



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 16495/2024

Anju Parihar W/o Shri Sanwarlal, Aged About 31 Years, R/o
Village Balrava, Tehsil Tinwari, District Jodhpur.

-----Petitioner

Versus

Looni Devi W/o Shri Banshi Lal, R/o Village Balrava, Tehsil
Tinwari, District Jodhpur.

-----Respondent

For Petitioner(s) : Mr. Vinay Shrivastava
For Respondent(s) : Mr. Gaurav Choudhary

HON'BLE MR. JUSTICE KULDEEP MATHUR

Order

06/11/2024

The present writ petition has been filed by the petitioner under Articles 226 and 227 of the Constitution of India seeking following reliefs:-

"It is therefore, humbly prayed, that this Hon'ble Court may kindly be pleased to allow the writ petition and:-

- i). by an appropriate writ, order or direction, impugned order dated 17.9.2024 (Annex.3) passed in the Civil Misc. Case (Election Petition) No. 3/2022 (Looni Devi Vs. Anju) in the Court of Senior Civil Judge No. 7, Jodhpur Metropolitan may kindly be quashed and set aside and the application (Annex.1) may kindly be rejected;*
- ii] any other appropriate writ, order or direction which this Hon'ble Court considers just and proper in the facts and circumstances of this case, may kindly be passed in favour of the petitioner."*

2. Succinctly stated facts of the present case are that the election of the petitioner pursuant to the election held on



10.10.2020, was challenged by the respondent- Looni Devi by way of an election petition filed before the District Judge, Jodhpur Metropolitan, mainly on the ground that the petitioner is a mother of three children and thus was ineligible to contest the elections as per Section 19(I) of the Rajasthan Panchayati Raj Act, 1994 (*hereinafter* referred to as 'Act of 1994'). The said election petition was transferred to the Court of Senior Civil Judge No. 7 Jodhpur Metropolitan (*hereinafter* referred to as 'Election Tribunal') for trial. During the pendency of trial, the respondent moved an application dated 23.07.2024 under Order XXVI Rule 1 read with Section 151 of CPC, stating *inter alia* that the respondent wishes to get her evidence recorded through a Commissioner appointed by the Election Tribunal at her home on account of her illness. The grievance of the petitioner is that the learned Election Tribunal, after framing of the issues, has now while allowing the application dated 23.07.2024, directed vide impugned order dated 17.09.2024 (Annex.3), to get the statements of the respondent recorded at her home through commissioner appointed in this behalf and not before the learned Election Tribunal.

3. Learned counsel for the petitioner vehemently contended that the learned Election Tribunal has committed grave errors of facts as well as law in allowing the application dated 23.07.2024 filed by the respondent under Order XXVI Rule 1 read with Section 151 of CPC. Learned counsel submitted that impugned action of the Learned Tribunal in allowing the statements of the respondent to be recorded at her home is in complete disregard to the Rule 85 of the Rajasthan Panchayati Raj (Election) Rules, 1994



(*hereinafter* referred to as 'the Rules of 1994'). Learned counsel further submitted that affidavit of the respondent for recording her evidence was filed way back in 2021, however, despite getting ample opportunities to remain present before the Election Tribunal for getting her statements recorded, the respondent failed to appear and now by way of filing an application under Order XXVI Rule 1 read with Section 151 of CPC, she simply intends to delay the trial. Learned counsel further submitted that no documents certifying her medical illness have been tendered before the Learned Election Tribunal in support of her application filed under Order XXVI Rule 1 read with Section 151 of CPC and thus the learned Election Tribunal ought to have rejected the same on this ground only.

4. Drawing attention of the Court towards Rule 85 of the Rules of 1994, learned counsel submitted that a perusal of Rule 85 would make it amply clear that only a *persona designata*, (that is the Election Tribunal in the present case) could record the evidence in the matter and thus no one other than the Presiding Officer of the learned Election Tribunal can get the statements of the respondent recorded in the present case. Learned counsel submitted that recording of the statements of the witness Smt-Looni Devi by a Court Commissioner would not amount to recording of evidence in memorandum which would be contrary to the provisions of the Rules of 1994. To substantiate this contention, attention of the Court was drawn towards proviso (b) to Rule 85 which states that Judge shall not record evidence in full



but shall only make a memorandum thereof, sufficient in his opinion for the purpose of deciding the petition. Learned counsel thus contended that the impugned order dated 17.09.2024 is *ex-facie* illegal and contrary to the procedure established by law as the same amounts to delegation of the functions of the learned presiding judge of the Election Tribunal.

5. Learned counsel for the petitioner has placed reliance upon the following judgments in support of his arguments:-

i) "Mahendra Kumar v. Arjun Kumar and Ors.": 2014 (1) WLN 227 Raj.

ii) "Panna Ram v. Ramu Ram": AIROnline 2019 Raj 403.

On the strength of these contentions, precedent law and arguments, learned counsel thus implored the Court to allow this writ petition and to quash and set aside the impugned order dated 17.09.2024 (Annex.3).

6. *Per contra*, learned counsel for the respondent has vehemently opposed the present writ petition. He contended that the present writ petition has been filed only with an intention to delay the trial. Learned counsel submitted that the impugned order dated 17.09.2024 is perfectly just and good in the eyes of law and thus the interference of this Court by way of invoking the Jurisdiction under Articles 226 and 227 of the Constitution of India is not warranted in this case. Learned counsel submitted that the power of issuing commission under Order XXVI is discretionary and the same should not be interfered by this Court. Reliance was placed upon the judgment rendered by Co-ordinate Bench of this



Court in the case of "**Smt. Kamla v. Ms. Radha Vishnoi**": S.B. Civil Writ Petition No.519/2016. Learned counsel thus prayed for the rejection of this writ petition.

7. Heard Learned counsel for the parties at Bar. Perused the material available on record.

8. The Rules 85 and 86 of the Rules of 1994 are reproduced below for ready reference:-

"85. Hearing of petition. - *The procedure provided in the Code of Civil Procedure, 1908 (Central Act V of 1908) in regard to suits, shall, in so far as it can be made applicable, be followed in the hearing of the petition:*

Provided that

(a) any two or more petitioners relating to the election of the same person shall be heard together;

(b) the Judge shall not be required to record evidence in full but shall only made a memorandum thereof sufficient in his opinion for the purpose of deciding the petition;

(c) the petitioner may at any stage of the proceeding be asked to give further security for the payment of the costs likely to be incurred by any respondent;

(d) the Judge, shall only be bound to require the production of, or to receive so much evidence, oral or documentary as he considers necessary; and

(e) no witness or other person shall be required to state for whom he has voted at an election."

"86. Powers of Court hearing petition. - *The Judge hearing a petition shall have the same powers and privileges as a Judge of a Civil Court when trying a suit and may for the purpose of serving any notice or issuing any process of doing any other thing employ an officer, clerk or peon attached to his Court:*

Provided that no injunction or stay order shall be issued restraining the person, whose election is questioned, from exercising the power and performing the duties under the Act and rule made thereunder."



9. The Hon'ble Supreme Court of India in the case of "**Bachhaj Nahar v. Neelima Mandal and Ors.**": AIR 2009 SC 1103, observed that Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied in civil litigation. The provisions are so elaborate that many a times, fulfillment of the procedural requirements of the Code may itself contribute to delay. But, any anxiety to cut the delay or further litigation should not be a ground to float the settled fundamental rules of Civil Procedure. This is too a well settled law that the procedural laws are handmaid of Justice and they are intended to facilitate and not to obstruct the course of substantive Justice. The object of prescribing procedure is to advance the cause of Justice and not to shut the doors of justice for the parties at the very threshold.

10. In the present case, this Court finds that sufficient documentary evidence was produced before the Election Tribunal with the application filed under Order XXVI Rule 1 read with section 151 CPC to establish that the election petitioner- Smt. Looni Devi who is aged about 72 years, is suffering from serious ailments and therefore she is entitled to be cross-examined by the Commissioner to be appointed by the learned Election Tribunal.

11. Having perused Rule 85 of the Rules of 1994, in the opinion of this Court, the phrase "in so far as it can be made applicable" indicates that while deciding an election petition, the Election Tribunal shall have the discretion to determine the applicability of CPC to the case and the procedure provided under CPC shall not apply to the case automatically. In other words, the Election



Tribunal after assessing the nature of proceedings shall have the liberty to decide as to what extent the procedure as mandated under the provisions contained in CPC can be applied. Thus, in the present case, if after considering the facts and circumstances of the case and in the interest of justice, if the learned Election Tribunal having exercised the discretion vested with it had decided to get the statements of the witness Smt. Looni devi recorded through the Court Commissioner appointed in this behalf, the said discretion can neither be held illegal nor arbitrary.

12. A Co-ordinate Bench of this Court in "*Smt. Kamla*" (supra) while dealing with a similar argument was pleased to observe that the proviso (b) to Rule 85 of the Rules of 1994 enables to record only a memorandum of evidence and provides, 'the judge shall not be required to record evidence in full' and further leaves it to his discretion to make a memorandum of the evidence, which is sufficient in his opinion for the purpose of deciding the petition; the use of expression 'shall not be required to record evidence in full' and further giving discretion regarding sufficiency of the memorandum cannot be read as prohibition against recording of evidence at length and it cannot be said that in case instead of recording the deposition of witness by way of memorandum of evidence, if evidence of witness is at length is recorded, the said procedure would be against the provisions of Rule 85 of the Rules of 1994 and the same would stand vitiated.

13. In view of the law laid down in "*Smt. Kamla*" (supra), the plea raised on behalf of the petitioner that Court Commissioner cannot be appointed for examining the witness Looni Devi for the



reason that as per the Rule 85 proviso (b) of the Rules of 1994, the Judge/ election Tribunal shall not be required to record evidence in full but shall only make a memorandum thereof sufficient in his opinion for the purpose of deciding the petition, and therefore if the Court Commissioner is appointed, he shall not be able to record only a memorandum and thus the same would not be in conformity with the object of Rules of 1994; is not tenable in the eyes of law.

14. The language of provision, providing for recording of memorandum only and providing for discretion regarding the sufficiency, makes the provision as enabling and not prohibitory. Therefore, the objection raised by the learned counsel for the petitioner regarding non- adherence of Rule 85 of the Rules of 1994 has no basis.

15. No other argument was raised/ pressed before this Court.

16. In view of the above discussion, there is no substance in the writ petition filed by the petitioner and the same is therefore dismissed.

17. All pending applications also stand disposed of.

18. No order as to costs.

(KULDEEP MATHUR),J

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