ALLAHABAD HIGH COURT

Mubarak Mazdoor

Vs.

K.K. Banerji

Civil Misc. Writ No. 2701 of 1957

(O.H. Mootham, C.J. and A.P. Srivastava, J.)

11.11.1957

JUDGMENT

O.H. Mootham, C.J.

1. This is a petition under Article 226 of the Constitution. The petitioner was a candidate for election to the Lok Sabha at the last general election held in March 1957 from an Allahabad Parliamentary constituency. The petitioner was defeated at that election, and on the 27th April, 1957, he filed an election petition before the Election Commission challenging the validity of the election of the successful candidate. The Election Commission appointed the respondent, who is a retired Judge of the High Court at Patna, as the Election Tribunal. In the petition which is now before us the petitioner contends that the respondent could not be appointed a member of an Election Tribunal under the Representation of the People Act, 1951, and he prays for the issue of a writ, direction or order directing the respondent not to act as a member of the Election Tribunal.

2. The main contention of the petitioner, who has argued the petition in person, is that the respondent was not qualified for appointment as he was not a Judge of a High Court at the date of his appointment as the member of an Election Tribunal.

3. The question of the eligibility for appointment of the respondent turns upon the meaning which must be given to the second proviso to sub-section (3) of Section 86 of the Representation of the People Act, 1951. Sub-section (1) of that section provides that, if a petition is not dismissed under Section 85, the Election Commission shall refer the petition to an Election Tribunal for trial. Sub-sections (2) and (3) so far as they are material read as follows :

> "(2) For the purpose of constituting such Tribunals, the Election Commission shall obtain from the High Court of each State.... a list of persons who are District Judges in the State and are in the opinion of the High Court fit to be appointed as members of Election

> Tribunals and shall maintain the list by making such alterations therein as the High Court may, from time to time, direct.....
> (3) Every Tribunal shall consist of a single member selected by the Election Commission from any of the lists maintained by it under sub-section (2) :
> Provided .... that if the Election Commission considers it expedient so to do, it may appoint a person who has been a Judge of a High Court as the member of a Tribunal."

4. The petitioner's contention is that the proviso to Section 86 (3) must be interpreted strictly according to the rules of grammar and that, when so interpreted, the words "has been" (in the phrase 'has been a Judge') signify that the person eligible for appointment must not only have held, but be then holding, office as a Judge; and that accordingly a retired Judge is not eligible for appointment. This argument is based on the assumption that 'has been' is a present perfect continuous tense. This assumption in our opinion is not correct. 'Has been' when not followed by a participle is the present perfect tense of "to be", and accordingly indicates that the state of being has existed and may be (but not necessarily is) continuing. For example, the statement 'A has been to Ceylon' indicates that A has visited Ceylon but is not there now; whereas the sentence 'The baby has been ill all day' implies not only that the baby has been ill but is still ill. On the other hand 'Y has been a soldier' excludes neither the possibility that Y is still a soldier nor that he has ceased to be one. We are clearly of opinion that the phrase "a person who has been a Judge" means a person who has, at some time, held office as a Judge, but that it does not necessarily mean that the person must be holding office as a Judge at the time of his appointment as a member of the tribunal. That this is the meaning intended by the legislature is made clear by an examination of Section 86 of the Act as it now stands and as it stood prior to its amendment by Act XXVII of 1956. Wherever the draftsman intended that the office should be held on the date of appointment he clearly indicates the intention by using the appropriate words. Thus in sub-section (2) of S 86 a reference is made to persons who "are" District Judges. Subsection (2) (a) as it stood prior to its amendment provided that for the purpose of constituting such Tribunals, the Election Commission shall obtain from the High Court of each State (other than Jammu and Kashmir) a

> "list of persons who are and have been District Judges in the State," and sub-section (3) provided that
> "(3) Every Tribunal appointed under sub-section (1) shall consist of
> (a) a Chairman who shall be either a person who is or has been a Judge of a High Court

We are accordingly of the opinion that the persn whom the Election Commission is empowered to appoint under sub-section (3) of Section 86 as it now stands is a person who has held office as a Judge of a High Court. It is immaterial whether that person is a retired Judge; the requirement is that he has held the office of a Judge.

5. The second submission made by the petitioner is not so much an independent ground of attack

but an argument in support of his primary contention "that the legislature when enacting the proviso to Section 86 (3) of the Act intended that only those persons actually holding office as Judees of a High Court should be eligible for appointment as members of a Tribunal." The contention is that the Election Commission cannot appoint a retired Judge under this proviso because the appointment carries with it a salary and no provision is made in Section 86, or indeed elsewhere in the Act, for the payment of any remuneration to a retired Judge. The intention of the legislature, the petitioner argues, in enacting sub-sections (2) and (3) of Section 86 of the Act. was to ensure that persons appointed as members of Election Tribunals should be persons wholly independent of the executive Government, and that they must therefore be persons who at the time of their appointment were in receipt of a salary which would be unaffected by the fact that they were members of an Election Tribunal. It is quite true that no provision is to be found in the Act for the payment of members of an Election Tribunal, but we are unable to see how that fact can deprive the Election Commission from exercising a power of appointment given to it under the Act. We think that the argument is not well founded and must be rejected.

6. The third submission is that the second proviso to sub-section (3) of Section 86 of the Act contravenes the provisions of Articles 309 and 14 of the Constitution and is therefore ultra vires. The first branch of the argument, if we have understood it correctly, is that in view of the provisions of Article 309 the power conferred upon the Election Commission to appoint as the member of a Tribunal a person who has been a Judge of a High Court is invalid as the conditions of service of persons so appointed have not been regulated by an Act of the legislature. Article 309, so far as it is relevant, provides that :

> "Subject to the provisions of this Constitution Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State."

The submission made by the petitioner cannot in our view be accepted for two reasons. In the first place, Article 309 is an enabling provision which confers certain powers upon a legislature. It does not impose upon the legislature a duty to enact regulations with regard to the conditions of service of persons appointed to public office or make the enactment of such regulations a condition precedent to such appointments. In the second place the Representation of the People Act, 1951, does contain provisions with regard to the appointment of persons who have been Judges of a High Court as members of Election Tribunals. The fact that that Act does not also contain any provision with regard to the remuneration (if any) to be paid to such persons will not, as we have already said, render the power to appoint ineffective.

7. The second branch of the argument is that as the proviso to sub-section (3) of Section 86 of the Act confers upon the Election Commission a power of appointment which is wholly unfettered it contravenes the provisions of Article 14. The petitioner has laid great emphasis on the difference between the provisions of the Act relating to the appointment, on the one hand, of District Judges

and, on the other, of persons who have been Judges of a High Court, as members of an Election Tribunal. In the former case the power of the Election Tribunal, under sub-sections (2) and (3) of Section 86, is restricted to the selection of such members as it requires from a list of District Judges considered by the High Courts as fit for appointment, whereas in the case of persons who have been High Court Judges there is no such "approved list" and the Election Commission does not select but appoints. We think that the distinction sought to be drawn by the petitioner between the powers exercised by the Election Commission in the two cases is more apparent than real. It is true that where the person to be appointed is a District Judge the Election Commission is restricted in its choice to those District Judges whose names are to be found on the lists for which provision is made in sub-section (2) but as among such District Judges the Election Commission's power to choose is unqualified. In the case of persons other than District Judges there is no corresponding list but the persons from among whom a choice has to be made must have been Judges of a High Court, and the legislature no doubt took the view that a person who has been found qualified to hold the high office of a High Court Judge was ipso facto qualified to be appointed a member of an Election Tribunal. In both cases therefore the Election Commission's field of choice is restricted - in the one case to those persons who are District Judges on the list for which provision is made in sub-section (2), and in the other case to the limited class of persons who have been High Court Judges. In both cases the Election Commission's power of appointment is, within the restricted field of selection, unqualified. The fact therefore that the procedure in the two cases is not entirely the same will not lead to the conclusion that the Election Commission's power of appointment in the second of the two cases is unconstitutional.

8. It would seem that Parliament took the view that it was immaterial which District Judges were selected by the Election Commission as members of Election Tribunals provided the names of the District Judges so selected were on a list approved by a High Court, and in the case of persons other than District Judges it was immaterial which persons the Election Commission appointed provided only that they have been High Court Judges. In the circumstances the petitioner has failed to satisfy us that the second proviso to sub-section (3) of Section 86 contravenes Article 14 of the Constitution.

9. Finally the petitioner contended that the second proviso to Section 86 (3) is of no effect as it is not really a proviso at all but a separate statutory provision. We do not consider it necessary to consider whether, strictly speaking, the power conferred upon the Election Commission to appoint a person who has been a Judge of a High Court, is a proviso to the power conferred upon that Commission by sub-section (3), for we have no doubt that the proper way of construing Section 86 is to read that section with its provisos as a whole, and that when so read the intention of the legislature that the Commission should have the power for which provision is made in the second proviso to sub-section (3) is perfectly clear.

10. In our opinion the petition fails and it is accordingly dismissed.

Petition dismissed.