

Jyoti Basu and Others

Vs

Debi Ghosal and Others

Civil Appeal No. 1553 of 1980

(O. Chinnappa Reddy, R. S. Pathak JJ)

26.02.1982

JUDGMENT

CHINNAPPA REDDY, J. –

1. The 1st appellant, Jyoti Basu, is the Chief Minister and appellants 2 and 3 Buddhadeb Bhattachary and Hashim Abdul Halim, are two Ministers of the Government of West Bengal. They have been impleaded by the 1st respondent as parties to an election petition filed by him questioning the election of the 2nd respondent to the House of the People from the 19-Barrackpore Parliamentary Constituency in the mid-terms Parliamentary election held in January 1980. There were five candidates who sought election from the Constituency. Mohd. Ismail, the 1st [sic 2nd] respondent, whose candidature was sponsored by the Communist Party of India [Marxist] was, elected securing 2,66,698 votes as against Debi Ghosal, a candidate sponsored by the Indian National Congress led by Smt. Indira Gandhi who secured 1,62,770 votes. The other candidates Ramjit Ram, Robi Shankar Pandey and Bejoy Narayan Mishra secured 25,734, 12,271 and 2763 votes respectively. The 1st respondent filed an election petition in the High Court of Calcutta questioning the election of the 2nd respondent Mohd. Ismail on various grounds. He impleaded the returned candidate as the 1st respondent, and the other three unsuccessful candidates as respondents 2, 3 and 4 to the election petition. Besides the candidates at the election, he impleaded several others as respondents. The District Magistrate and Returning Officer was impleaded as the 5th respondent, Buddhadeb Bhattacharya, the Minister for Information and Publicity, Government of West Bengal as the 6th respondent. Jyoti Basu, the Chief Minister as the 7th respondent, Md. Amin, the Minister of the transport Branch of the Home Department as the 8th respondent, Hashim Abdul Halim, the Minister of the Legislative and the Judicial Department as the 9th respondent and the Electoral Registration Officer as the 10th respondent. It was averred in the election petition that the Chief Minister and the other Ministers of the Government of West Bengal who were impleaded as parties to the election petition had colluded and conspired with the returned candidate to commit various alleged corrupt practices. Apart from denying the commission of the various alleged corrupt practices, the Chief Minister and the other Minister claimed in their written statements that the election petitioner was not entitled to implead them as parties to the election petition. They claimed that as they were not candidates at the election petition. They claimed that as they were not candidates at the election they could not be impleaded as parties to the election petition. The Chief Minister and two of the other Ministers, Hashim Abdul Halim and Buddhadeb Bhattachary filed an application before the High Court of Calcutta to strike out their names from the array of parties in the election petition. The application was dismissed by the Calcutta High Court on the ground that the applicants [appellants] were proper parties to the election petition and, therefore, their names should not be struck out of the array of parties. The appellants have preferred this appeal after obtaining special leave of this Court under article 136 of the Constitution.

2. Shri. Somnath Chatterjee, learned counsel for the appellants submitted that the concept of a proper party was not relevant in election law and that only those person could be impleaded as parties who were expressly directed to be so impleaded by the Representation of the People Act, 1951. He claimed that in any case such persons were entitled to be struck out from the array of parties. On the other hand Shri Siddhartha Shankar Ray, and Shri R. K. Lala, learned counsel for the 1st respondent submitted that the appellants were proper parties to the election petition and their presence was necessary for a complete, final and expeditious decision on the questions involved in the action.

3. To properly appreciate the rival contentions it is necessary to refer to the relevant provisions of the Constitution of India and the two Representation of the People Acts of 1950 and 1951.

4. First the Constitution. Part XV deals with elections. Article 324 vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections to Parliament and to the legislatures of the States. Article 325 provides that there shall be one general electoral roll for every territorial constituency and that no person shall be ineligible for inclusion in such rolls on grounds only of religion, race, caste, sex, or any of them. Article 326 provides that elections to the House of the People and to the Legislative Assemblies of State shall be on the basis of adult franchise. Article 327 enables Parliament to make laws with respect to all matters relating to elections to either House of Parliament or to the Houses of the Legislature of a State. Article 328 enables the Legislature of a state, if Parliament has not made such legislation, to make laws with respect to all matters relating to elections to the Houses of the Legislature of the State. Article 329 bars interference by courts in electoral matters and clause [b], in particular, provides that no election to either House of Parliament or to the House or either House of the Legislature of a state shall be called in question except by an election petition presented to such authority in such manner as may be provided for by or under any law made by the appropriate legislature.

5. Next, the Representation of the People act, 1950. This Act provides for the delimitation of the Constituencies for the purpose of elections to the House of the People and the legislatures of States, the qualification of voters at such elections, the preparation of electoral rolls and other matters connected therewith.

6. Last, the Representation of the People Act of 1951. Part VI of the act deals with 'Disputes regarding elections'. Section 79 defines various terms and expressions used in Parts VI and VII. Clause [b] defines a 'candidate' as meaning "a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate". Section 80 imposes a statutory ban on an election being called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. Section 80-A vests in the High Court, the jurisdiction to try an election petition. Section 81 provides for the presentation of an election petition on one or more of the grounds specified in Section 100 [1] and Section 101 by any candidate at such election or any elector who was entitled to vote at the election. Section 82 is entitled "Parties to the petition" and is as follows :

82. Parties to the Petition. - A petitioner shall join as respondents to his petition -

[a] where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself

or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where not such further declaration is claimed, all the returned candidates; and

[b] any other candidate against whom allegations of any corrupt practice are made in the petition.

Section 83 prescribes the contents of the petition. Section 84 provides that a petitioner may, in addition to claiming a declaration that the election of the returned candidates is void, claim a further declaration that the himself or any other candidate has been duly elected. Section 86 deals with trial of election petitions. Sub-section [4] provides for an application by a candidate who is not already a respondent to be joined as a respondent. It is in these terms :

Any candidate not already a respondent shall, upon application made by him to the High court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Section 87 is concerned with the procedure before the High Court and it is as follows :

87. [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 applicable under the Code of Civil Procedure, 1908 to the trial of suits :

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

[2] The provision of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

Section 90 enables the returned candidate or any other party to 'recriminate' in case where in the election petition a declaration that a candidate other than the returned candidate has been elected is claimed. Section 98 prescribes the orders that may be made by the High Court at the conclusion of the trial of an election petition. It provides that the High Court shall make an order dismissing the election petitioner declaring the election of all or any of the returned candidates to be void or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Section 99 enables the High Court to make, at the time of making an order under Section 98, an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of corrupt practice and the nature of that practice. The proviso to Section 99 [1], however, prescribes that no person who is not a party to the petition shall be named in the order unless he had been given notice to appear before the High Court to show cause why he should not

be so named and he had also been given an opportunity to cross-examine any witness who had already been examined by the High Court and had given evidence against him and an opportunity of calling evidence in his defence and of being heard. Section 100 enumerates the grounds on which an election may be declared void. The High court, it is said, among other grounds, shall declare the election of a returned candidate void in cases where corrupt practice are proved, where such corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Where the corrupt practice has been committed in the interests of the returned candidate by an agent other than his election agent, the result of the election insofar as it concerns the returned candidate must also be shown to have been materially affected. Section 101 prescribes the grounds for which a candidate, other than the returned candidate may be declared to have been elected. Section 110 provides for the procedure than an application for withdrawal of an election petition is made to the court. Section 110 [3] [c] says that a person who might himself have been a petitioner may apply to the court to be substituted as a petitioner in place of the party withdrawing. Section 112 [3] provides for the continuance of the election petition on the death of the sole petitioner in an election petition or of the survivor of several petitioners, by any person who might himself have been a petitioner and who applies for substitution within the stipulated period.

7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*, and *Jagan Nath v. Jaswant Singh*. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principle of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutory embodied. A court has no right to resort to them on consideration of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the scheme of the Act. We have noticed the necessity

to rid ourselves of notions based on common law or equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say ?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else. Section 82 is headed "Parties to the petition" and clause (a) provides that the petitioners shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of Section 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86 (4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while clause (b) of Section 82 obliges the petitioner to join as a respondent any candidates against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under Section 86 (4), any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all ? We think the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86 (4) and no other. However desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of the Representation of the People Act, 1951 and the Rules made thereunder. Section 87 (1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In *Mohan Raj v. Surendra Kumar Taparia*, this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election petition from dismissal for non-joinder of necessary parties. It was said :

The court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder (see Section 87). When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petitions.

Again, in *K. Venkateswara Rao v. Bekkam Narasimha Reddi*, it was observed :

With regard to the addition of parties which is possible in the case of a suit under the provisions of Order 1, Rule 10 subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of Section 86.

11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being 'named' as one guilty of a corrupt practice. Parliament however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election-petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all stages and in all matter, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitioner, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prima facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. it would be against the public interest to do so. The ultimate award of costs would be no panacea in such cases, since the public mischief cannot be repaired. That is why Public Policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of person other than those mentioned in Section 82 and 86 (4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the court find that there is sufficient material to hold a person guilty of a corrupt practice, the court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Section 99 which enables the court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected, Section 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under Section 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary

consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86 (6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Section 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Section 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the 7th respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us : S. B. Adityan v. S. Kandaswami, Dwijendra Lal Sen Gupta v. Harekrishna Konar, H. R. Gokhale v. Bharucha Noshir C. and S. Iqbal Singh v. S. Gurdas Singh Badal.

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