

ALLAHABAD HIGH COURT

Mubarak Mazdoor

Vs.

K.K. Banerji

Civil Misc. Writ No. 1977 of 1957
(O.H. Mootham C.J. and A.P. Srivastava, J.)

09.09.1957

JUDGMENT

O.H. Mootham, C.J.

1. This is a petition under Article 226 of the Constitution in which the petitioner challenges the validity of an order made by an Election Tribunal sitting at Allahabad dated 27-7-1957.

2. At the last general election the petitioner and the second respondent, together with certain other persons, were candidates for election to the Lok Sabha from the Allahabad Parliamentary Constituency. On 13-3-1957, the second respondent was declared duly elected, and on 27-4-1957 the petitioner filed an election petition challenging the validity of the election of the second respondent on a number of grounds. The petition was presented to the Election Commission which under Section 86 of the Representation of the People Act (hereinafter called the Act) referred the petition to an Election Tribunal at Allahabad and informed the parties that the petition would be heard on 22-7-1957. On that date the parties appeared before the Tribunal, which is the first respondent, and a preliminary objection to the petition was taken on behalf of the second respondent. That objection was that paragraphs 15, 16, 17, 18 and 19 of the petition contained only allegations of a general nature of corrupt practices and did not contain those particulars which the petitioner was required to give under Section 83 of the Act, and that paragraph 27 did not disclose any ground upon which the election could be avoided and the second respondent prayed that these paragraphs and the relevant schedules be struck out under Order 6, Rule 16, of the Code of Civil Procedure. The Tribunal heard the parties and by the order the validity of which is the subject of the present petition acceded to the prayer so far as paragraphs 15, 16, 17, 18 and 27 were concerned and directed that these paragraphs be struck out. The petitioner thereupon filed the petition which is now before us in which the principal relief sought is the issue of writ of certiorari quashing the order of the Tribunal dated 27-7-1957. Learned counsel for the petitioner contends that the petitioner is entitled to the relief which he now seeks on two grounds : first, that the Tribunal exceeded its jurisdiction in ordering that the offending paragraphs be struck out and, secondly, that if the Tribunal acted within its jurisdiction, it committed an error of law, apparent on the face of the record in striking out the offending

paragraphs. The submission on the first ground is that the Tribunal's order could be made only under Order 6, Rule 16 of the Code of Civil Procedure or by virtue of such inherent powers as the Tribunal might possess. Order 6, Rule 16, did not apply at the stage of the proceedings then before the Tribunal, and the latter being a creature of statute had only such powers as were conferred on it by the Act. It accordingly had no inherent powers. It is however unnecessary for us to consider the second branch of this argument as the first branch is not in our opinion sustainable. Section 90(1) of the Act provides that, subject to the provisions of the Act and of any rules made there under, an election petition shall be tried by the Election Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits, and the argument addressed to us is that (save in the special cases for which provision is expressly made in Section 90(4) and Section 97) the trial commences only at that point of time at which the Tribunal proceeds to frame issues. The only provisions of the Code of which use could be made by the Tribunal were accordingly O. 14 and the succeeding Orders, Orders 1 to 13 being excluded. In *Harish Chandra Bajpai v. Triloki Singh*¹, the Supreme Court on a consideration of the Representation of the People Act, 1951, prior to its amendment by the Representation of the People (Amendment) Act, 1956, (Act 26 of 1956) held that 'trial means the entire proceedings before the Tribunal from the time when the petition is referred to it until the pronouncement of the award and in *Bhikaji Keshao v. Brijlal Nandlal*², the Supreme Court itself exercised the power which it was of opinion the Election Tribunal might itself have exercised of striking out certain paragraphs of an election petition under Order 6, Rule 16. Mr. Gopi Nath Kunzru for the petitioner seeks however to distinguish these cases on the ground that the Supreme Court was considering only the unamended Act, and he argues that the changes effected by the Amending Act so directly affected the question that the earlier decisions of the Supreme Court no longer conclude the matter.

3. Chapter III of Part VI of the unamended Act, which consisted of Sections 86 to 107, is entitled "Trial of election petitions", and it was upon a consideration of this chapter as a whole that the Supreme Court in *Harish Chandra Bajpai's* case was of opinion (a) that, subject to the provisions of the Act and the rules made thereunder, the procedure of the Code of Civil Procedure applicable to the trial of suits applied to the entire proceedings before the Tribunal and (b) that nothing in the Act or rules excluded the application of Order 6, Rule 17. We entertain no doubt that, on a parity of reasoning, nothing in the Act or Rules excluded the application of Order 6, Rule 16, and as we have seen in *Bhikaji Keshao Joshi's* case the Supreme Court was of opinion that an Election Tribunal could strike out those paragraphs of a petition which offended the provisions of Order 6, Rule 16. Mr. Gopi Nath Kunzru had invited our attention to two changes of Chap. III of the Act which have been made by the Amending Act. He refers to Sections 86 (4) and 90 (4). Section 86 (4) of the unamended Act provided that if during the course of the trial any member of a Tribunal was unable to perform his functions the Election Commission was to appoint another member and thereupon the trial would continue. As a consequence of the Amending Act the words "during the course of the trial" in this sub-section have been omitted. Section 90(4) of the unamended Act provided that an Election Tribunal may

¹12 EI LR 461: AIR 1957 SC 444

²10 EI LR 357: AIR 1955 SC 610

dismiss an election petition which did not comply with the provisions of Section 81, Section 83 or Section 117. That provision has now become sub-section (3) of Section 90 of the amended Act and for the reference to Section 83, which prescribed what shall be the contents of a petition, Section 82 of the amended Act, which prescribes what persons a petitioner shall join as respondents to his petition, has been substituted.

4. Now these sections were included among those sections upon which the Supreme Court in Harish Chandra Bajpai's case relied in arriving at its decision. Section 86(4) was referred to as showing that the phrase 'during the course of the trial' must include stages prior to the hearing, and Section 90(4) as indicating that the Tribunal must have power to order rectification of the defects arising by reason of noncompliance with the requirements of Section 81, Section 83 or Section 117, and that that power was to be found in Section 90 (2), resort to which could only be had if 'trial' was understood as indicating proceedings prior to the hearing. As a consequence of the alteration affected by the amending Act in Section 86(4) the words which have been deleted can no longer be called in aid in support of the contention that under the amended Act the word 'trial' in Section 90(2) includes proceedings anterior to the hearing. Such also is the consequence of the amendment of Section 90, for by sub-section (3) of that section, as it now stands, the discretion with which the Tribunal was formerly vested has been taken away: it cannot now dismiss a petition which does not comply with the provisions of Section 83. But it does not in our opinion follow that the word 'trial' in Section 90(2) has ceased to mean the entire proceedings before the Tribunal.

5. On the contrary, we are of opinion that a perusal of the provisions of Chap. III as a whole makes it clear that notwithstanding the amendments effected by Act 26 of 1956 the word 'trial' in Section 90(2) continues to mean the entire proceedings before the Tribunal. Chapter III, as we have pointed out, is entitled "Trial of election petitions" and Section 86(1) requires the Election Commission, if it does not dismiss the petition under Section 85, to refer it to an Election Tribunal for trial. Section 86(4) provides that if a casual vacancy occurs in the office of a member of the Tribunal it shall be filled by an Election Commission and "the trial of the petition shall be continued as if he had been on the tribunal from the beginning". The implication of this provision is, we think, that the occurrence of a casual vacancy on a Tribunal after a reference has been made to it necessarily involves the temporary interruption of the trial, and that the beginning of the trial coincides with the commencement of the proceedings before the Tribunal. Section 87 empowers the Tribunal, when several petitions in respect of the same election are referred to it, to try them separately or in one or more groups. In order effectively to exercise this power the Tribunal must be in a position to make such orders as it deems necessary at a very early stage of the proceedings before it. Then Section 88 provides that the trial shall be held at such place as the Election Commission may appoint; but if the trial commences only with the

framing of the issues there is no provision as to where the Tribunal should sit for the disposal of proceedings anterior to the framing of the issues. Further it appears that the Tribunal will be quite unnecessarily handicapped in its disposal of a petition if it is unable to exercise the powers conferred on a civil Court by Orders 9 and 10. Finally it is to be observed that Section 79(c) defines costs in Part VI as meaning all costs, charges and expenses, of or incidental to a trial of an election petition". Unless 'trial' embraces the entire proceedings before the trial it is manifest that the expenses properly incurred by a party in the course of the proceedings before the Tribunal prior to the framing of the issues cannot be included in the costs of the losing party, and this we cannot think to have been the intention of the legislature. In our opinion 'trial' in Section 90(1) must include the entire proceedings before the Tribunal, and we hold accordingly.

6. We do not propose to consider whether the Tribunal rightly decided that paragraphs 15, 16, 17 and 18 of the petition failed to fulfil the requirements of Section 83 of the Act, or that paragraph 27 failed to disclose any ground upon which the election could be avoided. The Tribunal undoubtedly had jurisdiction to decide these questions, and we are of opinion that if the petitioner considers the decision of the Tribunal to be wrong his remedy is to challenge the decision in appeal from the final order of the Tribunal. We think that this Court would not ordinarily be justified, in the exercise of its discretion under Article 226 of the Constitution, in reviewing the grounds upon which the Tribunal's decision was founded, unless for example, the decision is on the face of it capricious. We are however of opinion, for reasons which we proceed to state, that the procedure followed by the Tribunal in this case was not according to law and ought to be corrected.

7. The trial commenced on 22-7-1957. On that day the second respondent filed his objection to the paragraphs in the petition which we have enumerated. Argument was thereafter heard, the petitioner's case being that paragraphs 15 to 19 sufficiently complied with the law and involved no contravention of Section 83. The Tribunal found against the petitioner save as regards paragraph 19, and it forthwith directed that the remaining paragraphs of which complaint was made be struck out.

8. Now charges of corrupt practices when before an Election Tribunal are of a quasi criminal nature, and it is undoubtedly the duty of the petitioner to comply, of his own accord, with the provisions of Section 83 of the Act. There is likewise no doubt that a respondent can raise an objection to the averments in the petition on the ground that they do not fulfill the requirements of Section 83; and if he does so the question must be determined by the Tribunal. The Tribunal however, if it finds the objection to be well founded, is not obliged to strike out the offending paragraphs, and in our opinion it ought not to do so unless the petitioner has had an adequate opportunity of applying for leave to amend or amplify his petition. A petitioner is entitled to contend that his petition is in conformity with the provisions of the Act, and if his contention is overruled we think that he must, unless the circumstances are such as to show clearly that he has no intention of so doing, be afforded an opportunity of remodifying the defects which the

Tribunal has found to exist. The Tribunal will, on such application being made, consider whether the proposed amendments fall within the ambit of Section 90(5) of the Act. If they do not, it would in our opinion be open to the Tribunal to refuse to grant the leave sought for and to strike out the offending paragraphs.

9. There is no specific provision in the Act which requires this opportunity to be afforded to the petitioner, but we think it is a requirement which common justice and fairplay demand. A petitioner who is carefully advised may, when submitting that his petition complies with the law, couple with his submission a prayer that, in the event of the former being rejected, he be given leave to amend; but the petitioner may not always be so advised or he may, as in the case before us, be a layman appearing before the Tribunal in person, and we do not think that the omission of such a prayer should necessarily result, if the Tribunal finds that certain paragraphs of the petition are defective, in those paragraphs being struck out. We find support for the view which we have taken in Bhikaji Keshao Joshi's case. In that case a number of paragraphs in the petition were defective, and the petitioner had had two opportunities, of which he did not avail himself, of amending his pleadings. The Tribunal, finding that the paragraphs were defective, dismissed the petition. Their Lordships laid emphasis on the duty imposed by the Act on a petitioner of ensuring that his petition complies with the requirements of Section 83, and they point out that a petitioner cannot take shelter behind the fact that neither the Tribunal nor the respondent has in terms called upon him to furnish better particulars. Nevertheless on page 373 of the Report their Lordships say :

"We think that in a case of this kind the Tribunal when dealing with the matter in the early stages should not have dismissed the application. It should have exercised its powers and called for better particulars. On non-compliance therewith it should have ordered the striking out of such of the charges which remained vague and called upon the petitioners to substantiate the allegations in respect of those which were reasonably specific."

10. Mr. Pathak contends however that we should not interfere with the Election Tribunal's order as it is an interlocutory order and the petitioner has in any case an adequate alternative remedy in that he may appeal under Section 116-A of the Act against the order made by the Tribunal at the conclusion of the trial. Now as a general rule this Court will not issue a writ in an interlocutory matter; but the rule is not absolute and in a fit case it will do so-see *Dr. Brijendra Swarup v. Election Tribunal, Lucknow*³,

11. In the case before us we think we should interfere. The Tribunal has, in our judgment, committed an error of procedure at a stage of the trial when it may be difficult to hold that the petitioner has an adequate remedy by way of appeal. A number of petitions have been referred to the respondent Tribunal for trial and it is very desirable that its practice should be in conformity with what we consider the law requires.

12. We accordingly allow the petition, and direct the issue of a writ of certiorari quashing the order of the Election Tribunal dated 27-7-1957. We also direct the Tribunal, in the exercise of our powers under Art. (227 of the Constitution, to deal with the matter in the manner indicated by us in this order.

13. We make no order as to costs.

³10 EL LR 191: AIR 1955 All 129

Petition allowed.