On March 2, 1964 the first respondent filed a petition under Articles 226 and 227 of the Constitution in the High Court of Madhya Pradesh challenging both the orders and asked that they be quashed. The High Court, by its order now under appeal by certificate, quashed the two orders and the Tribunal was directed to deal further with the petition in the light of the order of the High Court.

The High Court in an elaborate order has considered whether the provisions of rule 94-A were mandatory or directory but it did not address itself to the question whether the first affidavit was proper or not. This was, perhaps, due to the fact that the appellant seems to have conceded before the Tribunal that the first affidavit was not proper. This concession was sought to be withdrawn in this appeal by the appellant and on looking into the record we were satisfied that the concession was wrongly made and should be allowed to be withdrawn. We accordingly heard arguments on the question whether the original affidavit did not satisfy the Conduct of Election Rules and the Representation of the People Act. We are satisfied that the first affidavit was proper and the second affidavit was not necessary.

Before we give our decision on this point we shall first set down the relevant provisions. Section 83 of the Representation of People Act provided that-

"83 (1) an election petition-

- (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 such practice; and

481

- (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."

Rule 94-A of the Conduct of Election Rules, 1961 next provides:

"94-A. The 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 need not be reproduced but the endorsement of the officer before whom the affidavit is sworn may be reproduced

"Form 25.

Solemnly affirmed/sworn by
Shri/Shrimatiat...thisday...of
196 Before me. .Magistrate....of...First
Class Notary/Commissioner of Oaths".

The relevant rules of the High Court and the notifications issued by the Government have been placed in our hands. 'Me High Court has framed Rules relating to the Civil Procedure Code and rule 20 dealing with affidavits reads :

"20. All Courts dealing with affidavits should make calls for affidavits at I I a.m. and 2 p.m. every day. If ,the Clerk of Court or other ministerial officer is appointed a Commissioner for administering oath of affidavits, he will discharge that function at such time as may be fixed by the District Judge in this behalf."

482

Rule 34 says :

"34. The Officer administering the oath shall make the following endorsement on every affidavit sworn before him and shall date, sign and seal the same.

"Sworn before me on the day of
19 by son of who is
personally known to me (or) who has been
identified by whose signature is/signatures
are hereto appended.

SEAL

Signature
Designation".

The affidavit which was sworn before Moghe bore the above endorsement and Moghe described himself as "Officer for Administering Oaths on Affidavits, Jabalpur, Madhya Pradesh".

On February 16, 1959 the Government of Madhya Pradesh had issued a notification under District Judges were empowered under s. 139(c) of the Code of Civil Procedure to appoint Commissioners to administer oaths on affidavits made under the said Code and the District Judge, Jabalpur in exercise of the powers so conferred appointed, among others, the Clerk of Court attached to his office to be ex-Officio Commissioner for the purpose of administration of oaths on affidavits made under the Code of Civil Procedure. It may be pointed out that subsequently in May 1960 the first notification was amended and in place of the words in the first notification "empowers all the District Judges to appoint Commissioners to administer oaths on affidavit made the words "generally empowers the Court of District Judges to appoint officers to administer oaths to deponents in cases of affidavits" where substituted. This change does not affect the present matter because the appointment of Moghe was tinder the first notification and not under the second. The contention of the first respondent is that the affidavit did not comply with the requirements of rule 94-A because Moghe was not a Commissioner of Oaths but was an officer for Administration of Oaths for the purpose of s. 139(c) of the Code. We shall refer to that provision

presently.

The rule does not state before which Commissioner the affidavit must be sworn. It must, therefore, be read as including all Commissioners of Oaths duly appointed. The election petition is verified as a plaint but the affidavit is needed additionally

483

when allegations of a particular type are made. The rule really requires an affidavit so that action for perjury may be based on it if the allegation is found to be false. We enquired whether, in the State of Madhya Pradesh, there was any other provision under which Commissioners of Oaths could be appointed but none was shown. The Indian Oaths Act, no doubt, consolidates the law relating to judicial oaths and for other purposes. Section 4 of that Act gives authority to "all courts and persons having by law or consent of parties authority to receive evidence", "to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law." This is a general provision and it mentions generally persons having by law authority to receive evidence. It is difficult to say that the Clerk of Court answers this description. But there are other provisions of law under which oaths may be administered for purposes of affidavits. Section 139 of the Code of Civil Procedure, under which the Clerk of Court was given this jurisdiction, provides :

"139. Oath on affidavit by whom to be administered.

In the case of any affidavit under this Code-

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the Provincial Government has generally or specially empowered in this behalf, may administer the oath to the deponent".

Similarly, section 539 of the Code of Criminal Procedure provides.

"539. Courts and persons before whom affidavits may be sworn.-

Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the State, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland."

484

It is therefore not necessary that an appointment with reference to the Oaths Act had to be made.

The Clerk of Court was appointed a Commissioner of Oaths under s. 139(c) quoted above. It is contended that the powers of such a Commissioner were to administer oaths for purposes of affidavits under the Code of Civil Procedure and this meant Or. XIX of the Code. It is pointed out that none of the conditions under which the affidavit is required under that Order applies here. It is argued that Commissioners appointed under one statute cannot swear affidavits prescribed under another statute, and s. 539 of

the Code of Criminal Procedure is also cited as an instance. This may be so. It may be that an affidavit sworn by a District Clerk of Court may not be good for the purposes of the Code of Criminal Procedure and vice-versa but that is because the restriction is to be found in S. 139 of the one ,Code and s. 539 of the other. Rule 94-A makes no such condition and makes receivable an affidavit sworn before a Commissioner of Oaths without specifying of what kind. In this view of the matter the affidavit sworn before the District Clerk of Court, -who undoubtedly is a Commissioner of Oaths can only be excluded by taking an extreme and technical view which, in our ,opinion, is not justified. The appeal must therefore succeed on this short ground and it is not necessary to discuss whether the rule is mandatory or directory for, in any event, its requirements have been met. The appeal is allowed but as the appellant had earlier conceded the point on which the appeal succeeds, there shall be no order about costs. The case will now go back to Tribunal for decision on merits.

Appeal allowed.

485