

***HON'BLE SRI JUSTICE R.KANTHA RAO**

+ E.A.NO.531 OF 2010

AND

+ E.P.NO.17 OF 2009

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% Date: 30.09.2011

E.P.NO.17 OF 2009

—

BETWEEN:

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Sunkara Krishna Murthy and others

.. Petitioner

And

\$ Devineni Uma Maheswara Rao

.. Respondents

! Counsel for petitioner: M/s G.Mohan Rao and G.Malla Reddy

^ Counsel for respondents: Sri D.Srinivas

< GIST:

>HEAD NOTE:

? Cases referred:

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E.A.NO.531 OF 2010

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COMMON ORDER:

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E.A.No.531 of 2010 is filed by the first respondent in the election petition, who is the returning candidate under Order VII Rule 11 read with Section 151 C.P.C to dismiss the election petition without conducting the trial of the case on the ground that the election petition does not contain any cause of action and also on the ground that it is lacking material particulars relating to the corrupt practices said to have materially affected the election.

2. I have heard the learned counsel appearing for the contesting parties.

3. Before going to decide the application filed by the first respondent, I would like to make a mention about the brief averments in the election petition.

4. The election petition was filed by Sunkara Krishna Murthy, one of the contesting candidates in the election to 201, Mylavaram Assembly Constituency, Krishna District held on 23.04.2009. The election petitioner in the said election secured total votes of 382. However, his grievance is that he contested as an independent candidate. The Returning Officer on 08.04.2009 after 3 PM served

certificates to every candidate under Form 7(A). There were 13 candidates in the fray, the petitioner's name was given at Serial No.13 and table lamp symbol was allotted to him. His name is the last name in the ballot paper and it should also be the same in the electronic voting machine (EVM).

5. Thereafter, the petitioner printed the material required for the campaigning in the election and he made intensive campaign telling the voters not only about his symbol, but also that his name is at serial No.13 i.e. last one in the ballot paper. In the material relating to the campaign the table lamp was mentioned as last one at S.No.13 and the voters were made aware of the said fact.

6. Subsequently, the petitioner met respondent No.13-Returning Officer on 12.04.2009, 16.04.2009 and 20.04.2009 in connection with submitting the statement of his expenditure, but he was never informed about any change in the serial number. Again, on two occasions i.e. on 12.04.2009 and 16.04.2009, the petitioner's Chief Election Agent by name Ch.Srinivas also submitted election expenditure of the petitioner with accounts. The petitioner followed him to the Returning Officer and the Returning Officer on the said dates also did not intimate about any changes in the serial numbers of the list of the candidates nor about the order of the symbols of the respective candidates.

7. When the petitioner and his wife went to booth No.77 in Mylavaram Village to exercise their franchise, he surprised to know that in the electronic voting machine he was shown as 12th candidate. According to the petitioner neither the Returning Officer nor the Election Commission has any right to change the serial number of the candidate once it has declared by issuing certificate in

the Form 7-A. He submitted that most of the voters in the constituency are illiterate persons and as he campaigned in the election stating to the voters that his name and symbol would appear at Sl.No.13 i.e. at the last serial number and with the change in the serial number by which his name and symbol appeared at last but one i.e. Sl.No.12, there was lot of confusion among the voters and the said fact marred his winning chances in the election and thereby he was ultimately defeated in the election.

8. It is further contended by the petitioner that the 13th respondent Returning Officer having colluded with the respondents 1 and 2, who were the nominees of the Telugu Desam Party and Indian National Congress (I) changed the chronological order of the candidates and that he lost the election because of the foul play of the 13th respondent. He further stated that with the drastic support and collusion with the Returning Officer, the respondents 1 and 2 made changes in the serial number of the name and symbols of candidates in the electronic voting machine which created confusion among the voters. The voters were very much confused and in the state of confusion they pressed their option either to first or second candidate instead of the last one.

9. It is further stated that the act committed by the respondent No.13-Returning Officer by effecting the change in the serial number relating to the petitioner in collusion with the respondents 1 and 2 amounts to corrupt practice and misconduct. Therefore, he sought to declare the election 201, Mylavaram Assembly Constituency as null and void and to order fresh elections or in the alternative to declare him as elected.

10. The first respondent in his counter contended *inter alia* that he

was allotted 'cycle' symbol and his name was at S.No.1 in the ballot paper and in the election he was declared as duly elected from 201, Mylavaram Assembly Constituency by securing total votes of 78,554, whereas, the second respondent, who is his nearest rival secured total votes of 65,887, thus he had won the election with a huge majority of 12667 votes. It is further contended that the election petitioner and the 12th respondent, who contested as independent candidate at Sl.Nos.12 and 13 in the ballot paper secured 382 and 1124 votes respectively. According to the first respondent, the question of election of the petitioner being materially affected does not arise at all.

11. It is submitted by the first respondent that as per Section 38 of the Representation of the People Act, Rule 11 of the Conduct of Election Rules, 1961, the list of the contesting candidates shall be prepared basing on party-wise and also in the alphabetical order relating to the vernacular language. In the present case initially the list of the contesting candidates was prepared in English and subsequently after knowing the correct legal position, the names were recast in alphabetical order in vernacular language which resulted in change of Sl.Nos.12 and 13. He further submitted that the same was also reported in all daily newspapers on 13.04.2009 itself. He also submitted that a notice intimating the change of serial number was affixed on the notice board of the election office, as nobody was present on the given date to receive the said notice.

12. Thus, according to the first respondent, the election petition is not maintainable under Section 100 and 123 of the Representation of the People Act, there is absolutely no ground made out to set aside the election and that the election petitioner is not entitled to be declared as returned candidate.

13. The first respondent contended that because of the change in serial number, it cannot be said that it had any adverse effect on the voters in exercising their franchise. He stated that there is no material showing that the election is materially affected. Another important submission is that the corrupt practice has not been pleaded as required under law and no material is placed to substantiate the alleged corrupt practice under Section 123 of the Representation of the People Act. Contending as above, the first respondent sought to dismiss the election petition.

14. The only ground on which the election was sought to be set aside is whether the serial number of the election petitioner was changed after issuing Form 7-A to him.

15. The version of the election petitioner is that in Form 7-A his name and symbol were shown at Sl.No.13, whereas, in the electronic voting machine, his name and symbol are at Sl.No.12 and the name and symbol of the candidate which was originally shown at Sl.No.12 in Form No.7-A was shown in the electronic voting machine at Sl.No.13. There is a specific contention in the election petition that the Returning Officer with a view to help the candidates at Sl.No.1 i.e. Returned candidate belonging to Telugu Desam Party and Sl.No.2 candidate belonging to Indian National Congress (I), his serial number was altered from 13 to 12. He contends that the said change is a corrupt practice and was resorted to by the Returning Officer with a view to help the candidates at Sl.No.1 and 2. There is no averment as to how the first respondent, who was the returned candidate, influenced the officer. There is not even an allegation that the returned candidate had any role in change of serial number relating to the election petitioner in the ballot paper. The contention of the first

respondent is that he has nothing to do with the subsequent change, if any, made by the Returning Officer. Moreover, he contends that the change was effected as per Section 38 of the Representation of the People Act and Rule 11 of Conduct of Election Rules which require the alphabetical order as per vernacular language.

16. Section 83-b of the Representation of the People Act lays down as follows:

(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;

17. According to Section 12 of the Act which deals with corrupt practice, the corrupt practice shall be by the candidate himself or by his agent or by any other persons with the consent of the candidate or his election agent.

18. In **AZHAR HUSSAIN v RAJIV GANDHI**^[1] it has been laid down as follows:

“for failure to incorporate in petition material facts and particulars relating to the alleged corrupt practice the election petition can be dismissed for non-compliance of the provisions of Section 83 of the Act and the power to dismiss the election petition can be exercised at threshold.”

19. In the instant case, no particulars have been furnished by the election petitioner as to how the corrupt practice was resorted to, by whom and in what manner. Only a bald statement to the effect that the Returning Officer changed the serial number of the election petitioner from 13 to 12 is made in the election petition. The

averments of the election petition in relation to corrupt practice is not in accordance with Section 83-b of the Representation of the People Act. Therefore, it can be certainly said that there is no cause of action for filing the election petition.

20. In **ANIL VASUDEV SALGAONKAR v NARESH KUSHALI SHIGAONKAR**^[2] the Supreme Court held as follows:

“In context of charge of corrupt practice, “material facts” would mean all basic facts constituting ingredients of particular corrupt practice alleged which the petitioner has to substantiate before he can succeed on that charge, The election petition can be summarily dismissed if mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with and the election petitioner does not furnish cause of action.

It was also held that:

“The failure to state even a single material fact and full particulars will entail in dismissal of the election petition”.

21. Further, in **SAMANT N.BALAKRISHNA ETC v GEORGE FERNANDEZ AND OTHERS**^[3] the Supreme Court held as follows:

“If it is contended that the election was materially affected insofar as the returned candidate is concerned it requires proof and cannot be considered on possibility.”

22. Similarly in **SANTOSH YADAV v NARENDER SINGH**^[4] the Supreme Court held as follows:

“The success of winning candidate should not be lightly interfered with. More so, the election is sought to be set aside for no fault of his. Petitioner in some instances has to show that election was

materially affected.”

23. If we examine the facts of the present case, in the light of the principles laid down by the Apex Court, which are referred herein above, no particulars relating to corrupt practice have been pleaded specifically by the election petitioner in his petition. It is not even the specific case of the election petitioner that at the instance of the first respondent, who is the returned candidate, the Returning Officer changed his serial number from 13 to 12. It is quite unconvincing and unacceptable to state that on account of the mere change of the serial number of the election petitioner from 13 to 12, the voters were under lot of confusion and they voted either to the candidate No.1 or candidate No.2 on account of the confusion. For mere change in the serial number, it is not possible to accept that the voters will forget the name of the petitioner and also the symbol allotted to him. The said change in my considered view is not capable of materially affecting the winning chances of the election petitioner, who secured only 382 votes. More importantly, there is no averment that the alleged corrupt practice was resorted to by the first respondent himself or his agent or by somebody on their direction. Even from the averments of the election petition, it is very clear that the first respondent had nothing to do with the change of the serial number relating to the election petitioner. If that is so, for no fault of the first respondent, whose majority was 78,554 votes, his election cannot be set aside. The election petition does not disclose the material facts relating to the alleged corrupt practice and also does not disclose the specific and definite cause of action on the plea of change of serial number taken by the election petitioner. It is not possible to hold that such change plunged the voters into confusion and ultimately materially affected the winning chances of the election petitioner.

24. The election petition is, therefore, liable to be rejected at the threshold for not furnishing the material facts relating to the alleged corrupt practice and also for not disclosing the specific and definite cause of action basing on which the petitioner seeks to set aside the election.

25. For the foregoing reasons, E.A.No.531 of 2010 is allowed and E.P.No.17 of 2009 is rejected. There shall be no order as to costs.

Date: 30.09.2011
RAO, J
Note: L.R. copy to be marked
b/o kvrm

R. KANTHA

HON'BLE MR JUSTICE R. KANTHA RAO

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