

Dr. Rajendra Kumari Bajpai

Vs

Ram Adhar Yadav and Others

Civil Appeal No. 104 of 1975

(A. N. Ray, K. K. Mathew, Syed Fazal Ali, V. R. Krishna Iyer JJ)

06.08.1975

JUDGMENT

FAZAL ALI, J. –

1. This appeal by special leave involves an interpretation of the scope and admit of Section 87 of the Representation of the People Act, 1951, as amended by Act 47 of 1966. The short point that falls for determination in this appeal is as to whether or not the provisions of Order XI of the Code of Civil procedure can be applied to the trial of election petitions in the High Court by force of Section 87 of the said Act. For the purpose of brevity, the Representation of the People Act, 1951 shall be referred to as 'the Act of 1951' and the Representation of the People Act as amended by Act 47 of 1966 as 'the Act'. The circumstances under which this appeal arises may be succinctly stated as follows.

2. An election for the U.P. Legislative Assembly for 275 Allahabad North Assembly constituency was held on February 26, 1974. In this election the appellant was a candidate put up by the Congress ruling party and her election was contested by the first respondent Ram Adhar Yadav who was set up by the Samyukta Socialist Party. The appellant was declared duly elected in election and the respondent No. 1 was defeated.

3. The respondent No. 1 filed an election petition being Election Petition No. 30 of 1974 in the High Court of Allahabad sometime in April 1974 challenging the election of the appellant on various grounds. The appellant filed a detailed written statement denying all the allegations made by the first respondent in his petition. The election petition was assigned to J. M. L. Sinha, J., who framed a number of issues on October 4, 1974. In October 1974 respondent No. 1 filed an application being Paper No. A/53 under Order XI Rule 1 of the Code of Civil Procedure for grant of leave to respondent No. 1 to deliver interrogatories in writing for the examination of the appellant and filed certain interrogatories along with his application. The appellant filed her objections being Paper No. A/54 to the said application contending, inter alia, that the procedure prescribed under Order XI relating to interrogatories was not applicable to the trial of election petitions in the High Court and was not covered by Section 87 of the Act. The application filed by the first respondent and the objections of the appellant came up for consideration before the learned Single Judge who by his order dated December 12, 1974, held that the provisions of Order XI fully applied to the election petitions and accordingly rejected the objections filed by the appellant. Hence this appeal by special leave.

4. It appears that under the Act of 1951 the power to try election petitions was conferred on the Tribunal and Section 92 of that Act expressly conferred powers under Order XI of the Code of Civil Procedure on the Tribunal. The relevant portions of Section 92 of the Act of 1951 may be extracted

thus :

The Tribunal shall have the powers which are vested in a court under the Code of the Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters :

(a) discovery and inspection;

* * *

(g) issuing commissions for the examination of witnesses, and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a civil court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

By the Amendment Act 47 of 1966 this section was, however, deleted and Section 90 of the Act of 1951 was replaced by Section 87 of the Act which was the same as Section 90 of the Act of 1951.

5. Mr. Yogeshwar Prasad Counsel appearing for the appellant has submitted two points before us. In the first place he contended that the provisions regarding inspection and discovery and interrogatories as contained in Order XI of the Code of Civil Procedure are not an integral part of the procedure in a civil suit but are special powers contained in the Code and cannot, therefore, be made applicable to election petitions which are proceedings of a special nature. In amplification of this argument it was argued that the history of the English Law as also the Election Law of our country before independence would show that the procedure contained in Order XI of the Code of Civil Procedure was not made applicable to the trial of election petitions. It is, however, not necessary for us to examine the history of this matter because the Act of 1951 settles the issue. When the Parliament expressly conferred powers contained in Order XI on the Tribunal under the statutory provision of Section 92 of the Act of 1951, it must be presumed to have made a drastic departure from the old law on the subject and particularly the English Law. In view of this enactment, therefore, it cannot be said that the provisions of our Election Law, particularly in regard to Section 92 of the Act of 1951 were in pari materia with the provisions of the English Law on the subject. In fact Section 92 incorporating the entire provisions of Order XI of the Code of Civil Procedure was expressly enacted so that the elected representatives also may be subjected to the same law of the land such as the Code of Civil Procedure as any other citizen. In these circumstances, we are unable to apply the English Law to the Act in order to hold that the principles contained in Order XI of the Code of Civil Procedure are excluded from the trial of election petitions. The first contention put forward by Counsel for the appellant must, therefore, fail.

6. It was then contended that even though express powers for inspection and discovery were conferred on the Tribunal under Section 92 of the Act of 1951, yet by virtue of the amendment under Act 47 of 1966 this express provision was deliberately deleted, which shows that the Parliament intended to give special protection to the elected representatives so as not to compel them to answer interrogatories. This is no doubt an attractive argument, but on closer scrutiny it does not appear to be tenable. The argument completely overlooks the object of the Amendment Act of 1966. By virtue of this enactment a basic change in the trial of election petitions was sought to be introduced. Before 1966 the power to try election petitions was conferred on the Tribunal which was not a civil court and, therefore, special powers had to be conferred on it. In fact clause (g) Section

92 of the Act of 1951 extracted above clearly shows that the Tribunal was deemed to be a civil court hence there was the necessity of conferring special powers contained in Order XI of the Code of Civil Procedure on the Tribunal to avoid further doubts. After the amendment of 1966 as the election petitions were to be tried by High Court, Section 87 of the Act which is based on Section 90 of the Act of 1951 was considered sufficient to contain the entire procedure to be adopted by the High Court in trying the election petitions which were to be in accordance with the Code of Civil Procedure as far as applicable. Since the High Court is a court of record and a civil court is not, it was not at all necessary for the Parliament to have enacted a separate section like Section 92 of the Act of 1951 and that is why Section 92 was considered to be unnecessary in view of the change of forum and was deleted under the amended Act. From this it cannot be contended that the Parliament intended that the provisions of Order XI of the Code of Civil Procedure should not apply to the election petitions tried by the High Court under the Act. Counsel for the appellant was unable to cite any authority directly in point. On the other hand, the view which we have taken in this case, is amply supported by a number of authorities of this Court as well as other High Courts.

7. To begin with, this Court as far back as 1951, while considering Sections 90 and 92 of the Act of 1951 observed in *Harish Chandra Bajpai v. Triloki Singh* ((1957) SCR 370 : AIR 1957 SC 444 : 12 ELR 461) thus :

The second contention urged on behalf of the appellants is that if the provisions of the Civil Procedure Code are held to be applicable in their entirety to the trial of election petitions, then there was no need to provide under Section 92 that the Tribunal was to have the powers of courts under the Code of Civil Procedure in respect of the matters mentioned therein, as those powers would pass to it under Section 90(2). But this argument overlooks that the scope of Section 90(2) is in a material particular different from that of Section 92. While under Section 90(2) the provisions of the Civil Procedure Code are applicable only subject to the provisions of the Act and the rules made thereunder, there is no such limitation as regards the powers conferred by Section 92. It was obviously the intention of the Legislature to put the powers of the Tribunal in respect of the matters mentioned in Section 92 as distinguished from the other provisions of the Code on a higher pedestal, and as observed in *Sitaram v. Yograjsingh* (AIR 1953 Bom 293 : 55 Bom LR 334), they are the irreducible minimum which the Tribunal is to possess.

(3) It is then argued that Section 92 confers powers on the Tribunal in respect of certain matters, while Section 90(2) applies the Civil Procedure Code in respect of matters relating to procedure, that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under Section 92 and not under Section 90(2). We do not see any antithesis between 'procedure' in Section 90(2) and 'powers' under Section 92. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that, he was clearly entitled to do under Section 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not ? We are of opinion that there is no substance in this contention either.

The Court pointed out that the object of Section 92 was merely to secure powers of the court in respect of the matters mentioned therein and that there was no antithesis between Section 90(2) and

Section 92 of the Act of 1951.

8. Similarly in *Sitaram Hirachand Birla v. Yograjsingh Shankarsingh Parihar* (supra), Chagla, C.J. clearly pointed out that the distinction without any difference. The learned Chief Justice speaking for the Court observed as follows :

In our opinion, Mr. Kotwal is right, because on principle it is difficult to make a distinction between procedure and the powers of a court as suggested by Mr. Patwardhan. The whole of the Civil Procedure Code, as its very name implies, deals with procedure. In the course of procedure the Court always exercises power and when the Court is exercising its powers, it is exercising them in order to carry out the procedure laid down in the Code. Therefore procedure and powers in this sense are really interchangeable terms and it is difficult to draw a line between procedure and powers. The power conferred under Section 92 is not any substantive power, it is a procedural power, a power intended for the purposes of carrying but the procedure before the Tribunal.

9. In a recent decision of the Full Bench of the Allahabad High Court in *Duryodhan v. Sitaram* (AIR 1970 All 1) the Court held that the matters mentioned in Section 92 appertain to the procedure for trial, and are also attracted by virtue of Section 90(1). The Court observed as follows :

In my opinion, the matters mentioned in Section 92 appertain to the procedure for trial, and are also attracted by virtue of Section 90(1). They were separately stated in Section 92 to make them operate in spite of any provision to the contrary in the Act or the Rules, and not with a view to curtail the amplitude of Section 90(1). The provisions of Order 9, Rules 8 and 9, Civil P.C. even if they deal with powers, would be procedural powers and be attracted by virtue of Section 90(1).

10. While dealing with the scope and ambit of Section 90 of the Act of 1951 this Court in *Dr. Jagjit Singh v. Giani Kartar Singh* (AIR 1966 SC 773 : (1967) 1 SCJ 762) observed as follows :

The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by clause (a), the powers which are vested in a court under the Code the Civil Procedure when trying a suit, inter alia, in respect of discovery and inspection.

A Full Bench of the Punjab High Court in *Jugal Kishore v. Dr. Baldev Prakash* (AIR 1968 Punj 152 (FB)), while construing the provisions of Section 87 of the Act clearly pointed out that the High Court was a court of record and possessed all inherent powers of a court while trying election petitions. In this connection, Grover J. observed as follows :

It is quite clear that there is no distinct provision in the Act laying down any particular or special procedure which is to be followed when the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the petition. The provisions of the Code of Civil Procedure would, therefore, be applicable under Section 87 of the Act. I am further of the opinion that any argument which could be pressed and adopted for saying that the inherent powers of the Court could not be exercised in such circumstances would be of no avail now as the High Court is a court of record and possess all inherent powers of a

court while trying election petitions.

We fully approve of the line of reasoning adopted by the High Court in that case. The Rajasthan High Court in *Keshari Lal Kavi v. Narain Prakash* (AIR 1969 Raj 75) followed the Punjab case and has taken the same view.

11. Some reliance was placed by the learned Counsel for the appellant on the decision in *Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa* ((1959) SCR 611 : AIR 1958 SC 698 : 14 ELR 296), where this Court held that the procedure contained in Order 23, Rule 1 of the Code of Civil Procedure did not apply to election petitions and, therefore, on a parity of reasoning order 11 C.P.C. also could not be applicable to the trial of election petitions. We are, however, unable to agree with this argument. The provision contained in Order 23 Rule 1 cannot be equated with the provisions of Order XI because the election petition being a matter of moment and concerning the entire constituency there could be no question of the election petition being withdrawn by the petitioner who had filed the same. This was highlighted by this Court in that case when the Court observed as follows :

Order 23, Rule 1, sub-rule (2), provides for liberty being given by the Court to a party withdrawing or abandoning an art of his claim to file a fresh suit on the same cause of action, if so advised. In the very nature of things such liberty could not be reserved to a petitioner in an election petition.

* * *

On a due consideration of all these provisions, we are of opinion that the provisions of Order 23, Rule 1, do not apply to the election petitions and it would not be open to a petitioner to withdraw or abandon a part of his claim once an election petition was presented to the Election Commission.

Having regard to the nature of the election petition, the notion of abandonment of the claim or withdrawal is absolutely foreign to the scope of such proceedings and must, therefore, be held to be excluded by necessary intendment of Section 87 of the Act itself. This authority, therefore, does not appear to be of any assistance to Counsel for the appellant.

12. The matter, however, seems to be concluded by a recent decision of this Court in *Virendra Kumar Saklecha v. Jagjivan* ((1972) 1 SCC 826) where the Chief Justice speaking for the Court interpreted Section 87 of the Act and observed as follows :

Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Under Section 102 of the Code the High Court may make rules regulating their own procedure and the procedure of the civil courts subject to their supervision and may by such rules vary, alter or add to any of the rules in the First Schedule to the Code.

The relevant part of Section 87 runs thus :

(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance

with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits :

A bare perusal of this section leads to the irresistible conclusion that election petitions shall have to be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. In other words, election petitions would be tried like ordinary civil suits.

13. We are unable to agree with Counsel for the appellant that Order XI does not form part of the trial of suits but is a special procedure. This is repelled by a reference to Order XI of the Code of Civil Procedure itself. It will appear that Order X relates to the procedure for examination of parties by the Court and Order XI is a part of that procedure, because it provides that where witnesses are not able to appear before the Court personally they are examined through interrogatories. In these circumstances, therefore, Order XI is as much a part of the procedure as Order X relating to trial of suits in matters regarding summoning of witnesses, documents etc. In these circumstances it cannot be said that Section 87 of the Act either expressly or impliedly excludes the application of Order XI of the Code of Civil Procedure. In fact we are clearly of opinion that Section 87 of the Act is of the widest amplitude so as to cover the entire procedure mentioned in the Code of Civil Procedure with only two exceptions - (i) where the Act contains express provision for certain matters which are inconsistent with the procedure prescribed by the Code; and (ii) where a particular provision of the Code of Civil Procedure is either expressly or by necessary intendment excluded by the Act. Subject to these two exceptions, Section 87 is very wide in its connotation.

14. We, therefore, agree with the learned Single Judge who was trying the election petition that the application for interrogatories was one of the logical steps in aid of the prosecution of the petition and was fully covered by Section 87 of the Act. The second contention raised by Counsel for the appellant thus fails.

15. For the reasons given above, there is no merit in this appeal which fails and is accordingly dismissed with costs.

</html