

Mohan Rawale vs Damodar Tatyaba on 6 August, 1992

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Author: P.B. Sawant

Bench: P.B. Sawant

PETITIONER:

MOHAN RAWALE

Vs.

RESPONDENT:

DAMODAR TATYABA

DATE OF JUDGMENT 06/08/1992

BENCH:

VENKATACHALLIAH, M.N. (J)

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SAWANT, P.B.

CITATION:

1992 SCR Supl. (3) 850 1994 SCC (2) 392
JT 1993 Supl. 611 1994 SCALE (1) 481

ACT:

HEADNOTE:

JUDGMENT:

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1. Appellant seeks special leave to appeal to this Court from the order dated February 24/26, 1992 of the High Court of Judicature at Bombay in Chamber Summons No. 1179 of 1991 in Election Petition No. 4 of 1991.

2. Before the High Court, the first respondent, who was defeated at the election held on June 15, 1991, to the 10th Lok Sabha from the South Central Parliamentary Constituency, called in question the election of the returned candidate the appellant. Corrupt practices under Sections 123(2), 123(3) and 123(3-A) of the Representation of People Act, 1951 ('Act') are alleged. In the proceedings, appellant took out Chamber Summons for an order of dismissal of the election petition on the ground, inter alia, that the memorandum of election petition did not disclose a cause of action; that copies were not supplied; that the pleadings were frivolous and vexatious and required to be struck out. The High Court has dismissed this motion.

3. We have heard Shri G.L. Sanghi for the appellant and Shri R.F. Nariman for the respondents. We grant special leave. The appeal is heard and is disposed of by this order. A number of grounds appear to have been taken before the High Court in support of the Chamber Summons. But Shri Sanghi confined himself to and urged only three contentions in support of this appeal:

(i) The first is that the allegation of corrupt practice under Sections 123(2), 123(3) and 123(3-A) in paras 1 to 20 of the memorandum of election petition refer to matters long anterior to April 23, 1991 when the nomination papers were lodged by the appellant and on which date alone appellant could be said to have legally acquired the status of a candidate and that, therefore, the allegations in these paragraphs relating, as they do, to a period anterior to April 23, 1991 even if proved, would not amount to corrupt practice by a candidate. Accordingly, these pleadings require to be struck out.

(ii) Secondly, the allegations in other paragraphs of the petition are vague, bereft of material particulars and do not disclose a reasonable cause of action.

(iii) Thirdly, the copies of certain documents which were an integral part of the pleadings were not supplied.

Shri Sanghi referred to two instances which, according to him, attract Section 81. One was the nonsupply of notes said to have been prepared by Milind Ranade (agent of the first respondent) of the speech of a certain Sadhvi Ritambhra in support of the appellant's candidature declined by her on May 21, 1991. The other was the cassette recording of that speech referred to by the first respondent in the election petition.

4. On the first point, Shri Sanghi contends that the High Court fell into an error in not appreciating the effect of the substitution of the definition of the expression 'candidate' in Section 79(b) of the Act brought about by Act 40 of 1970 which, in effect, made a person a "candidate" only from the day he was duly nominated as a candidate at the election. Shri Sanghi says that while the old definition required that "any person shall be declared to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate" the substituted Section 79(b), however, did away with these words. The effect of this, says Shri Sanghi, is profound and far-reaching and renders all the allegations of corrupt practice in paras I to 20 in relation to a period prior to the nomination irrelevant and incapable, in law, even to amount to allegations of corrupt

practice. It is urged that as the candidature could be said to have legally commenced only on April 23, 1991 even if all the allegations of facts contained in paras I to 20 are deemed to have been proved by non-traverse or otherwise held proved, they could not establish corrupt practice. It was accordingly urged that those paragraphs in the election petition require to be struck out.

5. The High Court rejected this contention and held:

"In my judgment, it would not be appropriate to hold that the averments contained in the aforesaid paragraphs are unnecessary or irrelevant. In my view they are very much relevant to the facts in issue. The pleadings in these paragraphs are the foundation for the cause of action and they are material facts which constitute corrupt practice under Sections 123(2), (3), (3-A) of the Act."

The reason for that view, according to the High Court, is:

"It would be seen that the candidature of Respondent I was finalised on April 16, 1991 and Respondent I and his party workers had started campaigning on that day. In the issue of Samna dated April 19, 1991 the candidature of Respondent I was officially and formally announced by the Shiv Sena party and Respondent I accepted the candidature by remaining present in the public meeting held on April 19, 1991 at Girgaum-Chowpatty. Respondent I was introduced to the voters in the said public meeting and Respondent I also sought the blessings of Shri Bal Thackeray in the said public meeting. Respondent 1 was thus holding out to be a candidate from April 16, 1991."

6. This, we are afraid, is not the correct perception of the matter. The view fails to take note of and give effect to the substitution of the definition of the expression "candidate" in Section 79(b). All sub-sections of Section 123 of the Act refer to the acts of a 'candidate' or his election agent or any other person with the consent of the candidate or his election agent. The substituted definition completely excludes the acts by a candidate up to the date he is nominated as a candidate. Shri Sanghi, therefore, asks us to take this position to its logical conclusions and strike out these allegations in the election petition.

7. Shri R.F. Nariman for the first respondent found it difficult to support the view taken by the High Court as to the time at which appellant's candidature could be said to have commenced. However, Shri Nariman endeavoured to contend that even if the allegations in paragraphs I to 20 did not, by themselves, establish corrupt practice in law by virtue of their commission prior to the appellant becoming a candidate, these averments and allegations must be read as parts of similar transactions pleaded in the later and subsequent paragraphs of the memorandum of the election petition. Shri Nariman said that, at all events, the allegations in paragraphs I to 20 cannot be said to be irrelevant if they can be sustained for the purposes of probalising or furnishing "similar-fact" evidence of the allegations of corrupt practice made in the later paragraphs of the election petition.

8. We hold that all the averments in paragraphs I to 20 of the memorandum of election petition insofar as they refer to a period prior to April 23, 1991 cannot amount to allegations of corrupt practice. But on the question whether they are relevant and admissible for other purposes for the reasons submitted by Shri Nariman we abstain from expressing any opinion. This aspect did not engage the attention of the High Court and was not considered by it. It is for the High Court to consider them at the appropriate time. We, therefore, declare that the allegations in paras I to 20 relating to the period anterior to the commencement of the candidature cannot be relied upon to establish corrupt practice *proprio vigore*.

9. The second contention of Shri Sanghi is that even the allegations in the later paras of the election petition relating to the period after the commencement of the appellant's candidature are vague, bereft of material particulars, frivolous and vexatious and do not disclose a reasonable cause of action. Shri Sanghi submits that Section 86 does not exhaust the grounds of dismissal of an election petition in limine. An election petition, says counsel, can and ought to be rejected if grounds contemplated by Rule I I of Order 7 Civil Procedure Code exist. Shri Sanghi's contention really covers three distinct, though overlapping, ideas. It raises the question of absence of material particulars, alleges frivolousness and vexatiousness of the pleadings and lastly, alleges their inability and insufficiency to disclose a reasonable cause of action.

10. We may take up the last facet first. As Chitty, J. observed, "There is some difficulty in affixing a precise meaning to" the expression "discloses no reasonable cause of action or defence". He said: "In point of law ... every cause of action is a reasonable one." (See *Republic of Peru v. Peruvian Guano Co.*) A reasonable cause of action is said to mean a cause of action with some chances of success when only the allegations in the pleading are considered. But so long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The implications of the liability of the pleadings to be struck out on the ground 1 (1887) 36 Ch D 489 that it discloses no reasonable cause of action are quite often more known than clearly understood. It does introduce another special demurrer in a new shape. The failure of the pleadings to disclose a reasonable cause of action is distinct from the absence of full particulars. The distinctions among the ideas of the "grounds" in Section 81(1); of "material facts" in Section 83(1)(a) and of "full particulars" in Section 83(1)(b) are obvious. The provisions of Section 83(1)(a) and (b) are in the familiar pattern of Order VI, Rules 2 and 4 and Order 7, Rule I (e) Code of Civil Procedure. There is a distinction amongst the 'grounds' in Section 81(1); the 'material facts' in Section 83(1)(a) and "full particulars" in Section 83(1)(b).

11. Referring to the importance of pleadings a learned author says:

"Pleadings do not only define the issues between the parties for the final decision of the court at the trial, they manifest and exert their importance throughout the whole process of the litigation. ... They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he has

pleaded. They determine the range of the admissible evidence which the parties should be prepared to adduce at the trial. They delimit the relief which the court can award....."

[See: Jacob: "The Present Importance of Pleadings"

(1960) Current Legal Problems, at pp. 175-761.

12. Further, the distinction between "material facts" and "full particulars" is one of degree. The lines of distinction are not sharp. "Material facts" are those which a party relies upon and which, if he does not prove, he fails at the time.

13. In *Bruce v. Odhams Press Ltd.*² Scott L.J. said: "The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad." The purpose of "material particulars" is in the context of the need to give the opponent sufficient details of the charge set up against him and to give him a reasonable opportunity.

14. Halsbury refers to the function of particulars thus:

"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been variously stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required."

(See: Pleadings Vol. 36, para 38) 2 (1936) 1 KB 697 :(1936) 1 All ER 287

15. In *Bullen and Leake and Jacob's "Precedents of Pleadings"* 1975 Edn. at p. 112 it is stated:

"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to save costs. The object of particulars is to 'open up' the case of the opposite party and to compel him to reveal as much as possible what is going to be proved at the trial, whereas, as Cotton L.J. has said, 'the old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial'."

16. The distinction between 'material facts' and 'particulars' which together constitute the facts to be proved or the *facta probanda* on the one hand and the evidence by which those facts are to be proved *facta probantia* on the other must be kept clearly distinguished. In *Philipps v. Philipps*³, Brett, L.J. said:

"I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. ... The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erie C.J. expressed it in this way. He said that there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon the expression of opinion of Erie C.J. that Rule 4 [now Rule 7(1)] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies."

17. Lord Denman, C.J. in *William v. Wilcox*⁴ said:

"It is an elementary rule in pleading that, when a state of facts is relied it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegations."

18. An election petition can be rejected under Order VII Rule I I (a) CPC if it does not disclose a cause of action. Pleadings could also be struck out under Order VI Rule 16, *inter alia*, if they are scandalous, frivolous or vexatious. The latter two expressions meant cases where the pleadings are obviously frivolous and vexatious or obviously unsustainable.

19. We have considered the submissions of the learned counsel on both sides. We are not persuaded to the view that the order of the High Court on this aspect of the controversy calls for interference. The High Court was right in its view that there was a triable issue arising out of the pleadings. The second contention, in our opinion, is insubstantial.

20. The third contention of Shri Sanghi needs to be answered on the distinction between cases where the non-supply of the annexures referred to 3 (1878) 4 QBD 127, 133 4 (1838) 8 Ad & El 331 in the body of the election petition incurs the penalty of dismissal and cases where their non-supply would not entail dismissal. Decided cases lay down the principles on which the courts act. One of the distinctions underlying this difference is whether the document is, in itself, an integral part of the pleadings or is merely appended or referred to as a possible means of proving the allegations.

21. In *Sahodrabai Rai v. Ram Singh Aharwar*⁵ this Court observed:

"We have already pointed out that Section 81(3) speaks only of the election petition. Pausing here, we would say that since the election petition itself reproduced the whole of the pamphlet in a translation in English, it could be said that the averments with regard to the pamphlet were themselves a part of the petition and therefore the pamphlet was served upon the respondents although in a translation and not in original. Even if this be not the case, we are quite clear that sub-section (2) of Section 83 has reference not to a document which is produced as evidence of the averments of the election petition but to averments of the election petition which are put, not in the election petition but in the accompanying schedules or annexures. "

(emphasis supplied)

22. 1 p U.S. Sasidharan v. K. Karunakaran⁶ the distinction is brought out: (SCC p. 489, paras 15-16) "The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) provides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-

compliance with Section 81(3).

On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The document may be relied upon as an evidence in the proceedings." (emphasis supplied)

23. Appellant contended before the High Court that the notes made by Milind Ranade of the speech of a certain Sadhvi Ritambhra referred to in the 5 (1968) 3 SCR 13, 19 : AIR 1968 SC 1079 :36 ELR 52 6 (1989) 4 SCC 482: AIR 1990 SC 924 election petition not having been supplied the election petition must be dismissed for non compliance of Section 81(3) read with Section 86 of the Act. It was also urged that a 'cassette' recording that speech had not been supplied.

24. We have examined this contention of Shri Sanghi in the context of the actual pleadings. In our opinion, they are clearly covered by the latter part of the enunciation in Sasidharan case⁶ excerpted above. The purport and contents of the documents were set out in the election petition. Shri Sanghi however, sought to rely upon this Court's pronouncement in the case of M. Karunanidhi v. H. V. Hande⁷ as to what was held in that case held to be the consequence of the non-supply of the photograph of the "banner". In that case, the photograph was to be an integral part of the pleadings.

25. The question whether a particular document produced by the election petitioner partakes of the nature of and constitutes an integral part of the pleadings or whether it is merely material by which the allegations in the election petition are intended to be proved depends upon the facts and circumstances of each case and the nature and content of the pleadings and of the documents. No hard and fast test applicable to all cases can, or is possible to be laid down. Karunanidhi case⁷ did not depart from the principle laid down in earlier cases but merely illustrated one particular application of the rule to the facts of that case. The third contention is not substantial either.

26. In the result, the first point is held in favour of the appellant and the averments and allegations in paras 1 to 20 insofar as they relate to a period prior to April 23, 1991 re held incapable of amounting to allegations of corrupt practice. Whether they are relevant or admissible for other purposes is a matter which the High Court will decide at the appropriate time. The other two contentions are rejected. The appeal is disposed of accordingly. No costs.