



GAHC010158132019

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/3512/2019

NABA KUMAR SARANIA
S/O LATE LKHIKANTA SARANIA
VILL. DIGHALIPAR
P.O. TAMULPUR
P.S. TAMULPUR
DIST. BAKSA
ASSAM
PIN 781367

VERSUS

SRI DAORAO DEKHREB NARZARY
S/O LATE MAHESWAR NARZARY
VILL. KOKRAJHAR TOWN
WARD NO. 5
P.O. KOKRAJHAR
P.S. KOKRAJHAR
DIST. KOKRAJHAR
ASSAM
PIN 783370

Advocate for : MR. M SARANIA

Advocate for : MR. S CHOUHAN appearing for SRI DAORAO DEKHREB NARZARY

Linked Case : I.A.(Civil)/165/2020

SRI DAORAO DEKHREB NARZARY
S/O LATE MAHESWAR NARZARY
VILL. KOKRAJHAR TOWN



WARD NO. 5
P.O. KOKRAJHAR
P.S. KOKRAJHAR
DIST. KOKRAJHAR
ASSAM
PIN 783370

VERSUS

SRI NABA KUMAR SARANIA
S/O LATE LAKHI KANTA SARANIA
VILL. DIGHLIPAR
P.O. TAMULPUR
P.S. TAMULPUR
DIST. BARPETA
ASSAM
PIN 781367

Advocate for : MR. B C DAS
Advocate for : MR D MAZUMDER appearing for SRI NABA KUMAR SARANIA

Linked Case El.Pet./1/2019

SRI DAORAO DEKHREB NARZARY
S/O. LATE MAHESWAR NARZARY, VILL. KOKRAJHAR TOWN, WARD NO.5, P.O.
KOKRAJHAR, P.S. KOKRAJHAR, DIST. KOKRAJHAR, ASSAM, PIN-783370.

VERSUS

SRI NABA KUMAR SARANIA
S/O. LT. LAKHI KANTA SARANIA, VILL. DIGHLIPAR, P.O. TAMULPUR, P.S. TAMULPUR,
DIST. BAKSA, ASSAM, PIN-781367.

Advocate for the Petitioner : MR. B C DAS

Advocate for the Respondent : MR. D MOZUMDER

BEFORE
THE HON'BLE MR JUSTICE PRASANTA KUMAR DEKA

For the Applicant/ Respondent: Mr. D Mazumdar, Sr. Advocate
Mr. M Sarania, Advocate.

For the Election Petitioner/ Opposite Party: Mr. BC Das, Sr. Advocate
Mr. S Chouhan, Advocate.

Date of hearing
Date of Judgment/ Order : 26.08.2021

JUDGMENT & ORDER (CAV)

Heard Mr. D Mazumdar, the learned Senior counsel assisted by Mr. M Sarania, learned counsel for the respondent applicant and Mr. BC Das, the learned Senior counsel assisted by Mr. S Chauhan, the learned counsel for the election petitioner opposite party.

2. The IA(C) No. 165/2020 and IA (C) No. 3572/2019 are taken up for disposal by this common order.

3. The election petition is filed by the election petitioner opposite party in IA (C) 3512/2019 wherein the sole respondent in the election petition as the applicant in IA (C) No. 3512/2019 filed the said application under Section 86 of the Representation of People Act, 1951 (hereinafter referred as Act, 1951) challenging the election petition for non compliance of the provisions of Sections 81, 82 and 117 of the Act, 1951 read with Chapter VIII A of the Gauhati High Court Rules. After completion arguments by both the learned Senior counsel in

the said IA(C) 3512/2019, the election petitioner opposite party in the interlocutory application filed an application seeking leave to adduce evidence in IA (C) No. 3512/2019. The said application was registered as IA (C) No. 165/2020 and the outcome of the same is relevant for disposal of IA (C) No. 3512/2019 as such both the interlocutory applications are taken up for disposal.

4. The opposite party in IA(C) No. 3512/2019 as the election petitioner filed the election petition under Section 80 read with Sections 80A and 81 of the Act, 1951 calling in question the election of the respondent applicant in IA(C) No. 3512/2019 from No. 5 Kokrajhar (ST) House of People Constituency thereby seeking for a declaration that the election of the respondent/ returned candidate to be void by virtue of the provisions of Section 100 (1)(a) & (d) (i) of the Act, 1951. The election petitioner opposite party did not contest the election but he is an elector of No. 5 Kokrajhar (ST) House of People Constituency his name being recorded in the electoral roll of No. 30, Kokrajhar East (ST) Legislature Assembly Constituency which forms a part of No. 5 Kokrajhar (ST) House of the People Constituency.

5. The notice of election for holding the election to the said constituency was issued on 28.03.2019 by the Returning officer of the said constituency with the following schedule:

- (a) Last date for filing nomination paper 04.04.2019.
- (b) Sorting of nomination papers-05.04.2019
- (c) Last date for withdrawal of nomination papers-08.04.2019.
- (d) Date of poll-23.04.2019.

6. Alongwith the respondent applicant eight other candidates submitted their nomination papers which were found valid. The poll of the Constituency was held on 23.04.2019. The

result of the election was declared on 24.05.2019 and the respondent applicant contesting as an independent candidate was declared to have been duly elected.

7. The respondent applicant as per the election petitioner submitted his nomination paper before the Returning officer of the Constituency by declaring his name as "Naba Kumar Sarania @ Naba Sarania" alongwith a Tribe certificate issued by the All Assam Tribal Sangha, Tamulpur district unit certifying that the respondent applicant belong to Borokachari community which is recognized as Schedule Tribe (Plains) under the Constitution of India (Schedule Tribe) Order 1950, as amended (modification) Order 1956 SC/ST Orders (Amendment) Act, 1957. But, "Sarania" or "Sarania Kachari" is not a notified/ recognized Scheduled Tribe and consequently the respondent applicant, a member of Sarania community is not a member of the Schedule Tribe Community under the Constitution Schedule Tribe Order, 1950. The respondent applicant as such is not a member of any notified Scheduled Tribe Community of the State of Assam and on the date of his election he was not qualified to be choosen to contest from the said constituency and nomination papers of the respondent applicant claiming himself to be a member of Borokachari Community was improperly accepted. The said acceptance of the nomination papers materially affected the result of the election to the constituency. Hence the declaration as aforesaid is sought in this election petition.

8. Vide order dated 24.07.2019 in the election petition, notice was directed to be issued for appearance of the respondent applicant and on receipt of the same, the respondent applicant entered appearance. The written statement was filed on 22.10.2019 by the respondent applicant wherein the issue of maintainability of the election petition was raised. Alongwith the written statement, the present applicant filed the application IA (C) 3512/2019

challenging the maintainability of the election petition for non compliance of the provisions of Sections 81,82 and 117 of the Act, 1951.

9. The respondent applicant in the application raised the following deficiencies:

(i) The election petition was not presented by the election petitioner opposite party in person at the time of filing which is a mandatory requirement. Further there is nothing on record to demonstrate the presence of the election petitioner opposite party. The affidavit filed in support of the contention in the election petition was not sworn by the election petitioner before any Oath Commissioner or Notary Public which demonstrates absence of the election petitioner opposite party during presentation of the election petition.

(ii) The election petitioner opposite party did not furnish true copy of the election petition upon the respondent applicant as per Section 81(3) of the Act, 1951. It was only after an order of issuance of summons passed by the court did the election petitioner opposite party submit true copy of the election petition alongwith notices for onward dispatch to the respondent applicant. The copy served on the respondent applicant was not the true copy of the election petition as the affidavit accompanying the election petition did not contain the endorsement figuring in the original affidavit filed in the court.

(iii) Though a statement was made in the election petition that a challan in support of deposit of security for costs formed an enclosure but the challan was not furnished to the respondent applicant with the copy of the election petition. There was violation of Section 81(3) of the Act, 1951 and Rule 3 of Chapter VIII-A of the Gauhati High Court Rules. Further, the respondent applicant could not verify the particulars as to whether there was compliance of Section 117 of the Act, 1951. Thus there was non compliance of the provision requiring

serving of true copy of the election petition to the respondent applicant. Moreover the election petitioner opposite party failed to attest the copy of election petition furnished to the respondent applicant as the true copy of the election petition. The copy served on the respondent applicant merely consisted of the signatures of the election petitioner opposite party on the side margin but no attestation endorsing the same to be the true copy in the entire copy. There is also no mention of date of filing the election petition on its body as a result there is nothing in the election petition to show that the same was filed within the period of limitation prescribed under the law.

10. The election petitioner opposite party filed his objections against the grounds raised. It was the stand of the election petitioner opposite party that he was himself present in the Registry of the court at the time of presenting the election petition. It was stated further that he did Swuar the affidavit in support of the election petition before one Sri Gandhi Ram Kathar, the Oath Commissioner. Denied the fact of non submission of attested copy of the petition and asserted that he submitted one attested copy of election petition to be served on the respondent applicant. Further stated that as per the statement made in para 22 of the election petition a challan supporting the fact that Rs. 2000/- was deposited as security for the cost of the petition was enclosed with the election petition in compliance of the Section 117 and Chapter VIII A of the Gauhati High Court Rules. There were no deficiencies as alleged in presenting the election petition in due compliance of Sections 81,82 and 117 of the Act, 1951.

11. After completion of the argument by both the learned counsel while the IA (C)3512/2019 was fixed for order, the election petitioner opposite party filed an application under Order XVI Rule 1(3) of the Code of Civil Procedure, 1908 praying for leave to adduce

evidence in the IA (C) No. 3512/2019. The said application was registered as IA (C) No. 165/2020. It was contended by the election petitioner in the said IA(C) 165/2020 that the petitioner (respondent opposite party in IA(C) 3512/2019) was upon bonafide impression that the matter would be considered on the basis of facts and records. But during the progress of hearing he realized the requirement of evidence and as such he prayed for the leave to adduce evidence of two witnesses namely the election petitioner opposite party himself and another official witness from the Registry of this court.

12. The respondent applicant as the opposite party in IA(C) 165/2020 filed his affidavit cum written objection against granting of the leave for adducing evidence on the grounds:-

(a) that the election petitioner failed to disclose as to how the evidence of the proposed witnesses were vital and relevant;

(b) the points raised by the respondent (returned candidate) were essentially matters of record duly indicated in the endorsement made by the Stamp Reporter and question of oral evidence does not arise;

(c) the hearing of IA(C) 3512/2019 already concluded and as such examination of the proposed witnesses were not at all necessary.

13. Considering the convenience the petition seeking leave for adducing evidence is taken up for disposal in this common order. Let me take note of the deficiencies as alleged by the respondent applicant resulting in non-compliance of the relevant provisions-

(i) Election petition was not presented by the election petitioner opposite party in person.

(ii) The election petitioner opposite party did not furnish true copies of the election petition on the respondent applicant including the copy of challan though the same formed part of the



enclosure of the petition.

(iii) Copy of election petition furnished to the respondent applicant was not attested by the election petitioner opposite party to be a true copy of the election petition.

(iv) No copy of the election petition duly attested by the election petitioner opposite party to be a true copy for the respondent applicant accompanied the election petition at the time of its presentation.

14. The said deficiencies are covered by Sections 81 of the Act, 1951 which stipulates as follows:

“81. Presentation of petition-(1) An election petition calling in question any election may be presented on one or more grounds specified in ^a[sub-section (1)] of Section 100 and Section 101 to the ^b[High Court] by any candidate at such election or any elector ^c[within forty five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the letter of those two dates.]

Explanation- In this sub-section ‘elector’ means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

^d[.....]

^e[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition ^f[.....], and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]”

15. Thus Section 81 of the Act, 1951 stipulates the requirements at the time of presentation of the election petition. So it is required to examine whether the petition was filed within the period stipulated therein and whether the petition was accompanied by requisite numbers of copies as there were respondents and every such copies attested by the petitioner under his own signature to be a true copy of the petition. It is also required to be seen as to whether the petitioner was present at the time of presentation of the petition.

16. Section 86 of the Act, 1951 empowers the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. Section 83 of the Act, 1951 is not covered under Section 86(1) of the Act, 1951 though it stipulates the nature of contents of the election petition. The intent of exclusion of Section 83 from the purview of Section 86 was discussed by the Hon'ble Supreme Court in ***Manohar Joshi Vs. Nitin Bhaurao Patil and another reported in (1996) 1 SCC 169*** as follows:

“20. Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provision of Section 81 or Section 82 or Section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of Section 81 requires the checking of limitation with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with Rules of the High Court. Thus, the compliance of Section 81, 82, and 117 is to be seen with reference to the evident facts found in the election petition and

the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirement of Section 83 of the R.P. Act which is a judicial function. For this reason, the non compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.”

17. Relying the said ratio the Hon’ble Supreme court in ***Ajay Maken vs. Adesh Kumar Gupta (supra) and another reported in (2013) 3 SCC 489*** distinguished the consequence between failure to sign and verify the original copy of the election petition filed in the court as contemplated in Section 83 of the Act, 1951 and failure to attest the copy served on the respondent to be a true copy of the election petition prescribed by Section 81 (3) of the Act, 1951 as follows:

“7. Legally there is a distinction between failure to sign and verify the original copy of the election petition filed in the court and failure to attest the copy served on the respondent to be a true copy of the election petition. While the latter failure falls within the scope of Section 81(3), the earlier failure falls under sub-section (1)(c) and sub-section (2) of Section 83. While the failure to comply with the requirements of Section 81 obligates the High Court to dismiss the election petition, the failure to comply with the requirements of Section 83 is not expressly declared to be fatal to the election petition. The said distinction is explained by this court in *Manohar Joshi vs. Nitin Bhaurao Patil* ² in paras 20³ and 21⁴.”

18. From the aforesaid two decisions more specifically in ***Manohar Joshi (supra)*** the



deficiencies as highlighted in the application by the respondent applicant being covered by Section 81 of the Act, 1951 are required to be examined on the basis of the evident facts found in the election petition and the documents filed alongwith it at the time of presentation which are of ministerial acts. The election petitioner opposite party mainly sought the leave for adducing evidence in order to prove the fact that the election petitioner presented the petition in person. To that effect there is a report of the stamp reporter and same had been relied by the learned Senior counsel for the election petitioner in support of the said fact that the petitioner was present at the time of presentation of the election petition. 'Ministerial act' as defined in Black's Law Dictionary, (Ninth edition) is an act performed without the independent exercise of discretion or judgment and such act is mandatory. Thus the question of application of discretion, judgment or skill does not arise at all. As such performance of such act can very well be found in the election petition itself. The election petitioner opposite party argued in favour of granting leave for adducing evidence citing various enabling provisions of the Code of Civil Procedure, 1908 (CPC) supported by various decisions but in my considered view no further evidence is required in order to decide the application under Section 86 of the Act, 1951 for the reasons discussed above. Accordingly the IA (C) No. 165/2020 is dismissed. Let me take up the IA (C) No. 3512/2019.

19. Mr. Mazumdar, the learned Senior counsel submitted that the last date for filing the election petition was 08.07.2019. But the report as per the records of the Administrative Officer (Judicial) dated 15.07.2019 is not proper inasmuch as though in the report indicated the date of filing as 08.07.2019 but the endorsement of Administrative Officer (Judicial) was on 15.07.2019 which further indicates that the election petitioner was not present on 08.07.2019 but on 15.07.2019. Nowhere from the report of the Administrative Officer

(Judicial) it could be gathered about the presence of the election petitioner opposite party on the date of presentation of the election petition. Thus there was specific non-compliance of the provision under Section 81(1) of the Act, 1951 which stipulates presentation of election petition either by any candidate or any elector. Relying ***G.V. Sreerama Reddy and another Vs. Returning Officer and other reported in (2009) 8 SCC 736*** Mr. Mazumdar highlighted the importance of the presence of the petitioner at the time of presentation of the election petitioner which the Apex court held that the legislature provided that the petition must be presented by the petitioner himself so that at the time of presentation the High Court may make a preliminary verification which ensures that the petition is neither frivolous nor vexatious. In the said case the Apex court upheld the dismissal order of an election petition by the Hon'ble High Court of Karnataka on the ground that the election petition was presented by the Advocate in absence of the election petitioner under Section 81(1) of the Act, 1951. Mr. Mazumdar also relied ***Y Vikheho Swu & another vs. Sukhato A Sema (Dr) & Ors reported in (2019) 1 GLT 718.***

20. Referring Section 117 of the Act, 1951, Mr. Mazumdar contended that at the time of presenting an election petition, the election petitioner was required to deposit a sum of Rupees two thousand as security for the costs of the petition in accordance with Rules of the High court. Chapter VIII-A Rule 1 (d) of the Gauhati High Court Rules stipulates that the election petition shall be accompanied by a challan showing the deposit of Rs. 2,000/- into the State Bank of India, Gauhati Branch in favour of the Registrar of the Court as security for the cost of the petition. In the copy of the election petition supplied to the respondent applicant at para 22 it was pleaded that the challan No. 7/2839 dated 08.07.2019 was enclosed with the election petition. But no such copy of challan was found to be enclosed

with the copy of election petition.

21. Arguing further that it was mandatory for an election petition to be accompanied by the challan and the deposit of Rs. 2,000/- as held by the Apex Court in ***Sitaram Vs Radhey Shyam Vishnav and others reported in (2018) 4 SCC 507***, as such the copy of challan ought to have been enclosed with the copy of the election petition supplied to the respondent applicant at least for the purpose of taking the defence. Moreover, from the pleadings in para 22 of the election petition it was quite clear that the challan formed a part of the election petition, non supply of the challan itself goes to show that the copy of the election petition served to the respondent applicant was not a true copy as envisaged under Section 81 (3) of the Act, 1951. There was no attestation also in the copy of the election petition served to the respondent applicant by the election petitioner opposite party as true copy. In support of the said contention Mr. Mazumdar relied ***M Karunanidhi Vs. HV Hande and others reported in AIR 1983 SC 558*** wherein a photograph was a part of the averment contained in para 18(b) of the election petition and in the absence of the photograph the averment of the said particular paragraph 18 (b) would be incomplete which formed an integral part of the election petition. The Apex court relying the Constitutional Bench decision in ***Ch. Subbarao Vs Member Election Tribunal reported in AIR 1964 SC 1027*** held that "copies thereof" in sub-section (3) of Section 81 read in context of sub-section (2) of Section 83 must refer not only to the election petition proper but also to schedule or annexures thereto containing particulars of any corrupt practice alleged in the election petition.

22. Mr. Mazumdar also relied the decision in ***Ajay Maken Vs Adesh Kumar Gupta and another (supra)*** and submitted that failure to attest copy of election petition furnished to respondent to be true copy and failure to sign and verify original copy of petition filed in the

court are not on the same footing. The former being non-compliance with Section 81(3) of the Act, 1951 would entail dismissal of election petition under Section 86 of Act, 1951 and the latter though being in violation of Section 83(1) on the Act, 1951 would not be fatal to election petition. Now as there was no attestation by the election petitioner of the copy served to the respondent applicant and the same being not a true copy as such it fell within the category which would entail dismissal of the election petition under Section 81(3) of the Act, 1951 as per the aforesaid ratio.

23. Referring to the stamp reporter's report dated 15.07.2019 Mr. Mazumdar argued that the said report specifically stated that the election petitioner opposite party was present on 08.07.2019. The election petition was filed alongwith one spare copy for the office use. Chapter VIII-A Rule 1(a) of the Gauhati High Court Rules required an extra copy of the election petition in addition to as many copies thereof as there were respondents mentioned in the petition. But from the report it could be seen no copy for the sole respondent accompanied the election petition at the time of its presentation which amounted to specific non-compliance of Section 81 (3) of the Act, 1951. Accordingly the election petition is not maintainable and liable to be dismissed for the deficiencies referred by the learned Senior counsel for the respondent applicant.

24. Mr. Das, the learned Senior counsel for the election petitioner opposite party countering the contentions of Mr. Mazumdar submitted that the election petition was maintainable and required to be disposed of after a full fledged trial. The election petition was presented by the election petitioner himself which stand supported by the report of the Stamp reporter dated 15.07.2019. Each and every documents forming annexures to the copy of the election petition served on the respondent applicant were duly verified and there does

not arise any question of non-compliance of the provision under Section 81(3) of the Act, 1951.

25. Regarding non supply of the copy of challan in support of compliance of Section 117 of the Act, 1951 for security of cost of the petition, Mr. Das referred to the contents of Section 117 of the Act, 1951 and Rule 1 (d) of Chapter VIII A of the Gauhati High Court Rules. The election petitioner mandatorily required by the provision of Section 117 of the Act, 1951 to deposit in the High Court in accordance with the rules of the High Court a sum of Rs. 2,000/- as security for costs. Rule 1(d) of Chapter VIII A of Gauhati High Court Rules require every election petition to be accompanied by a challan showing deposit of Rs. 2,000/- to the State Bank of India, Gauhati Branch in favour of the Registrar of the court as security for costs of the petition. The challan accompanied with the election petition was in total compliance of Rule 1 (d).

26. In the election petition in para 22 the fact that there was compliance of Section 117 of Act, 1951 and the relevant Rule of the Gauhati High court was stated. In support of the said fact the challan was enclosed as evidence only and not beyond that. As documents forming evidence does not form integral part of the averment in the election petition so non supply of the challan cannot be held to be non compliance of Section 81(3) of the Act, 1951. Non enclosure of the copy of challan itself could not classify the copy of the election petition to be one within the category as not a true copy. In support of the said contention Mr. Das relied the decision of the Constitutional Bench in ***Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and another reported in AIR 1964 SC 1545***. According to Mr. Das the respondent applicant miserably failed to show that such variation from the original owing to non enclosure of the copy of challan was intentional in order to mislead the respondent

applicant by election petitioner opposite party.

27. Mr. Das in order to buttress his argument relied ***Ch. Subbarao Vs. Member, Election Tribunal Hyderabad and others reported in AIR 1964 SC 1027*** wherein the test laid down by Constitutional Bench in ***Murarka Radhey Shyam Ram Kumar (supra)*** was followed by another Constitutional Bench. Similarly another Constitution Bench of the Apex Court in ***T.M Jacob Vs.C Poulse and others reported in AIR 1999 SC 1359*** followed and accepted the test laid down by the Constitution Bench in ***Murarka Rahey Shyam Kumar (supra)*** and it is further submitted by Mr. Das that the object of serving a 'true copy' of an election petition and the affidavit filed in support of the allegation of corrupt practice on the respondent was to understand the charge and for effectively taking defence in his written statement. Requirement is of substance and not of form. He also relied the decision of the Apex court in ***T. Phungzathang vs Hangkhanlian and other reported in (2001) 8 SCC 358.***

28. Mr. Das strenuously argued that submission of one single copy of the election petition was sufficient in order to satisfy the provision of Section 81 (3) of the Act, 1951 inasmuch as it is the sole respondent required to be served with the election petition. So the submission made by Mr. Mazumdar that mere submission of the office copy of the election petition without the other copy amounted to violation of Section 81(3) of the Act, 1951 cannot be accepted. Finally it was the contention of Mr. Das that application filed by the respondent applicant was liable to be dismissed.

29. From the aforesaid contentions of both the learned Senior counsel it is found that Mr. Mazumdar submitted that the copy of the challan which formed an enclosure to the election

petition was not found enclosed to the copy of the election petition served on the respondent applicant and as such there is violation of Section 81(3) of the Act.

30. Further there was no attested copy of the election petition accompanying the election petition. The copy served on the respondent applicant was not the true copy of the election petition as the affidavit accompanying the petition did not contain the endorsement figuring in the original affidavit filed in the court. Moreover the copy furnished to the applicant was not "attested" by the election petitioner opposite party except the signatures of the opposite party on the side margin of the petition.

31. Now in order to decide the said contentions of Mr. Mazumdar I would like to note the purpose of Section 81(3) of the Act, 1951. In ***Ajay Maken Vs Adesh Kumar Gupta (supra)***, the Apex Court held that the purpose of Section 81(3) is to put the returned candidate on notice of the various allegations made against him in order to enable him to defend himself effectively in the election petition. It was further held that the said stipulation form one of the basic postulates of the principles of natural justice. In the application it is stated that due to non enclosure of the challan in the copy of election petition the respondent applicant could not take the defence properly.

32. Here I would like to look into the provisions of the Code of Civil Procedure, 1908 (CPC) Order VI Rule 2 CPC which stipulates that every pleading shall contain, and contain only, a statement in a concise form of material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. Order VI Rule 1 CPC specifies that 'pleadings' shall mean plaint or written statement and for that purpose Order VI Rule 1 CPC includes the terms "claim or defence".

33. Section 83 of the Act, 1951 stipulates the nature of the pleadings in an election petition which shall contain a concise statement of the material facts on which the petitioner relies. It requires setting forth full particulars of any corrupt practice that the petitioner alleged. The petition shall be signed and verified in the manner laid down in the CPC for verification of pleadings. In case of allegation of corrupt practice, the petition is required to be accompanied by an affidavit in support of the allegation of such corrupt practice and particulars. Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

34. Section 81 of the Act, 1951 specifies the requirement at the time of presentation of an election petition and the period of limitation. It mandates every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. It specify the requirement of schedules or annexures of the petition.

35. Section 87 of Act, 1951 prescribes applicability as nearly as possible of CPC for suits while conducting a trial of an election petition by the High Court. The Act, 1951 is a complete code governing the election process under it and the dispute resolution forum and procedures. As it prescribes applicability of the CPC for trial of suits as such the interpretation of Section 81 and 83 of the Act, 1951 must be almost in consonance with the procedures applicable for suit under the CPC as held in ***Smti Sahodrabai Rai Vs. Ram Singh Aharwar and Others reported in AIR 1968 SC 1079.***

36. Section 83 stipulates for a concise statement of the material facts which is similar to that of Order VI rule 2 CPC. Section 83 also stipulates any schedule or annexure to the



petition must be signed and verified in the same manner as the petition. This section stipulates the nature of contents of petition only, which requires a concise statement of the material facts on which the petitioner relies. While doing so, if such concise material fact includes a document and the contents thereof then it would form part of the election petition and shall have to be signed and verified in the same manner as the election petition. This is similar to the provision of Order VII Rule 14 CPC which stipulates submission of the documents relied in the plaint to be filed alongwith the plaint in the court. Order VI Rule 2 mandates that evidence need not be pleaded in the pleadings. So if the contents of a document is specifically pleaded in the election petition or pleadings that itself forms the material facts and the document is the evidence of the contents therein. But if reference of a document is made and the contents thereof are not pleaded in the petition then the document itself forms a material fact but not evidence inasmuch as the adverse party is required to take his defence after going through the contents of the document only. So the said document must form part of the petition, copy whereof must be accompanied with the election petition in order to form the true copy as stipulated under Section 81 (3) of the Act, 1951.

37. In ***Smti Sahodrabai Rai –Vs- Ram Singh Aharwar and others (supra)***, the Hon'ble Supreme Court held in a case where an election petition itself reproduced the whole of the pamphlet in a translation in English as particulars of a corrupt practice and the original Hindi pamphlet was filed as annexure to the petition but no copy of the annexure was served on the respondent along with the copy of the petition as follows:-

“12..... 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 election petition which are put in not in the election petition but in the accompanying schedules or annexures.”

38. Let me reproduce the paragraph 22 of the Election petition which refers to the copy of challan which was not enclosed with the copy of election petition to the respondent:-

“22. That the election petitioner has made security deposit of Rs. 2000/- as stipulated under Section 117 of the Act of 1951 vide Challan No. 7/2839 dated 08.07.2019 which is enclosed herewith.”

39. From the aforesaid statement it is apparent that the security deposit of Rs. 2000/- as per Section 117 of the Act, 1951 was deposited vide the challan. In order to support the said statement, copy of the challan was enclosed but the material fact is that the mandatory requirement as prescribed under Section 117 of the Act, 1951 was satisfied vide the challan bearing No. 7/2839 dated 08.07.2019. The challan enclosed in the petition is the evidence in support of the said fact. If the ratio laid down in **Smti. Sahodrabai Rai (Supra)** is applied it can very well be held that the contents of challan does not form the integral part of the averment in election petition but is only evidence of the averment in para 22 and form an annexure to the election petition.

40. In **Manohar Joshi Vs Nitin Bhaurao Patil (supra)** the Hon’ble Supreme court

relying ***Sahodrabai Rai (supra)*** and other decisions of the Apex Court held as follows.

“24. The distinction brought out in the above decisions is that a case where the document is incorporated by reference in the election petition without reproducing its contents in the body of the election petition, it forms an integral part of the petition and if a copy of that document is not furnished to the respondent with a copy of the election petition, the defect is fatal attracting dismissal of the election petition under Section 86(1) of the R.P. Act. On the other hand, when the contents of the document are fully incorporated in the body of the election petition and the document also is filed with the election petition, not furnishing a copy of the document with a copy of the election petition in which the contents of the documents are already incorporated, does not amount to non-compliance of Section 81(3) to attract Section 86(1) of the R.P. Act. In other words, in the former case the document filed with the election petition is an integral part of the election petition being incorporated by reference in the election petition and without a copy of the document, the copy is incomplete copy of the election petition and, therefore, there is non compliance of Section 81(3). In the other situation, the document annexed to the petition is mere evidence of the averment in the election petition which incorporates fully the contents of the document in the body of the election petition and, therefore, non supply of a copy of the document is mere non-supply of a document which is evidence of the averments in the election petition and, therefore, is no non-compliance of Section 81(3).

41. Relying the ratio of ***Sahodrabai (supra)*** the Hon'ble Supreme Court in ***Ajay Maken and Adesh Kumar Gupta and another (supra)*** held as follows:

“37. From the above, it can be seen that two propositions of law are settled by this court in Sahodrabai case¹².

37.1. Firstly when an election petition is accompanied by annexures, where content is completely described in the election petition, failure to serve a copy of the election petition on a respondent to the election petition does not render the copy served on the respondent anything other than a true copy of the election petition.

37.2 Secondly, even in a case where the content of the annexure is not fully described in the election petition, the non-supply of such annexure alongwith the copy of election petition to the respondent does not violate the mandate of Section 81(3) in the case where annexure is only sought to be used as evidence of same allegation contained in the election petition.”

42. Thus in view of the aforesaid discussions the submission of Mr. Mazumdar, the learned Senior counsel for the respondent applicant that the copy of the petition served on the respondent applicant was not a true copy due to non enclosure of the challan and violate Section 81(3) of the Act, 1951 cannot be accepted.

43. Mr. Mazumdar also submitted that the copy served on the respondent applicant was not the true copy of the election petition as the affidavit accompanying the petitioner did not contain the endorsement figuring in the original affidavit filed in the court. In this regard let me consider the meaning of the expression ‘copy’ occurring in Section 81(3) of the Act, 1951. In ***Murarka Radhey Shyam Ram Kumar’s case (supra)*** it was held that expression ‘copy’ did not mean an exact copy but only one so true that no reasonable person could by any possibility misunderstand it as not being the same as original.

44. The aforesaid view of the Constitution Bench was accepted by another Constitution Bench in ***T.M. Jacob Vs C Poullose and others (supra)*** and held as follows:

“41. The expression “copy” in Section 81 (3) of the Act, in our opinion, means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature as could possibly mislead a reasonable person to understand and meet the charges/ allegation made against him in the election petition. Indeed a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of Section 81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation.”

45. The deficiency as submitted by Mr. Mazumdar is only in respect of the endorsement figuring in the original affidavit which are missing in the copy of the affidavit in the petition. But how the respondent applicant is affected due to the said deficiency is not stated in the application. The said deficiency falls within Section 83 of the Act, 1951 which is curable. It is not the case that such endorsements are not found in the affidavit filed alongwith the petition in the court. Then the same cannot be cured after the expiry of the period of limitation. In this regard the Constitution Bench decision of the Apex Court in ***T.M. Jacob Vs. C Poullose (supra)*** is relevant which is extracted below:

“43.....That apart, to our mind, the legislative intent appears to be quite clear, since it divides violations into two clauses-those violations which would entail dismissal of the election petition under Section 86(1) of the Act like non-compliance with Section 81(3) and the violation which attract Section 83(1) of the act i.e. non-compliance with the provisions of Section 83. It is only the violation of Section 81 of the Act which can

attract the doctrine of substantial compliance as expounded in *Murarka Radhey Shyam* (AIR 1964 SC 1545) and *Ch. Subbarao's* case (AIR 1964 SC 1027). The defect of type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure.....”

46. The aforesaid ratio was applied by the Hon'ble Supreme court in ***T.Phungzathang Vs Hangkhanlian and others reported in AIR 2001 SC 3924*** and held as follows:

“25. In the above declared legal provision, if we examine the case in hand, we notice that the only lacuna pointed out by the contesting respondent in his application in Civil Miscellaneous Election case No. 3/2000 is that the copy supplied to him did not contain the verification or affirmation made by the Oath Commissioner or the Prescribed Authority as required in Form 25 and Rule 94 A of the Conduct of Election Rules, 1961. It is not the case of the respondent No. 1 that the original affidavit alongwith the election petition in Form 25 did not contain such verification or affirmation. On the contrary, it is an admitted fact that such affirmation or verification was made in the original affidavit filed before the High Court. Therefore the question arising in this appeal is: would this omission as pointed out by the respondent in his petition ipso facto entail dismissal of the election petition under Section 86(1) of the Act? In view of the law laid down in *Jacob's* case (supra), the answer then should be 'no' because by such omission the copy, supplied will not cease to be a 'true copy' and there is no possibility of any prudent person being misled in defending himself or being prejudiced in the defence of his case. Further, such omissions are only curable irregularities.”

47. Now if the submission of Mr. Mazumdar, the learned Senior counsel for the respondent

applicant is considered and applying the aforesaid ratio, in my considered opinion the deficiency urged is not fatal under Section 86(1) of the Act, 1951 inasmuch as even today the election petitioner is at liberty to supply a copy of the affidavit after correcting the defects pointed out inasmuch as the said defect does not go to the root at the time of presentation of the election petition under Section 81 (3) of the Act, 1951 rather the same in my further considered opinion is a curable defect which occurred at the time of supplying the copy of the election petition alongwith the notice to the respondent applicant after the order was passed for taking steps on the respondent.

48. Mr. Mazumdar submitted that the election petition at the time of its presentation was not accompanied with the copy for the respondent applicant which is a specific violation of the Section 81 of the Act, 1951 and election petition is liable to be dismissed under Section 86(1) of the Act, 1951. Further, it was submitted that the election petitioner did not present the election petition on his own. Mr. Das, the learned Senior counsel strongly refuted the submission of Mr. Mazumdar and relied the report which is on record of the Administrative Officer (Judicial) of the High Court dated 15.07.2019 and submitted that the said report clearly mentioned about the presence of the election petitioner on 08.07.2019, the date of filing the election petition. It was also stated that the said report indicated about submission of a spare copy of election petition for office use. According to him the election petition satisfies all the requirements as stipulated by Section 81 of the Act.

49. The report of the Administrative Officer (Judicial) of this court is extracted hereinbelow:

“ REPORT OF THE ELECTION PETITION



1. The election petition has been filed by the petitioner today i.e. 08.07.2019 personally during the office hours. The petitioner is present and signed each of the pages of the petition, annexure of the petition in my presence.
2. The petition alongwith one spare copy for the office use and filed within 45 days and in form.
3. The petition has been supported by an affidavit.
4. One number of written envelope duly stamped for Rs. 130/- with registered A/D has been filed.
5. One number of written up notice has been submitted for service of notice upon the sole respondent.
6. Security amount of Rs. 2,000/- has been deposited in the Treasury Office, Kamrup (M), vide challan No. 7/2839 dated 08.07.2019. A copy of the said challan has been enclosed.
7. The petition contains 19 pages.
8. The petition is supported by a vakalatnama accepted by 6 nos. of counsels.

Sd/ Illigible

15.07.2019

Administrative Officer (Judl)

Gauhati High Court, Guwahati."

50. From the aforesaid report dated 15.07.2019 it is seen that the petitioner filed the election petition on 08.07.2019 personally during the office hours. The election petition was

accompanied by one "spare copy" for the office use and filed within 45 days purportedly from the date of result of the election.

51. Section 81 of the Act, 1951 stipulates the requirements at the time of presentation of election petition to the High Court to try the said election petition. Section 81(3) of the Act, 1951 stipulates that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition. Chapter VIII-A of the Gauhati High Court Rules stipulates special provisions relating to procedure in election petitions under the Representation of Peoples Act, 1951 and the relevant portion is extracted below:

"1. An election petition under S. 80-A of Representation of Peoples Act may be presented duly verified in the form prescribed under Ss. 82 and 83 of the said Act before the stamp reporter of this court with a court fee of Rs. 6.00 affixed thereon, within 45 days from the date of election of the returned candidates, or if there are more than one returned candidate at the election and the dates of their election are different, the latter of those two dates. Every such petition shall be accompanied by-

(a) as many copies thereof as there are respondents mentioned in the petition together with one extra copy, all the copies being fully attested by the petitioner under his own signature to be a true copy of the petition and as many envelopes as there are respondents being requisite postage stamp to enable service to be effected by registered post with acknowledgement due."

52. From the report of the Administrative Officer (Judl) dated 15.07.2019 it is seen that the election petition was filed accompanied by one spare copy for office use. Now Section 81 of the Act, 1951 stipulates that the election petition must be accompanied by as many copies

thereof as there are respondents mentioned in the petition. Chapter VIII A of the Gauhati High Court Rules stipulates special provisions requiring the election petition to accompany as many copies thereof as there are respondents mentioned in the petition together with one extra copy. Mr. Mazumdar submitted that as there was only one respondent the election petition ought to have been accompanied by two copies of election petition. As the only copy with election petition was for the office use as such, no copy accompanied in terms of Section 81 of the Act, 1951 for the sole respondent amounting deficiency under Section 81 of the Act, 1951. Mr. Das on the other hand objected to the said submission as hereinabove referred and submitted that as per the mandate of Section 81 (3) of the Act, 1951 the copy for the sole respondent accompanied the election petition which was sufficient compliance of Section 81.

53. In order to decide the issue arising out of the contentions above made by both the learned Senior counsel, let me examine the force of Rule 1 of Chapter VIII A inasmuch as it is sub rule (a) of Rule 1 of Chapter VIII A prescribes one extra copy alongwith as many copies thereof as the respondents. The Hon'ble Supreme Court in ***M. Karunanidhi vs H.V. Hande and others reported in AIR 1983 SC 558*** observed as follows:

“17.....There are different sets of rules framed by different High Courts under Article 225 of the Constitution regulating the practice and procedure to be observed in all matters coming before the High Court in exercise of its jurisdiction under S.80-A of the Act.....”

54. Thus the rules so framed by the Hon'ble High Courts are for the purpose of regulating the practice and procedure to be observed in all matters coming before the High Court as per Section 80-A of the Act, 1951 for exercising the jurisdiction on such petition under Section 80-

A. In ***Abdul Jabbar vs. Syeda Anwara Taimur and ors. reported in (1986) 1 GLR 257*** an issue was raised whether Rule 1 of Chapter VIII A of the Gauhati High Court Rules which provides for presentation of the election petition before the Stamp Reporter of the High Court was ultra-vires Article 329(b) of the Constitution and Section 169 of the Act of 1951. While holding against the issue and taking note of the observation in ***M. Karunanidhi vs. HV Hande (supra)*** the learned Single Judge of this court held as follows:

“8. The High Court is a legal entity. It consists of not only the Chief Justice and other Judges but also officers of various departments. When the Stamp Reporter receives the election petition or the election petition is presented to the Stamp Reporter he does not do it as a delegate of the High Court. The Stamp Reporter is a limb of the High Court and not a delegate as the Stamp Reporter is entrusted to perform his duties under the rules. By framing the Rules, the High Court has not parted itself with the power to act under the Act. The Chief Justice is the Head of the body. The Judges and other officers are limbs or parts of the body (High Court). It is therefore concluded that the said Rules are not inconsistent with the Article 329 (b) and the provisions of Section 81 or any other provisions of the Act.”

55. Almost a similar issue as the one raised in ***Abdul Jabbar Vs Syeda Anwara Taimur (supra)*** was raised before this Hon’ble Court in ***Banendra Kumar Mushahary V. Md. Mohibul Haque reported in AIR 2002 Gau 118***. The learned Single Judge of this court relying the ratio in ***Manohar Joshi vs. Nitin Bhaurao Patil (supra)*** and ***Abdul Jabbar (supra)*** held as follows:

“20. The above observation of the Hon’ble Supreme Court that “this is a ministerial

act” sets at rest the controversy at hand. The function involved in the presentation of an election petition is essentially clerical in character. No exercise of judicial power is contemplated in the act of presentation and its acceptance. What is needed is the scrutiny of the election petition which is essentially clerical. Section 81 has been quoted hereinabove. There appears to be a vacuum which speaks of presentation of before the High court and not the manner of presentation. The vacuum, in my opinion, can be filled up by the High court in exercise of its inherent powers since the Rule in this behalf will not be in clash with any provisions of law made by the appropriate legislature. It is for this purpose, the continuance of the Rule appears to be indispensable till appropriate legislature provide the manner by legislation. Therefore Rule 1 of Chapter VIII-A of the Gauhati High Court Rules need not be interfered on this given back ground.”

56. In ***Jamal Uddin Ahmed vs Abu Saleh Najmuddin and another reported in AIR 2003 SC 1917***, the Hon’ble Supreme Court held in respect of Chapter VIII-A of the Gauhati High court Rules as follows approving the ratio in ***Abdul Jaffar (supra)***:

“18. Even in the absence of Chapter VIII-A in the Gauhati High Court Rules there would have been nothing wrong in the High Court or the Chief Justice authorizing any of its officers to receive the election petition presented to it so as to enable exercise of the jurisdiction conferred on the High Court by Chapter II of the Act. The Gauhati High Court thought it proper to incorporate Chapter VIII-A in its Rules in view of the amendment of Chapter II of the Act.

19. We are therefore of the opinion that presentation of an election petition to the

Stamp Reporter of the High Court is a valid presentation. Such has been the view taken by High Court of Gauhati consistently. At least three decisions can be referred to immediately: ***Abdul Jabbar v. Syeda Anwara Taimur & Ors., (1986)1 GLR 257: Shri Melhpura Vero v Shri Vamugo (1990) 1 GLR 290 and Shri Saingura v. Shri F Sapa & Ors., (1990) 2 GLR (NOC) 48.*** So is the view taken by the High Court of Allahabad in ***Nawab Khan v. Vishwanath Shastri, AIR 1993 Allahabad 104.*** We find ourselves in agreement with the view so taken by the learned Single Judges of Gauhati and Allahabad High Court.

57. It would not be out of place to mention that originally in the Act, 1951 an election petition could be presented to the Election Commission and thereafter to be tried by an Election Tribunal. Act No. 47 of 1966 amended Chapter II of the Act, 1951 with effect from 14.12.1966 by which jurisdiction to try election petition was conferred on the High Court. After the amendment, Part VI Chapter II Section 80A of the Act, 1951 gives the jurisdiction to the High Court to try the election petition and on the basis of the said authority, Gauhati High Court introduced Chapter VIII-A in the Gauhati High Court Rules consequent to the amendment of the Act, 1951 by Act No. XL, VII of 1966. The said Rules are not ultra vires Article 329(b) of the Constitution of India and as such it must be read along with Section 81 (3) of the Act, 1951 and compliance of the Rule 1 sub-rule (a) is mandatory. Thus the requirements while filing an election petition as per Section 81 of the Act, 1951 must also require compliance of Rule 1 sub-rule (a) of the Chapter VIII-A of the High Court Rules.

58. In the present case in hand as referred hereinabove from the report of the Administrative Officer (Judl) extracted hereinabove there was an apparent failure on the part of the election petitioner in due compliance of Rule 1 sub-rule (a) of the Chapter VIII-A of the



Gauhati High Court Rules as such I am inclined to hold that there was non compliance of Section 81 of the Act, 1951 as no copy of the election petition for sole respondent applicant accompanied the election petition inasmuch as the only copy accompanied with the election petition was only for office use i.e. in compliance of Rule 1 sub-rule (a) of Chapter VIII-A only but not the provision of Section 81(1) of the Act, 1951.

59. It was observed in ***Ajay Maken –vs- Adesh Kumar Gupta and another (supra)*** that failure to comply with requirements of Section 81 of the Act, 1951 obligates the High Court to dismiss the election petition. Now as it is held that there is a specific failure of the election petitioner opposite party in compliance of Section 81 of the Act, 1951 accordingly I conclude that IA (C) 3512/2019 is required to be allowed which I accordingly allow. Finally exercising the jurisdiction under Section 86(1) of the Act, 1951 this election petition is dismissed with costs.

JUDGE

Comparing Assistant