Bijayananda Patnaik

Vs

Satrughna Sahu and Others

Civil Appeal No. 603 of 1962

(A. K. Sarkar, K. N. Wanchoo, K. C. Das Gupta JJ)

26.03.1963

JUDGMENT

WANCHOO J. -

This is an appeal by special leave against the order of the Orissa High Court. The appellant stood for election to the Orissa Legislative Assembly from the Choudwar constituency; in the district of Cuttack. He was opposed by three persons who are the respondents before us. The appellant was elected. Then followed an election petition by respondent No. 1, Satrughna Sahu. To this election petition, the appellant as well as the other two candidates who had stood for election were made opposite parties. When the election petition came to be heard an objection was raised before the tribunal that the petition was not in accordance with s. 82 of the Representation of the People Act, 1951 (43 of 1951), (hereinafter referred to as the Act), and that this defect was fatal to the petition in view of s. 90(3) thereof. This objection was heard as a preliminary objection and the tribunal came to the conclusion that as the petition was not framed in accordance with s. 82, the defect was fatal. It therefore dismissed the petition.

Satrughna Sahu then appealed to the High Court under s. 116-A of the Act. This appeal was heard on March 5 and 6, 1962, and apparently was fixed for judgment on March 8, 1962. On March 7, an application was filed by Satrughna Sahu for withdrawal of the appeal, as he did not want to prosecute it further. It was put up for consideration on March 8, 1962, and the judgment in the main appeal, which had already been prepared for delivery, was therefore withheld pending the disposal of the withdrawal application. The contention on behalf of Satrughna Sahu was that he was entitled as of right to withdraw the appeal. He was supported in this by the appellant but the other two respondents objected to withdrawal and contended that Satrughna Sahu had no absolute right to withdraw the appeal on the analogy of O. XXIII, r. 1(1) of the Code of Civil Procedure, and that principles analogous to ss. 109 and 110 of the Act applied to an application for withdrawal of an appeal. The High Court held that it must be guided by the principles contained in ss. 109 and 110 of the Act when considering an application for withdrawal of the appeal before it. It therefore went on to consider whether Satrughna Sahu should be given permission to withdraw the appeal and decided not to give him such permission. Finally it ordered that though the prayer of the appellant for withdrawal was rejected, the application for withdrawal with all the counter-affidavits filed in opposition be kept alive for the disposal of the question of withdrawal of the election petition by the tribunal. This order was passed on March 28, 1962, and the High Court then proceeded to deliver judgment in the main appeal on the same day and the order of the election tribunal dismissing the election petition was set aside, and the petition was remanded for disposal according to law.

The appellant then made two applications for certificates to appeal to this Court, which were

dismissed. Thereupon he filed two petitions for special leave before this Court, which were allowed, and two appeals resulted therefrom one against the judgment of the High Court in the matter of withdrawal application and the other in the matter of the main appeal. The present appeal is with respect to the withdrawal application, and the contention of the appellant before us is two-fold. In the first place it is urged that Satrughna Sahu who was the appellant in the appeal before the High Court had an absolute right to withdraw the appeal on the analogy of the provision contained in O. XXIII, r. 1(1), and the High Court was in error in holding that principles analogous to ss. 109 and 110 of the Act applied to the withdrawal of an appeal filed under s. 116-A of the Act, and therefore after the withdrawal application had been filed there was no option to the High Court but to permit the withdrawal. In the second place, it is urged that even if the view taken by the High Court was correct it was the duty of the High Court to consider all the matters specified in ss. 109 and 110 of the Act and decide for itself whether the application for withdrawal should be granted and it was not open to the High Court to convert the application for withdrawal of the appeal as if it was an application for withdrawal of the election petition and refer it to the election tribunal for disposal.

The first question therefore that falls for consideration is whether Satrughna Sahu who made the withdrawal application had an absolute right to withdraw the appeal on the analogy of the provision contained in O. XXIII, r. 1(1), and therefore when the application for withdrawal was made in this case the High Court was bound to allow it and permit the withdrawal of the appeal. Section 116-A was inserted in the Act in 1956, and the relevant part thereof is in these terms :-

> "116A. Appeals against orders of Election Tribunals - (1) An appeal shall lie from every order made by a Tribunal under section 98 or section 99 to the High Court of the State in which the Tribunal is situated.
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> (2) The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction :
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> Provided that where the High Court consists of more than two judges every appeal under this Chapter shall be heard by a bench of not less than two judges.
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> (3) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under section 98 or section 99;
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> Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.
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> (4) Where an appeal has been preferred against an order made under clause (b) of section 98 or section 99, the High Court may, on sufficient cause being shown, stay operation of the order appealed from and in such a case the order shall be deemed never to have taken effect under sub-section (1) of section 107, and a copy of the stay order shall immediately be sent by the High Court to the Election Commission and the Speaker or Chairman as the case may be of the House of Parliament or of the State Legislature concerned.
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> (5) Every appeal shall be decided as expeditiously as possible and endeavour shall be

made to determine it finally within three months from the date on which the memorandum of appeal is presented to the High Court.

(6)... ... ..."

It will be seen that the provision as to appeals is in Chap. IVA of the Act while the subject of withdrawal and abatement of election petition is dealt with in Chap. IV, in which ss. 109 and 110 occur. Before we deal with the powers of the High Court in the matter of withdrawal of an appeal under s. 116A, we may refer to the scheme of Chap. IV, which contains ss. 108 to 116, relating to withdrawal and abatement of election petitions. Section 108 provides that "an election petition may be withdrawn only by leave of the Election Commission if an application for its withdrawal is made before any Tribunal has been appointed for the trial of such petition." Section 109 makes provision for withdrawal of petitions after appointment of a tribunal, and provides that in such a case an election petition may be withdrawn only by leave of the tribunal. It also provides that where an application for withdrawal is made before the tribunal, notice thereof specifying the date for the hearing of application shall be given to all other parties to the petition and shall be published in the official gazette. Section 110 provides for procedure for withdrawal of petitions before the election commission or the tribunal, and sub-s. (2) thereof lays down that "no application for withdrawal shall be granted if in the opinion of the election commission or of the tribunal, as the case may be, such application has been induced by any bargain or consideration which ought not to be allowed." Sub-section (3) provides that if the application for withdrawal is granted, the petitioner shall be ordered to pay the costs of the respondents theretofore incurred or such portion thereof as the tribunal may think fit; further notice of the withdrawal shall be published in the official gazette by the election commission or by the tribunal, as the case may be; and finally any person who might himself have been a petitioner, may within fourteen days of such publication, apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions of s. 117 as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the tribunal may think fit. Section 111 provides for report of withdrawal by the tribunal to the election commission. Sections 112 to 116 deal with abatement of election petitions on the death of a sole petitioner - provision is made therein for publication of the notice of abatement in the official gazette, and s. 115 provides that on such notice, any person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions of s. 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the tribunal may think it. Section 116 makes a similar provision in the case of death of a sole respondent.

It will be seen from these provisions in Chap. IV that the petitioner in an election petition has not an absolute right to withdraw it; nor has the respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provision as to withdrawal of election petitions is to be found in the well established principle that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public of the constituency also is substantially interested in it, as an election is an essential part of the democratic process. That is why provision is made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in order to preserve the purity of elections [see Kamaraja Nadar v. Kunju Thevar ([1959] S.C.R. 583.)]. At the same time, though these principles are the basis of the provisions to be found in Chap. IV of the Act, it is equally clear that but for these provisions it may

have been possible for a petitioner to withdraw the election petition absolutely. Section 90(1) provides that "subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits". In view of this provision, O. XXIII r. 1(1) would have applied even to an election petition before the tribunal but for the provisions contained in Chap. IV. It is because the provisions of the Code of Civil Procedure apply to election petitions subject to the provisions of the Act and the Rules framed thereunder that O. XXIII, r. 1(1) cannot be applied to the withdrawal of election petitions in view of ss. 108 to 111 thereof, but for these special provisions, O. XXIII, r. 1(1) would have been applicable, and it is well established that that provision gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim.

This position with respect of withdrawal of an election petition is not in dispute. The question however is whether the same position applies to the withdrawal of an appeal and this brings us to the consideration of the provisions of s. 116 A of the Act, which we have already set out above. The powers of the High Court in respect of an appeal under that section are contained in sub-s. (2), which lays down that "the High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction". Sub-s. (2) therefore confers all the powers on the High Court and enjoins upon it to follow the same procedure as in the case of appeals from original decree in suits. It is true that the powers of the High Court under sub-s. (2) are subject to the provisions of the Act. This Court had occasion to consider this matter in T. K. Gangi Reddy v. M. C. Anjaneya Reddy ((1960) 22 E.L.R. 261.), in connection with an argument that the High Court had no jurisdiction to set aside the finding of the election tribunal on questions of fact arrived at on an appreciation of the evidence. In that connection this Court observed with respect to sub-s. (2) of s. 116A that "it was manifest that the jurisdiction of the High Court in the disposal of appeals is similar to that it has in the disposal of appeals from original decrees. No doubt this was subject to the provisions of the Act and no provision has been brought to the notice of the Court which curtailed that jurisdiction. Therefore when an appeal is filed the entire case is reopened in the appellate court". Clearly, therefore, when sub-s. (2) says that the powers, jurisdiction and authority of the High Court is subject to the provisions of the Act, it means that the provision must be an express provision in the Act or such as arises by necessary implication from an express provision. One such express provision is to be found in the proviso to sub-s. (2) of s. 116A, which lays down that "where the High Court consists of more than two judges, every appeal under this Chapter shall be heard by a bench of not less than two judges." Another express provision is to be found in sub-s. (4) which gives express power to the High Court to stay the operation of the order appealed from and provides that where such a stay order is made, the order appealed from shall be deemed never to have taken effect under sub-s. (1) of s. 107. Again sub-s. (5) enjoins on the High Court to decide the appeal as expeditiously as possible with a direction that it shall be determined finally within three months as far as possible. There is, however, no express provision in Chap. IV-A dealing with appeals, which deals with the question of withdrawal of appeals under that Chapter. Nor do we think that ss. 109 and 110 necessarily imply that an appeal also cannot be withdrawn as a matter of right, unless the procedure laid down in those sections is followed. One reason for this view may at once be stated. The losing party is not bound to file an appeal and if he does not, nobody else has the right to do so. The object apparently is that the election petition filed should, if any voter so desire, be heard and decided. The sections dealing with substitution on death of the petitioner lead to that view : see ss. 112-115. There is no such provision for appeals. It seems to us that if Parliament

intended that the provisions of ss. 109 and 110 which deal with withdrawal of election petitions before a tribunal shall also apply to withdrawal of appeals before the High Court under Chap. IV-A an express provision could have been easily made to that effect in s. 116-A by adding a suitable provision in the section that the provisions of ss. 109 and 110 would apply to withdrawal of appeals before the High Court as they apply to withdrawal of election petitions before the tribunal. In the absence of such a provision in Chap. IV-A, we do not think that the High Court was right in importing the principles of ss. 109 and 110 in the matter of withdrawal of appeals before the High Court. So far therefore as the question of withdrawal of appeals before the High Court under Chapter IV-A is concerned, it seems to us that the High Court has the same powers, jurisdiction and authority in the matter of withdrawal as it would have in the matter of withdrawal of an appeal from an original decree passed by a civil court within the local limits of its civil appellate jurisdiction without any limitation on such powers because of ss. 109 and 110. The High Court thus has the same powers, jurisdiction and authority and has to follow the same procedure in the matter of withdrawal of appeal under s. 116-A as in the matter of an appeal from an original decree before it, and there is no warrant for importing any limitation in the matter on the analogy of ss. 109 and 110 of the Act, which expressly deal only with election petitions and not with appeals under s. 116-A.

Let us therefore see what powers the High Court has in the matter of withdrawal of an appeal from an original decree before it and what procedure it has to follow in that behalf. The provisions in the Code relating to withdrawal of suits are to be found in O. XXIII, r. 1. Sub-rule (1) thereof lays down that at any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claims. Sub-rule (2) provides that "where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim." We have already said that sub-rule (1) gives absolute power to the plaintiff to withdraw his suit or abandon part of his claim against all or any of the defendants, and where an application for withdrawal of a suit is made under O. XXIII, r. 1(1), the Court has to allow that application and the suit stands withdrawn. It is only under sub-rule (2) where a suit is not being withdrawn absolutely but is being withdrawn on condition that the plaintiff may be permitted to institute a fresh suit for the same subject-matter that the permission of the court for such withdrawal is necessary. The provisions of O. XXIII r. 1(1) and (3) also apply in the same manner to withdrawal of appeals. In Kalyan Singh v. Rahmu (I.L.R. (1901) 23 All. 130.), it was held that where no objection had been filed by the respondent, the appellant had an absolute right to withdraw his appeal at any time before judgment. This view was followed by the Allahabad High Court in Kanhaya Lal v. Partap Chand ((1931) 29 A.L.J. 232.), where it was held that having regard to O. XXIII, r. 1(1) and s. 107(2) of the Code of Civil Procedure, where no cross-objection has been filed by the respondent, an appellant has the right to withdraw his appeal unconditionally, his only liability being to pay costs. In Dhondo Narayan Shiralkar v. Annaji Pandurang Kokatnur (I.L.R. (1939) Bom. 66.), it was held that "an appellant is entitled as of right to withdraw his appeal, provided the respondent has not acquired any interest thereunder". There was however difference between the Allahabad and Bombay High Courts as to whether s. 107(2) of the Code of the Civil Procedure would help an appellant in such a case. It is unnecessary for our present purpose to decide whether the absolute right of the appellant to withdraw an appeal unconditionally flows from s. 107(2) or is an inherent right of the appellant on the analogy of O. XXIII r. 1(1). But there can be no doubt that an appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the court, it has to grant it. The difficulty arising out of any cross-objection under

which the respondent might have acquired an interest as pointed out by the Bombay High Court, no longer remains in view of O. XLI r. 22(4), which now permits the cross-objection to be heard even though the appeal is withdrawn. Therefore when the High Court is hearing an appeal from an original decree and an application is made to it to withdrew the appeal unconditionally, it must permit such withdrawal subject to costs and has no power to say that it will not permit the appeal to be withdrawn and will go on with the hearing of the appeal. The power of the High Court under s. 116A(2) when hearing an appeal from an election petition is the same as its power when hearing an appeal from an original decree, and the procedure is also the same, for there is no express provision to the contrary in the matter of withdrawal of an appeal in the Act. Therefore when an appellant under s. 116-A makes an application for an unconditional withdrawal of the appeal, the power of the High Court, consistently with its power in an appeal from an original decree, is to allow such withdrawal, and it cannot say that it will not permit the appeal to be withdrawn. We are therefore of opinion that the High Court was in error in importing the principles of ss. 109 and 110 of the Act which deal only with the withdrawal of election petitions and not with the withdrawal of appeals.

It has been urged that in this view an appeal may be withdrawn even where withdrawal has been induced by bargain or consideration which ought not be allowed and this would interfere with purity of elections. As the statute stands it seems that the intention was that the provisions about withdrawal and abatement would apply to a petition only when it is either before the commission or the tribunal. It may have been intended that only one proceeding should be specially provided for and that would ensure the purity of elections. If it was intended that ss. 109 and 110 should also apply to an appeal for which provision was made by s. 116-A, that intention has not been given effect to by proper language. In any case, the position is not the same when an appeal is being withdrawn for generally speaking at that stage a trial has taken place before the tribunal which would ordinarily safeguard such purity. We therefore see no reason to import the principles of ss. 109 and 110 into withdrawal of appeals on this ground.

We are, therefore, of opinion that the High Court should have allowed the application for unconditional withdrawal made by Satrughna Sahu, the appellant before it. Further the High Court in this connection need not have referred to the affidavits filed on behalf of the other two defeated candidates before it, for such affidavits were irrelevant, if Satrughna Sahu, the appellant before the High Court, was entitled to withdraw the appeal unconditionally and the High Court could not refuse such withdrawal.

In the view we have taken on the first question raised before us, it is not necessary to deal with the second question, though we may add that as at present advised it seems to us that the High Court was in error in treating the application for withdrawal of the appeal as if it were an application for withdrawal of an election petition under s. 109 and referring the matter to the election tribunal. Even if the High Court had power to refuse an application for withdrawal of an appeal, the proper course for the High Court would be to consider all that is required by s. 110 itself. However in view of our decision on the first question we need not pursue the point further.

We, therefore, allow the appeal, set side the order of the High Court and in view of the unconditional application for withdrawal made by Satrughna Sahu, the appellant before the High Court, order that the appeal before the High Court should stand withdrawn. In the circumstances we pass no order as to costs.

Appeal allowed.

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