Dr. P. Nalla Thampy Thera

Vs

B. L. Shanker and Others

Civil Appeal No. 2922 of 1981

(A. N. Sen, Ranganath Misra, P. N. Bhagwati JJ)

28.10.1983

JUDGMENT

RANGANATH MISRA, J. –

1. This appeal by special leave is directed against the order dated June 23, 1981 passed by the Karnataka High Court in Miscellaneous Petition No. 1 of 1981 arising out of Election Petition No. 76 of 1978.

2. On November 5, 1978, polling took place for electing a member to the Lok Sabha from No. 20 Chikmaglur Constituency and the result of the election was declared on November 8, 1978. Respondent 2 was declared elected. In all 28 candidates had participated in the election. One of the contenders for the seat filed Election Petition No. 76 of 1978 before the Karnataka High Court on December 20, 1978 impleading the returned candidate as also all other contesting candidates and three outsiders asking for setting aside the election of Respondent 2 under Section 100(1)(b) of the Representation of the People Act, 1951 ('Act' for short), declaring Shri Virendra Patil, respondent 5 of the election petition, as the duly elected candidate from the constituency and for an order declaring respondents 2, 3 and 4 of the election petition to have been guilty of corrupt practices within the meaning of Section 123 of the Act. In view of the reliefs claimed it became necessary to implead all the contesting candidates as required under Section 82 of the Act. On March 26, 1979, respondent 29 of the election petition filed his written statement as also a petition of recrimination within the meaning of Section 97 of the Act as against respondent 5 whom the election petitioner wanted to be declared as the duly elected candidate. On October 4, 1979, the present appellant who was respondent 19 in the election petition filed his written statement. The election petitioner who is respondent 1 in the appeal applied to the Court for deleting the prayer in regard to the declaration of Shri Virendra Patil as the returned candidate. On November 16, 1979, the Court allowed the application and prayer (c) of the election petitioner under which the declaration of Shri Virendra Patil as the returned candidate was asked for was deleted. The order of the High Court shows that there was no opposition to the request for deletion. On November 23, 1979, a memorandum was filed for the deletion of respondents 5 to 31. On July 23, 1980, on his own prayer respondent 2 of the election petition was deleted. Simultaneously the names of the two other outsiders to the election petition being respondents 3 and 4 of the election petition were also deleted. Respondent 29 filed a memorandum on August 1, 1980 for withdrawal of the prayer for recrimination as against Shri Virendra Patil. This was a necessary sequel of the deletion of prayer (c) of the election petition. On September 12, 1980 the High Court directed that names of respondents 5 to 31 excepting respondents 13 and 19 to the election petition would stand dropped. Thus, in all three respondents were left in the election petition being original respondents 1, 13 and 19. On September 30, 1980 the Court directed withdrawal of the recrimination petition as against Shri Virendra Patil by

allowing the memorandum dated August 1, 1980. The present appellant had objected to the request for withdrawal of the recriminatory petition. Separate orders, viz., the order dated November 16, 1979 allowing deletion of prayer (c) of the election petition, the order dated September 12, 1980 deleting all the respondents excepting respondents 1, 13 and 19 of the election petition from the record, and the order dated September 30, 1980, permitting withdrawal of the recrimination petition, were all allowed to become final in the absence of any challenge.

3. On November 23, 1980 written statement was filed on behalf of original respondent 1 and issues were settled on January 5, 1981. The Court indicated a trial schedule by requiring the documents to be filed on February 16, 1981 and recording of evidence was also directed to begin from that date and the trial was to proceed day to day. On February 16, 1981, the election petitioner wanted adjournment. The High Court was justified in giving only one adjournment as a last chance and fixing the trial on March 9, 1981, in view of the statutory mandate that an election petition shall be disposed of as far as practicable within six months from the date of presentation of the election petition as required by Section 86(7) of the Act. On March 9, 1981, the election petitioner again asked for adjournment. The High Court declined the prayer for adjournment and said : "On the previous occasion, i.e. February 16, 1981, it was posted for commencement of evidence but neither the petitioner nor his witnesses were present. However, at the request of the petitioner's counsel the matter was adjourned to today as a last chance. The list of witnesses and list of documents were also at the request of the petitioner's counsel permitted to be filed before February 2, 1981 with notice to respondents. This has not been done. However, when the matter was called today the petitioner is absent; none of his witnesses is also present. Shri K. Channabasappa, learned counsel for petitioner wanted to file the list of documents and witnesses today in Court and stated that the matter may be adjourned for trial to some other date..... In view of the circumstances that petitioner is absent in spite of the fact that this is second date fixed for trial of the petition, I have no option except to dismiss this petition for non-prosecution. This election petition is accordingly dismissed. There are three contesting respondents in this election petition viz., R-1, R-13 and R-19. Respondent 1 and R-13 are represented by Shri G. V. Shanta Raju, and Sri Vyas Rao respectively. R-19 who appears in person is however absent.....".

4. On the same day respondent 19 to the election petition made an application praying for "recall of the order dated March 9, 1981 with reference to Election Petition No. 76 of 1978, and this respondent 19 may please be permitted to prosecute this election petition, and to submit his evidence, and this respondent may please be permitted to be substituted and to continue the proceedings of this election petition". Respondent 19 amended this application and asked for restoration of the election petition. The original respondent 1 filed objection to the request for restoration contending that the application for restoration was not maintainable and that respondent 19 had no locus standi to ask for restoration of the case. There was no provision for transposition when an election petition was dismissed and, therefore, respondent 19 who could have filed an independent election petition within the time admissible under the Act could not ask for transposition. On June 23, 1981, the High Court rejected the application after negativing the stand of respondent 19 that an election petition could not be dismissed for default and that a case of abandonment should be treated at par with abatement and withdrawal of the election petition. On September 14, 1981, a petition for special leave was filed and upon leave being granted, this appeal by respondent 1 has come before us for final hearing.

5. At the hearing the appellant appeared in person. Respondent 1 who was the election petitioner and respondent 3 who was respondent 13 before the High Court did not appear. Thus the appellant has been heard in person and respondent 2 has been heard through counsel.

6. The appellant contended : (1) the earlier orders passed by the High Court, namely, the order dated November 16, 1979 by which prayer (c) was allowed to be deleted and the order dated September 30, 1980 by which respondent 29 was allowed to withdraw his prayer of recrimination as against original respondent 5, are in the nature of partial withdrawal of the election petition and the statutory provision for withdrawal having not been followed, it must be held that the orders are a nullity and no party would be entitled to rely on them. The appellant is, therefore, free to contend that these orders must be ignored and the High Court should be called upon to comply with the statutory provision relating to withdrawal of election petition before such permission can be granted; (2) an election petition once filed does not mean a contest only between the parties thereto but continues for the benefit of the whole constituency and cannot come to an end merely by the withdrawal thereof by the petitioner or even by his death or by the death or withdrawal of opposition of the respondent but is liable to be continued by any person who might have been a petitioner. Therefore, an election petition cannot be dismissed for default and when the appellant who was himself entitled to file an election petition applied for permission to continue the case, the High Court should have given him the opportunity to continue the election petition; (3) the view taken by this Court in some cases that except in cases of withdrawal and abatement, the special provisions contained in the Act for notifying to the constituency so that any other person may apply for being allowed to continue the election petition, are not applicable.

7. Apart from these contentions which we propose to examine, it is also necessary to consider whether the appellant, not being the election petitioner, could ask for the restoration within the ambit of Order IX, Rule 9 of the Code of Civil Procedure ('Code' for short).

8. This Court has consistently taken the view that elections and elections disputes are a matter of special nature and that though the right to franchise and right to office are involved in an election dispute, it is not a lis at common law nor an action in equity. As early as 1952 when the first election under the Constitution took place, a Constitution Bench of this Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency (1952 SCR 218 : AIR 1952 SC 64 : 1 ELR 133), observed :

> The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

While dealing with an appeal in an election dispute arising out of the first series of elections under the Constitution, Mahajan, C.J., speaking for a Constitution Bench of this Court stated in Jagan Nath v. Jaswant Singh (1954 SCR 892, 895 : AIR 1954 SC 210 : 9 ELR 231) :

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.

In Charan Lal Sahu v. Nandkishore Bhatt ((1974) 1 SCR 294, 296 : (1973) 2 SCC 530, 533), this Court observed : (SCC p. 533, para 3)

The right conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the

delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matter, none can be exercised under any general law or on any principle of equity. This Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

In N. P. Ponnuswami case (1952 SCR 218 : AIR 1952 SC 64 : 1 ELR 133) it was pointed out that strictly speaking it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it. In Jyoti Basu v. Debi Ghosal ((1982) 3 SCR 318, 326-27 : (1982) 1 SCC 691, 696-97 : AIR 1982 SC 983), this Court said : (SCC pp. 696-97, para 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 an 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 principles of equity apply but only those rules which the stature 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 stranger to election law unless statutorily embodied. A court has no right to resort to them on considerations 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 straight-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.

That view has been endorsed in Arun Kumar Bose v. Mohd. Furkan Ansari ((1984) 1 SCC 91), where two of us were parties to the decision.

9. The legal position is, therefore, well settled that election disputes are strictly statutory proceedings.

10. Chapter VI in Part III of the Act makes provision for the trial of election petitions. Sub-section (1) of Section 87 provides :

> 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 (5 of 1908) to the trial of suits.

The same section makes provision for application of the Indian Evidence Act to trial of election petitions, subject to the provisions of the Act. Keeping in view the detailed provisions in the Act for the trial of election petitions, a three-Judge Bench in Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa (1959 SCR 611, 624 : AIR 1958 SC 698 : 14 ELR 296), indicated :

> The effect of all these provisions (which previously were included in certain other sections of the Act) really is to constitute a self-contained Code governing the trial of election petitions....

11. We have already found that an election petition is a strict statutory proceeding. An appeal lies to this Court under Section 116-A of the Act both on questions of law and/or fact from every order made by the High Court under Sections 98 and 99 of the Act. No other order is open to appeal under the statute. When the application of the appellant to restore the election petition was rejected, an application under Article 136 of the Constitution for grant of special leave was made. In that the petitioner clearly prayed for leave against the order dated June 23, 1981. Leave has, therefore, been granted to him to appeal against the order of the High Court made on that day. The earlier orders dated November 16, 1979, September 12, 1980, and September 30, 1980, are not open to challenge in this appeal and Mr Mridul for the respondent has rightly contended that these orders have become final and cannot be assailed at this stage unless they can be shown to be nullity. The appellant has taken the stand that an election dispute is not one between two sets of parties who are before the Court, but it is a dispute concerning the entire constituency. That is the pronounced view of this Court. In Inamati Mallappa Basappa case (1959 SCR 611, 624 : AIR 1958 SC 698 : 14 ELR 296) this Court observed :

Once this process has been set in motion (in election petition has been filed) by the petitioner he has released cerain forces which even he himself would not be able to recall and he would be bound to pursue the petition to its logical end.

This observation goes to show that an election petition once filed does not remain a contest only between the parties thereto but becomes a dispute in which the whole constituency is interested. The Act makes provisions to meet certain eventualities in the course of the trial in Chapter IV of part VI. Two situations which have been covered by the statute are withdrawal and abatement of election petitions. Sections 109 and 110 deal with withdrawal of election petitions, and Sections 112 and 116 deal with the eventuality of death and non-substitution leading to abatement. Section 109 provides :

> 109. Withdrawal of election petitions - (1) An election petition may be withdrawn only by leave of the High Court;
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> (2) Where an application for withdrawal is made under sub-section (1), notify thereof fixing a date for the hearing of the application shall be given to all other parties to the petition and shall be published in the Official Gazette.

Section 110 read thus : 110. Procedure for withdrawal of election petition - (1) If there are more petitioners than one, no application to withdraw an election petition shall be made except with the consent of all the petitioners :

> (2) No application for withdrawal shall be granted if in the opinion of the High Court, such application has been induced by any bargain or consideration which ought not to be allowed;
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> (3) If the application is granted –
>
> #(a) * * *##
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> (b) the High Court shall direct that the notice of withdrawal shall be published in the

Official Gazette and in such other manner as it may specify and thereupon the notice shall be published accordingly;

(c) a 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, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the High Court may deem fit.

12. The question of abatement does not arise in this case. It is, therefore, sufficient to state without extracting the provisions of Sections 112 and 116 of the Act, that even in the case of death and non-substitution, the Court is required to publish the notice in the official gazette.

13. Two questions become relevant at this stage : firstly, it has to be decided whether the earlier orders allowing prayer (c) to be deleted and the relief of recrimination to be omitted amounted to withdrawal of the election petition within the meaning of Sections 109 and 110 of the Act; and secondly, whether on that account the orders are a nullity. Prayer (c) in the election petition was concerned with the declaration of respondent 5, Shri Virendra Patil as duly elected from the constituency in question. This relief was asked to be deleted. No objection was raised to its deletion and in due course the Court allowed this prayer to be omitted. In opposition to the claim made in this prayer, recrimination was filed by one of the respondents in the election petition. But once prayer (c) was dropped, the relief of recrimination could no more stand. Consequently on the prayer of the recriminator that relief was also allowed to be omitted. In view of the contention of the appellant, it is necessary to decide whether omission of prayer (c) comes within the ambit of Section 109 of the Act. Sub-section (1) of Section 109 provides that an election petition can be withdrawn only by leave of the High Court. Omitting a prayer from the election petition strictly would not amount to withdrawal of the election petition. There would be several instances where notwithstanding the deletion of one relief, the election petition as such would continue to be alive. In the cases which were cited before us referring to the applicability of Order XXIII, Rule 1 of the Code, this aspects was examined with reference to withdrawal of the election petition. We do not think that if one of the reliefs claimed in the election petition is asked to be omitted, it would come within the provision of sub-section (1) of Section 109 of the Act. There is no reason why, if even after omission of a particular relief the election petition survives and is available to be tried in accordance with law, that omission or deletion should be treated as withdrawal of the election petition. There may be cases where while asking for one definite relief as the main one in a lis several other reliefs are prayed for and after the pleadings are closed instances are not rate when untenable and unnecessary reliefs are asked to be omitted. Amendment to omit such a relief does not amount to a prayer for withdrawal of the lis itself. In this case the main relief of the election petitioner was setting aside of the election of respondents 2. Along with it he had also claimed the relief that the original respondent 5 be declared to be duly elected.

14. Apart from the fact that no objection was raised when the prayer for deletion was made, the appellant did not challenge the order of the Court deleting the other parties and omitting the relief of recrimination and indeed he could not do so, since to the present appeal the other respondents are not parties and in their absence the validity of the Court's order of deletion of the prayer for declaring respondent 5 as duly elected and the consequent deletion of the prayer for recrimination as also the omission of the other parties from the category of respondents to the election petition could not be allowed to be agitated as that would be contrary to rules of natural justice and likely to prejudice those parties without affording a reasonable opportunity to them of being heard.

Moreover, it may be noticed that special leave was obtained only against the subsequent order of June 23, 1981, and no challenge at all was raised against these previous orders. It is, therefore, clear that the earlier orders of the Court could not possibly be regarded as a nullity and the appellant is precluded from challenging those orders in this appeal.

15. We proceed next to examine whether the election petition could be dismissed in the absence of the election petitioner and whether the appellant could apply for its restoration though he himself was not the election petitioner. The basis of the appellant's contention that the election petition cannot be dismissed for the absence of the election petitioner is that once an election petition is filed, it concerns the entire constituency. Purity of the electoral process in a democracy, it is contended, is of paramount importance and an election petition cannot be permitted to be dismissed for default inasmuch as that would lead to situations brought about by manipulation, undue influence, fraud or winning over of the election petitioner. The second respondent's counsel has not disputed before us and rightly in our view that purity of the electoral process is paramount in a democracy and an election petition should not be permitted to be abandoned by undue influence or pressure over the election petitioner. It may be pointed out that there was no allegation of undue influence or pressure over the election petitioner to justify his conduct in this case. It is relevant to mention that the second respondent who was the elected candidate was expelled from the Lok Sabha in December 1978, and in August 1979, the Lok Sabha to which respondent 2 had been elected was dissolved. It was after these supervening events that in October 1979 the request to delete prayer (c) was made and the other orders followed. This explanation given by respondent 2's counsel to justify the conduct of the election petitioner is a relevant feature.

16. There is no support in the statute for the contention of the appellant that an election petition cannot be dismissed for default. The appellant contended that default of appearance or non-prosecution of the election petition must be treated as on par with withdrawal or abatement and, therefore, though there is no clear provision in the Act, the same principle should govern and the obligation to notify as provided in Section 110 or 116 of the Act should be made applicable. We see no justification to accept such a contention. Non-prosecution or abandonment is certainly not withdrawal. Withdrawal is a positive and voluntary act while non-prosecution or abandonment may not necessarily be an act of volition. It may spring from negligence, indifference, inacting or even incapacity or inability to prosecute. In the case of withdrawal steeps are envisaged to be taken before the Court in accordance with the prescribed procedure. In the case of non-prosecution or abandonment, the election petitioner does not appear before the Court and obtain any orders. We have already indicated that the Act is a self-contained statute strictly laying down its own procedure and nothing can be read in it which is not there nor can its provisions be enlarged or extended by analogy. In fact, the terms of Section 87 of the Act clearly prescribed that if there be no provision in the Act to the contrary, the provisions of the Code would apply and that would include Order 9, Rule 8 of the Code, under which an election petition would be liable to be dismissed if the election petitioner does not appear to prosecute the election petition.

17. In many cases it has been held that an election petition can be dismissed for default. A Full Bench of the Punjab High Court in Jugal Kishore v. Dr Baldev Prakash (AIR 1968 P & H 152, 158-159 : ILR (1967) 2 Punj 830), had occasion to consider this question when Grover, J. delivering the judgment of the Court spoke this :

> It has been repeatedly said that an election petition once filed is not a contest only between the parties thereto but continues for the benefit of the whole constituency. It is for that purpose that in the Representation of the People Act, 1951, provisions

have been made in Sections 109 and 110 relating to withdrawal of an election petition and Sections 112 and 116 relating to abatement of such a petitions the effect of which is that the petition cannot come to an end by the withdrawal thereof by the death of the petitioner or by the death or withdrawal of opposition by the respondent, but is liable in such cases to be continued by any person who might have been a petitioner. There is nothing in the entire Act providing or indicating that a similar procedure is to be followed in the even of a petitioner failing to prosecute the petition. Such failure can be due to various causes. The petitioner can, by force of circumstances, be genuinely render helpless to prosecute the petition. For instance, he may find that his financial condition has suddenly worsened and that he can no longer afford the expenses of litigation. He may even, owing to exigencies of business or vocation or profession, have to go to such a distant place from the seat of the High Court where the election petition is being tried that he may find it impossible to prosecute the petition in a proper manner. There would be two courses open to him and that will depend entirely on his violation. He can either file an application for withdrawal of the petition disclosing the circumstances which have brought about such a situation in which case there would be no difficult in following the procedure laid down in Sections 109 and 110 of the Act, or he may choose to simply absent himself from the Court or cease to give any instructions to the counsel engaged by them or fail to deposit the process-fee and the diet-money for witnesses or take the necessary steps for summoning the witnesses in which case the Court will have no option but a dismiss the election petition under the provisions of the Code of Civil Procedure which would be applicable, to the election petitions in the absence of any express provisions in the Act. The dismissal will have to be under the provisions contained in Order 9 or Order 17 of the Code.

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It is quite clear that there is no distinct provision in the Act laying down any particular on 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 prosecution 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 was 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 possesses all the inherent powers of a court while trying election petitions.

It is relevant to note the observations of Hidayatullah, C.J. in Sunderalal Mannalal v. Nandramdas Dwarkadas (AIR 1958 MP 260 : 1958 Jab LJ 232 : 1958 MPC 192), where he indicated : (AIR p. 261, para 5)

Now the Act does not give any power of dismissal. But it is axiomatic that no court or tribunal is supposed to continue a proceeding before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which every tribunal possesses....

18. Similar view has been expressed by another Full Bench of the Allahabad High Court in Duryodhan v. Sitaram (AIR 1970 All 1 : 1969 All LJ 87). A four-Judge Bench of this Court in Rajendra Kuamari Bajpai v. Ram Adhar Yadav ((1976) 1 SCR 255, 260 : (1975) 2 SCC 447, 453),

referred to the Punjab case. Fazal Ali, J. speaking on behalf of the Court quoted a portion of the judgment of Grover, J. which we have cited above and said : (SCC p. 453, para 10)

We fully approve of the line of reasoning adopted by the High Court in that case.

It, therefore, follows that the Code is applicable in disposing of an election petition when the election petitioner does not appear or take steps to prosecute the election petition. Dismissal of an election petition for default of appearance of the petitioner under the provisions of either Order IX or Order XVII of the Code would, therefore, be valid and would not be open to challenge on the ground that these provisions providing for dismissal of the election petition for default do not apply.

19. The appellant was not the election petitioner. Order IX, Rule 9, of the Code (and not Rule 13 relied upon by the appellant) would be the relevant provision for restoration of an election petition. That can be invoked in an appropriate case by the election petitioner only and not by a respondent. But its own language, Rule 9 provides that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit by he may apply for an order to set the dismissal aside. Under this rule, therefore, an application for restoration can be made only by the petitioner. Since it is a provision for restoration, it is logical that the provision should be applicable only when the party on account of whose default in appearance the petition was dismissal, makes an application to revive the petition to its former stage prior to dismissal. In the instance case the election petitioner and not respondent 19 who is in appeal before us, could have asked for the relief of restoration. The appellant contended that the statutory scheme authorises an elector at whose instance an election petition could have been filed to get substituted in the event of withdrawal or abatement and applying that analogy, he urged that a petition for restoration would also lie at the instance of a respondent. The ambit of the provisions relating to withdrawal and abatement cannot be extended to meet other situations. Specific provisions have been made in the Act to deal with the two situations of withdrawal and abatement and a person hitherto not a party or one of the respondents who was entitled to file an election petition has been permitted to substitute himself in the election petition and to pursue the same in accordance with law. These provisions cannot be extended to an application under Order IX, Rule 9 of the Code and at the instance of a respondent or any other elector a dismissed election petition cannot be restored.

20. The fallacy in the logic advanced by the appellant in this behalf is manifest when we refer to a suit for partition. In a suit for partition the position of the plaintiff and that of the defendant is interchangeable. So along as the suit is pending a defendant can ask the Court to transpose him as a plaintiff and a plaintiff can also ask for being transposed as a defendant. The possibility of transposition during the pendency of the suit would to permit a defendant to apply for restoration of a suit for partition which is dismissed for default and the right to apply for transposition would certainly come to an end when the suit is no more alive. In our opinion the respondent's position in an election petition would not be higher than that. We, therefore, conclude that an election petition is liable to be dismissed for default in situations covered by Order IX, or Order XVII of the Code and for its restoration an application under Rule 9, Order IX of the Code would be maintainable but such application for restoration can be filed only by the election petitioner and not by any respondent.

21. This Court in Dhoom Singh v. Prakash Chandra Sethi ((1975) 3 SCR 595, 599 : (1975) 1 SCC 597, 601-02 : AIR 1975 SC 1012), held : (SCC pp. 601-02, paras 9, 10)

The Legislature in its wisdom has chosen to make special provisions for the continuance of the

election petition only in case of its withdrawal or abatement. It has yet to thought it fit to make any provision in the Act permitting intervention of an elector of the constituency in all contingencies of failures of the election petition either due to the collusion or fraud of the original election petitioner or otherwise. It is not necessary for this Court to express any opinion as to whether the omission to do so is deliberate or inadvertent. It may be a case of casus omissus. It is a well-known rule of construction of statutes that "A statute, even more than a contract, must be construed, it res magis valeat quam pereat, so that the intentions of the Legislature may not be treated as vain or left to operate in the air." A second consequence of this rule is that "a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made" - See pages 69 and 70 of Craies on Statute Law - 6th edition.

It seems plain the High Court is enjoined to dismiss an election petition which doses not comply with the provision of Section 81 or Section 82 or Section 117 of the Act. In the true cases of non-compliance with the said provisions of law a question of intervention by another person may not arise. But there may be a case, as the instant one was alleged to be (we are expressing no opinion of ours in this regard even by any implication whether this was so or not), where as a result of the fraud or collision between the election petitioner and the returned candidate the High Court is fraudulent misled to act under Section 86(1). Even in such a situation we find no provision in the Act under which the High Court could permit a person like the appellant to intervene in the matter or to substantiate his allegations of fraud or collusion between the election petitioner and the returned candidate. It is difficult to press into service the general principles of law governing an election petition as was sought to be done on behalf of the appellant for his intervention in the matter. It there be any necessity of avoiding any such situation as the present one was said to be it is for the Legislature to intervene and make clear and express provision of law for the purpose.

22. The ratio of this decision as also the observations in Basappa case (1959 SCR 611, 624 : AIR 1958 SC 698 : 14 ELR 296), the appellant contends, are wrong in view of the earlier decisions of this Court taking the view that an election dispute involves the entire constituency because of the paramount necessity of having purity of an election in a democracy safeguarded. We do not think the appellant's contention can be accepted. The earlier decisions of this Court do not in any way militate against the views taken in Dhoom Singh case ((1975) 3 SCR 595, 599 : (1975) 1 SCC 597, 601-02 : AIR 1975 SC 1012) and the observations made in Basappa case (1959 SCR 611, 624 : AIR 1958 SC 698 : 14 ELR 296). Those decisions were not concerned with the question as to whether an election petition can be dismissed for default. The consensus of judicial opinion in this Court has always been that the law in regard to elections has to be strictly applied an to the extent provision has not been made, the Code would be applicable. About eight years back this Court had occasion to point out that if the intention of the Legislature was that a case of this type should also be covered by special provision, this intention was not carried out and there was a lacuna in the Act. We find that even earlier in Sheodhan Singh v. Mohan Lal Gautam ((1969) 3 SCR 417, 421 : (1969) 1 SCC 408, 411 : 41 ELR 146), this Court had stated : (SCC p. 411, para 9)

From the above provisions it is seen that in an election, petition, the contest is really between the constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the petitioner. The reason for the elaborate provisions noticed by us earlier is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds.

23. We must assume that the Legislature takes notice of the decisions of this Court and if it was of

the view that its true intention had not been carried out or that a lacuna remained in the statute it could have removed the lacuna by amending the Act making its intention clear and manifest, particularly when many amendments have subsequently been made. The fact that nothing has been done leaves an impression in our mind that this Court had not misread the situation. At any rate it is not for the Court to fill up any lacuna in the legislation and as the law stands, the appellant has no right to contend that the view taken by this Court is not tenable in law. We may recall the observation of Lord Denning in Seaford Court Estates Ltd. v. Asher ((1949) 2 All ER 155 : (1949) 2 KB 481 (CA)) :

> A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

24. All the three contentions advanced on behalf of the appellant fail. We have already taken the view that at the instance of the appellant the application for restoration was not maintainable. Therefore, the appeal cannot be allowed and we cannot direct restoration of the election petition. Accordingly the appeal fails and is dismissed and the order of the High Court is confirmed. We leave the parties to bear their respective costs.

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