

PETITIONER:
SULTAN AHMD. OWASI

Vs.

RESPONDENT:
MOHD. OSMAN SHAHEED AND ORS.

DATE OF JUDGMENT 10/04/1980

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
KAILASAM, P.S.

CITATION:
1980 AIR 1347 1980 SCR (3) 439
1980 SCC (3) 281
CITATOR INFO :
RF 1986 SC 3 (23,152)

ACT:
Election Petition-Applications for summoning of witnesses and amendment of counter-Practice and Procedure under the Representation of People Act-Sections 87 and 116 of the Representation of the People Act read with Order VIII Rule 2 of Civil Procedure Code.

HEADNOTE:

In the two election petitions E. P. No. 18/78 and E. P. No. 20/78 filed by the defeated candidates, allegation of corrupt practice, namely "indulgence in promoting hatred rousing religious sentiments by speeches made at certain places" was made against the appellant, a successful candidate.

After the election petitioner closed his evidence and the High Court directed the appellant to file the list of his witnesses, the appellant filed two applications before the High Court namely, one for summoning witnesses Nos. 6, 8, 15 and 16 and another for amendment of his counter. The High Court however refused to summon these witnesses on the ground that no foundation for the facts on the basis of which these witnesses were sought to be cited or for the points on which they were to be, examined was laid in the counter. Similarly, the High Court rejected the application for amendment of the counter on the same grounds. The High Court was of the view that in the absence of any specific plea of alibi, having been taken in the counter, the appellant could not be allowed to examine the witnesses or amend the counter. Hence the two appeals, by special leave.

Allowing the appeals the Court,

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HELD: 1. Under the provisions of the Representation of People Act, the onus lies entirely on the petitioner to prove the corrupt practices alleged against the elected candidate. The necessary facts and particulars and the statements of facts etc. are to be pleaded by the election petitioner with exactitude and precision. It is now well settled by a large catena of the authorities of this Court that a charge of corrupt practice must be proved to the hilt, the standard of proof of such allegation is the same

as a charge of fraud in a criminal case. [442B-C]

D. Venkata Reddy v. R. Sultan and Ors., [1976] 2 S. C. C. followed.

2. So far as the elected candidate is concerned, he is merely to rebut the allegations made by the petitioner in accordance with the provisions of the Civil Procedure Code as far as practicable. In the instant case, the appellant had taken an express plea in his counter that he did not make any speech at the places alleged by the election petitioner. He also stated that tape records or the cassettes alleged to contain his speech were fabricated. One of the ways of proving this plea could be by showing that the appellant was not physically present at the places where the speeches are alleged to have been made as he was present at that time, at some other place. This is what the appellant sought to do through the proposed amendment and by summoning

440 the witnesses. Thus it was clearly open to the appellant to have proved facts in order to rebut the allegations made by the petitioner that he was not present at the places where he is said to have made speeches. [442E-G]

3. Under s. 116 of the Representation of the People Act an election petition has to be tried as nearly as possible according to the procedure applicable under the Civil Procedure Code to the trial of suits. Under O.VIII R. 2 the defendant must raise by his pleading all matters which show that the suit is not maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence, as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint. Having expressly denied the allegation of having made the speech, the appellant was fully justified in raising this defence. [442G-H, 443A]

In the instant case, it cannot be said that the witnesses sought to be examined by the appellant or the plea which he claimed in his counter by virtue of the amendment would spring surprise on the election petitioner because the appellant had already denied in clear terms that he never made any speeches at the places mentioned in the election petition. There was no corresponding duty on the appellant to give full particulars or detailed statement of fact which the petitioner had to do in order to set at naught the electoral process which resulted in the election of the appellant. [443A-C]

4. So far as the discretion vested on the High Court by Section 87 of the Representation of the People Act, 1951 to refuse to summon any witness lies only when it is of the opinion that the evidence of the witness is not material or that the party tendering such witness is doing so on frivolous ground or with a view to delay the proceedings. [443D-E]

In the instant case none of these conditions are present. In order to repel the plea of the election petitioner, the appellant was entitled to lead evidence to show that he did not make any speech as he was physically incapable in doing so at the time and place as alleged by the petitioner. By virtue of the amendment the appellant sought to insert a plea that he could not have made the speeches as alleged by the election petitioner because he was at that time out of station and was present in Adoni-180 miles from the places where he is said to have delivered speeches. In fact, witnesses Nos. 6, 8, 15, 16 and 17 were summoned to prove the fact that this appellant was in Adoni. [441G-H, 442A, 443E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2036-2039/79.

Appeals by special leave from the Judgment and Orders dated 27-4-1979, and 25-6-1979 of the Andhra Pradesh High Court in U.R.S. Nos. 4039 and 4040 in W.P. Nos. 18 & 20 of 1978 and application Nos. 75 & 76 in WP Nos. 18 & 20 of 1978 respectively.

M. A. Abdul Khader, Mukramuddin and G. Narayana Rao for the Appellants.

Dr. Y. S. Chitale, K. Ram Kumar and T. A. Ramchandran for the Respondent.

The Judgment of the Court was delivered by

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FAZAL ALI, J. These appeals by special leave have been filed by the appellant who was respondent No. 1 (before the High Court), the elected candidate from the Charminar Assembly Constituency No. 218 in the State of Andhra Pradesh. The election petitioner Mohd. Osman Shaheed filed election petition for setting aside the election of the appellant being E.P. No. 18/78 in the High Court. Ahmed Hosain, a candidate who was defeated also filed another election petition No. 20/78 on the same grounds assailing the election of the appellant. In the aforesaid election petitions before the High Court two applications were filed in each of the petition by the appellant, one for summoning witnesses Nos. 6, 8, 15 and 16 and the other for amendment of the counter. These applications were filed after the petitioner closed the evidence and the High Court directed the appellant to file the list of witnesses. The High Court, however, refused to summon these witnesses on the ground that no foundation for the facts on the basis of which these witnesses were sought to be cited or for the points on which they were to be examined was laid in the counter. Similarly the High Court rejected the application for amendment of the counter on the same grounds. The High Court was of the view that in the absence of any specific plea of alibi having been taken in the counter, the appellant could not be allowed to examine the witnesses or amend the counter. Appeal Nos. 2036-37/79 are directed against the order striking out the witnesses nos. 6, 8, 15, 16 and 17 and Appeal Nos. 2038-39/79 are directed against the order rejecting the application for amendment of the counter.

We have heard counsel for the parties and have gone through the Judgment of the High Court. We have also perused the application for amending the written statement. It appears that one of the main allegations made against the appellant was that he had delivered speeches at Khilawat, Chowk and Baragalli on 17-2-78 and 21-2-78 respectively in which he indulged in promoting hatred rousing religious sentiments. It was further alleged in Election Petition No. 20/78 that he made another speech at Baragalli where also he indulged in preaching religious hatred against the election petitioner. In his counter the appellant stoutly denied the allegation that he ever made any speech at these places at all. The respondent denied having made speech at all at Khilawat or Chowk or Baragalli. By virtue of the amendment, the appellant sought to insert a plea that he could not have made the speeches as alleged by the election petitioner because he was at that time out of station and was present in Adoni-180 miles from the places where he is said to have delivered

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speeches. In fact, witnesses nos. 6, 8, 15, 16 and 17 were summoned to prove the fact that this appellant was in Adoni.

With due respect, we may observe that in refusing the amendment of the Counter or summoning the witnesses, the High Court seems to have over-looked the fact that under the provisions of the Representation of People Act, the onus lies entirely on the petitioner to prove the corrupt practices alleged against the elected candidate. The necessary facts and particulars and the statements of facts etc. are to be pleaded by the election petitioner with exactitude and precision. It is now well settled by a large catena of the authorities of this Court that a charge of corrupt practice must be proved to the hilt, the standard of proof of such allegation is the same as a charge of fraud in a criminal case. In the case of D. Venkata Reddy v. R. Sultan & Ors., (1) this Court observed as follows:-

"Another principle that is equally well settled is that election petitioner in order to succeed must plead all material particulars and prove them by clear and cogent evidence. The allegations of corrupt practices being in the nature of a quasi-criminal charge the same must be proved beyond any shadow of doubt."

So far as the elected candidate is concerned, he is merely to rebut the allegations made by the petitioner in accordance with the provisions of the Civil Procedure Code, as far as practicable. In the instant case the appellant had taken an express plea in his counter that he did not make any speech at the places alleged by the election petitioner. He also stated that tape records or the cassette alleged to contain his speech were fabricated. One of the ways of proving this plea could be by showing that the appellant was not physically present at the places where the speeches are alleged to have been made as he was present at that time, at some other place. This is what the appellant sought to do through the proposed amendment and by summoning the witnesses. Thus it was clearly open to the appellant to have proved these facts in order to rebut the allegations made by the petitioner that he was present at the places where he is said to have made speeches. Under s. 116 of the Representation of the People Act an election petition has to be tried as nearly as possible according to the procedure applicable under the Civil Procedure Code to the trial of suits. Under O. VIII R. 2 the defendant must raise by his pleading all matters which show that the suit is not maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence, as, if not raised, would be likely

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to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint. Having expressly denied the allegation of having made the speech, the appellant was fully justified in raising this defence.

Thus in the instant case it cannot be said that the witnesses sought to be examined by the appellant or the plea which he claimed in his counter by virtue of the amendment would spring surprise on the election petitioner because the appellant had already denied in clear terms that he never made any speeches at the places mentioned in the election petition. There was no corresponding duty on the appellant to give full particulars or detailed statement of fact which the petitioner had to do in order to set at naught the electoral process which resulted in the election of the appellant. In fact proviso to s. 87 of the Representation of the People Act which may be extracted thus provides:

"Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings."

So far as the discretion on the High Court to refuse to summon any witness lies only when it is of the opinion that the evidence of the witness is not material or that the party tendering such witness is doing so on frivolous ground or with a view to delay the proceedings. None of these conditions appear to be present in the instant case nor did the High Court dismiss the application for amendment of the counter or refused to examine the witnesses on the grounds mentioned above. It is, therefore, manifest that in order to repel the plea of the election petitioner the appellant was entitled to lead evidence to show that he did not make any speech as he was physically incapable in doing so at the time and place as alleged by the election petitioner. For these reasons, therefore, we are clearly of the opinion that the High Court was wrong in disallowing the prayer made by the appellant for examining the witnesses and for allowing amendment of the counter. The appeals are accordingly allowed, the Judgment of the High Court is set aside and the High Court is directed to allow the appellant to examine witnesses Nos. 6, 8, 15, 16 & 17 and the amendment prayed for by the appellant is also hereby allowed. The High Court will dispose of the election petition now as expeditiously as possible. The costs of these appeals will abide the result of the election petition.

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Appeals allowed.