

Dinabandhu Sahu

Vs

Jadumoni Mangaraj and Others

Civil Appeal No. 25 of 1954

(CJI M.C. Mahajan, B.K. Mukherjea, Vivian Bose, N.H. Bhagwati, T.L. Venkatarama Ayyar JJ)

23.04.1954

JUDGMENT

VENKATARAMA AYYAR J. -

This is an appeal by special leave against the order of the Election Tribunal, Cuttack, setting aside the election of the appellant to the Legislative Assembly, Orissa, from the Kendrapara Constituency. Four persons, the appellant and respondents Nos. 1 to 3, were duly nominated for election to the seat. One of them, Loknath Das (the third respondent herein), withdrew his candidature, leaving the contest to the other three. At the election which was held between 9th and 15th January, 1952, the appellant secured the largest number of votes and was declared elected. The respondent, Jadumoni Mangaraj, then presented a petition under section 81 of the Representation of the People Act, (Act No. XLIII of 1951) alleging various corrupt practices on the part of the appellant, and praying that the election might be set aside. The last date for presenting the petition was 4th April, 1952. It was delivered at the post office at Cuttack on 3rd April, 1952, for being sent by registered post, and actually reached the Election Commission at Delhi on 5th April, 1952, a day beyond the period prescribed. It was also defective in its verification. Section 83(1) of the Act enacts that the petition should be verified in the manner laid down in the Civil Procedure Code for the verification of the pleadings. Order VI, rule 15, sub-clause (2), of the Civil Procedure Code provides that "the person verifying shall specify by reference to the numbered paragraphs of the pleading what he verifies on his own knowledge and what he verifies upon information received and believed to be true." The verification in the petition did not specify which of the paragraphs were verified on personal knowledge and which, on information received and believed to be true. On 2nd July, 1952, the Election Commission passed an order condoning the delay in the presentation of the petition. By another communication, dated 3rd July, 1952, it drew the attention of the petitioner to the defect in the verification, and suggested that he might apply to the Tribunal for amending it. On 15th July, 1952, an order was passed under section 86 of the Act appointing the Election Tribunal, Cuttack, for the hearing of the petition. The petitioner then applied to the Election Tribunal for amending the verification. That was ordered, and the verification was amended on 24th July, 1952, so as to conform to the prescriptions laid down in Order VI, rule 15(2), of the Civil Procedure Code.

In the written statement filed by the appellant, he raised the contention that as the petition was presented out of time and as the verification was defective, it was liable to be dismissed by the Election Commission under section 85 of the Act, and that, in consequence, the Election Tribunal ought to dismiss it as not maintainable. Disagreeing with this contention, the Election Tribunal proceeded to hear the petition on the merits, and by its judgment dated 16th November, 1953, it held by a majority that three of the corrupt practices set out in the petition had been established against the appellant. They were (1) that the appellant had, in violation of section 123(1) of the Act,

induced the third respondent to withdraw from the election on a promise to get him employment; (2) that he had, in breach of section 123(6) of the Act, used Bus No. O.R.C. 1545 for conveying the electors to polling booths; and (3) that he had, in contravention of section 123(8) of the Act, obtained the assistance of Extra Departmental Agents in branch post offices and of Presidents of Choukidari Union in canvassing for him in the election, they being in the view of the Election Tribunal, Government servants as defined in that provision. On these findings, the Election Tribunal passed an order setting aside the election of the appellant. The matter now comes before us on special leave under article 136 of the Constitution.

It is obvious that any one of these findings, if accepted, would be sufficient to support the order of the Election Tribunal. With reference to the last of the findings, it is possible to urge with some force that Extra Departmental Agents and Presidents of Choukidari Union are not, having regard to their functions, Government servants, and that accordingly there was no contravention of section 123(8). But the position is different as regards the other two findings. They are pure questions of fact, depending on appreciation of evidence. Mr. Krishnaswami Ayyangar, learned counsel for the appellant, argued that the conclusions of the majority were not justified by the evidence on record, and that the findings of the third member in his dissentient opinion were the right ones to come to. But this Court does not, when hearing appeals under article 136, sit as a Court of further appeal on facts, and does not interfere with findings given on a consideration of the evidence, unless they are perverse or based on no evidence. This is particularly so, when the findings under challenge are those of Election Tribunals. The findings in this case that the appellant got the third respondent to withdraw on a promise to get him employment, and had used Bus No. O.R.C. 1545 for conveying voters to the polling booths, are supported by the evidence, and cannot be characterised as perverse, and are therefore not open to attack in this appeal.

In this view, counsel for appellant concentrated on the issues relating to the maintainability of the petition. He contended that as the petition was not presented within the time as required by section 81 of the Act, it was liable to be dismissed under the mandatory provision in section 85, and that when the matter came before the Election Tribunal, its jurisdiction was only to pass the order which the Election Commission ought to have passed, and that the petition should accordingly have been dismissed in limine as not maintainable. The proviso to section 85 of the Act runs as follows :

"Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may in its discretion condone such failure."

It was in exercise of the discretion vested in it under this provision that the Election Commission condoned the delay by its order dated 2nd July, 1952. It is not disputed that if this order is valid, there can be no question of dismissing the petition on the grounds of delay. The contention of Mr. Krishnaswami Ayyangar is that the order is not valid, because it was passed not on any application of the party praying that the delay might be excused but suo motu; and such an application, it is contended, is a condition to the exercise of jurisdiction under that proviso. Support for this contention was sought in the decisions under section 5 of the Limitation Act, holding that it was incumbent on the party praying that delay might be excused under that section to clearly allege and strictly prove the grounds therefor. We are not impressed by this contention. As was pointed out by this Court in *Jagan Nath v. Jaswant Singh* (A.I.R. 1954 S.C. 210), the rights under litigation in these proceedings are not common law rights but rights which owe their existence to statutes, and the event of those rights must be determined by reference to the statutes which create them. The proviso

to section 85 does not contemplate the Election Commission giving to the respondent notice of the petition for condonation of the delay, or the holding of an enquiry as to the sufficiency of the grounds in his presence before passing an order under it. The policy underlying the provision is to treat the question of delay as one between the Election Commission and the petitioner, and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. Under section 90(4) of the Act, when the petition does not comply with the requirements of section 81, section 83 or section 117, the Election Tribunal has a discretion either to dismiss it or not, "notwithstanding anything contained in section 85." The scope of the power conferred on the Election Tribunal under section 90(4) is that it overrides the power conferred on the Election Commission under section 85 to dismiss the petition. It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 85 of the Act. The words of section 90(4) are, it should be marked, "notwithstanding anything contained in section 85" and not "notwithstanding anything contained in section 85 or any order passed thereunder." An order of the Election Commission under section 85 dismissing a petition as barred will, under the scheme of the Act, be final, and the same result must follow under section 90(4) when the order is one excusing the delay. Section 90(4) will be attracted only when the Election Commission passes the petition on to the Tribunal without passing any order under section 85. If the Election Commission can thus pass a final order condoning delay without notice to the respondent, there is no reason why it should not pass such an order suo motu. In this respect, the position under the proviso to section 85 is materially different from that under section 5 of the Limitation Act, under which an order excusing delay is not final, and is liable to be questioned by the respondent at a later stage. [Vide the decision of the Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar* (45 I.A. 25)].

It was argued that in this view the respondent would be without remedy even if the Election Commission should choose to condone delays - it might be of years - and that that would result in great hardship. But the proviso advisedly confers on the Election Commission wide discretion in the matter, and the obvious intention of the Legislature was that it should be exercised with a view to do justice to all the parties. The Election Commission might therefore be trusted to pass the appropriate order when there is avoidable and unreasonable delay. That a power might be liable to be abused is no ground for denying it, when the statute confers it, and where there is an abuse of power by statutory bodies, the parties aggrieved are not without ample remedies under the law. With particular reference to the order dated 2nd July, 1952, it is difficult to come to any conclusion other than that in passing that order the discretion under the proviso to section 85 has been properly exercised. The petition had been presented at the post office one day earlier, and reached the Election Commission one day later than the due date. Even if the matter had to be judged under section 5 of the Limitation Act, it would have been a proper exercise of the power under that section to have excused the delay. As was observed in the Full Bench decision in *Krishna v. Chathappan* (I.L.R. 13 Mad. 269), in a passage which has become classic, the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant." We have, therefore, no hesitation in holding that the order dated 2nd July, 1952, is on the facts a proper one to pass under the proviso to section 85.

It was also argued for the appellant that the power conferred by the proviso to section 85 could, on its true construction, be exercised only when the petitioner moved the matter in person, and as the Election Tribunal had found that that was not done, there was no jurisdiction in the Election Commission to pass the order which it did. We do not see anything in the language of the section to support this contention. While the proviso requires that "the person making the petition" should satisfy the Election Commission that there was sufficient cause for delay, it does not require that he

should do so in person. And there is nothing in the character of the proceedings requiring that the petitioner should make the representations under that proviso in person. It is only a question of satisfying the Election Commission that there was sufficient ground for excusing the delay, and that could be done otherwise than by the personal appearance of the petitioner. None of the objections advanced against the validity of the order dated 2nd July, 1952, being tenable, the contention that the petition was liable to be dismissed under section 85 as presented out of time must be rejected.

There is another ground on which also the contention of the appellant that the petition is not maintainable should fail. When the election petition came before the Election Tribunal by virtue of the order under section 86 of the Act, the appellant moved for its dismissal under section 90(4) on the grounds, firstly that it was not presented within the time prescribed by section 81, and secondly, that it was not verified in accordance with section 83; but the Election Tribunal declined to do so. If it was within the competence of the Election Tribunal to pass such an order, that would itself furnish a complete answer to the contention of the appellant that the petition was not maintainable. Mr. Krishnaswami Ayyangar sought to get over this difficulty by contending that the order of the Election Commission sending the petition for hearing by the Election Tribunal under section 86 of the Act, was without jurisdiction, because an order under that section could be passed only when the petition is not liable to be dismissed under section 85 as when the requirements of sections 81, 83 or 117 are complied with; but that when those provisions are not complied with, its only power under that Act was to dismiss it under section 85; that, in consequence, the Election Tribunal acquired no jurisdiction to hear the petition by virtue to that order, and that all the proceedings taken under it culminating in the order now under appeal were a nullity. This contention is, in our judgment, wholly untenable. The jurisdiction to pass an order under section 86 arises "if the petition is not dismissed under section 85." That has reference to the factual position whether the petition was, in fact, dismissed under section 85 and not to the legal position whether it was liable to be dismissed. That is the plain meaning of the words of the section, and that is made plainer by section 90(4) which provides that,

"Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

This provision clearly contemplates that petitions which are liable to be dismissed for non-compliance with sections 81, 83 or 117 might not have been so dismissed, and provides that when such petition come before the Election Tribunal, it is a matter of discretion with it to dismiss them or not. The power of the Election Tribunal to condone delay in presentation or defective verification is thus unaffected by the consideration whether that petition was liable to be dismissed by the Election Commission under section 85. The effect of an order under Section 90(4) declining to dismiss the petition on the ground of delay or defective verification is clearly to condone those defects.

In the instant, case, with reference to the plea of limitation the position stands thus : The delay was condoned by the Election Commission under the proviso to section 85, and by reason of that order, the question is, as already held, no longer open to consideration at any later stage. Even assuming for the sake of argument that the Election Commission had non-jurisdiction to pass an order of condonation suo motu, and further accepting the finding of the Election Commission that the order dated 2nd July, 1952, was so made, and that it was therefore a nullity, when the matter came before

the Election Tribunal by transfer under section 86, it had jurisdiction to pass appropriate orders under section 90(4), and its order declining to dismiss the petition is sufficient to condone the defect.

The position as regards verification is slightly different. There is no provision corresponding to the proviso to section 85 conferring express power on the Election Commission to permit amendment of the verification. Whether it has inherent power to permit such amendment, it is not necessary to decide, because when it did not, in fact, dismiss the petition under section 85 for not complying with section 83 and passed an order under section 86 appointing an Election Tribunal for the hearing of the petition, the matter is thereafter governed by section 90(4) of the Act, and it is a matter of discretion with the Election Tribunal either to dismiss the petition for defective verification or not. In the present case, the Election Tribunal directed the verification to be amended on 24th July, 1952, and further declined to dismiss the petition under section 90(4) for defective verification. These are not orders with which this Court will interfere in appeal under article 136 of the Constitution.

The objection to the maintainability of the petition on the ground of delay in presentation and of defective verification must therefore be overruled, and this appeal dismissed with costs.

Appeal dismissed.

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