

# CALCUTTA HIGH COURT

Dwijendra Lal Sen Gupta

Vs.

Harekrishna Konar

Civil Revn. No. 281 of 1961

(P.B. Mukharji and N.K. Sen, JJ.)

28.06.1962

## JUDGMENT

### **P.B. Mukharji, J.**

1. This is an application under Article 227 of the Constitution. It raises a short but interesting question of election law and procedure. The short point is whether under the Representation of the People Act, 1951 the Returning Officer is either a necessary or a proper party to an election petition.
2. The order against which this Rule was directed was an order of the Election Tribunal dismissing the application of the present petitioner, Sri Dwijendra Lal Sen Gupta, under Order 1 Rule 10 of the Code of Civil Procedure read with section 90 of the Representation of the People Act, 1951, for adding the Returning Officer Sri Ajita Ranjan Mukherjee as a respondent and for issuing a notice on him as such.
3. The Election Tribunal relied on (1) the Surat Municipality Case, 2 Doabia's Election Cases, 340 and (2) *Abdul Quadir Siddiqui v. Abul Hasan Natiqee*<sup>1</sup>, and dismissed the application for adding the Returning Officer as a party to the election petition. The two cases on which the election tribunal relied are not relevant for the decision and do not help in deciding the point raised. The first case on which the tribunal relied was the Surat Municipality case, but that case relates only to a suit for injunction and damages against the Returning Officer and it was held that no such suit or action could lie against the Returning Officer. That decision has nothing to do with the present question. Here the present question arose in connection with an election petition which is pending trial before the tribunal. It is not a suit but an election petition in the present instance. The second case on which the tribunal relied is 1 Doabia's Election Cases p. 324. This was a Legislative Assembly Election case in Central Provinces reported also in Hammond's Election Case 1920-35 at page 291. That case, however, lays down that it is not necessary, or proper, to make the Local Government or the returning officer a respondent to an election petition and that the returning officer when determining objections to a nomination paper is performing a judicial function. But it proceeds on to say that the returning officer "can only be joined as respondent if there is an imputation of misconduct, as distinct from an erroneous

decision on a point of law". It, therefore,

<sup>1</sup> Doabia's Election Cases 324

appears that this is an authority to say that if there is an allegation of misconduct then the returning officer is a necessary party. The Election Tribunal here fails to notice that in the present election petition which it was trying there is an averment or allegation of both mala fides and negligence. So while the case of Abdul Qadir Siddiqi is quoted by the Election Tribunal in support of his decision to reject the application for adding the Returning Officer as a party, that decision in effect and substance is against such a conclusion.

4. The dispute in this election is with regard to election to the West Bengal Legislative Council by the members of the West Bengal Legislative Assembly. This election was held on the 10th May, 1960. The Rules inter alia provided for voting by poll and by marking the ballot papers by single transferable vote. Nine persons were declared elected including the present petitioner before this Court, Sri Dwijendra Lal Sen Gupta and opposite parties Nos. 2 to 4 and 6 to 10. On the 23rd June, 1961, Harekrishna Konar, Opposite Party No. 1 presented an election petition calling into question the said election held on the 10th May, 1960, by the members of the West Bengal Legislative Assembly.

5. Various allegations were made by the petitioner, Konar in the election petition. It was expressly alleged that the Returning Officer illegally, improperly and in sheer negligence rejected one valid ballot paper. It was also alleged that the Returning Officer contravened Rule 116 of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1956. It was further alleged that the Returning Officer failed to regulate admittance of persons to the place fixed for the poll as prescribed under Rule 96 of such Rules. The petition also alleged mala fides against the Returning Officer. The major issues framed by the Election Tribunal clearly indicate that the act or conduct of the Returning Officer is a second issue in the case and that his negligence is also a third issue in the case. The election petition also uses the word 'mala fides' against the Returning Officer.

6. In short, issues not only of illegality committed by the Returning Officer, but also of his impropriety, his negligence and his mala fides have been raised before the tribunal.

7. The question then arises - Is the Returning Officer, when such allegations are made against him, a necessary or a proper party to an election petition? The present petitioner, Dwijendra Lal Sen Gupta contends that he is and the election Tribunal was wrong in rejecting his application to add the Returning Officer as a party.

8. This point must primarily be determined with reference to the particular statute, namely, the Representation of the People Act, 1951. There are some cases on the point, two of which have already been noticed by the Election Tribunal and to which reference has already been made here. Many of these cases are not helpful first because they are not on the same statute and secondly because the actual decision in those cases was not really concerned directly with the point raised here. Nevertheless it will be necessary to refer to some of these decisions including those on the present statute to understand the legal position so far as the authorities are concerned. I shall dispose of the cases first before coming to the provisions of the statute.

9. In *Jagan Nath v. Jaswant Singh*<sup>2</sup>, Mahajan, C. J., observed at page 213 as follows :

<sup>2</sup> AIR 1954 SC 210

"Provision has been made in section 90 (1) for any other candidate subject to the provisions of section 119, to have himself impleaded as a party in the case within a prescribed period. This provision indicates that the array of parties as provided by section 82 is not final and conclusive and that defects can be cured. Provisions of sections no, 115 and 116 of Chapter IV of this part also support this view. Section no provided the procedure for the withdrawal of a petition.

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These provisions suggest that if any proper party is omitted from the lists of respondents, such a defect is not fatal and the tribunal is entitled to deal with it under the provisions of the Code of Civil Procedure, Order 1, Rules 9, 10 and 13."

10. It has been contended by the learned Advocate appearing for opposite party No. 1 that this case is distinguishable on two grounds : The first distinction is that this was a case of non-joinder of a nominated candidate and not a case of non-joinder of a Returning Officer. That is certainly true. This comment acquires an added force by reason of the language of section 82 of the Representation of the People Act where the word 'candidate' is emphasised throughout. We shall deal with this interpretation of section 82 presently. But the second distinction that is made is that this decision of the Supreme Court was rendered in 1954 when the Act was different materially and significantly on this point. The present significant amendments came in 1956. A point of distinction is that in the unamended law as existing in 1954 on the basis of which this Supreme Court decision was given, non-compliance with the provision of Section 82 of the Representation of the People Act did not render the petition liable to be dismissed. The present amendments make it quite clear that non-compliance with the amended section 82 of the Representation of the People Act shall make the petition liable to be dismissed. That can be seen from section 85 and section 90(3) of the present Act as amended where section 82 is expressly mentioned.

11. Our attention has been drawn to certain decisions on election under the Calcutta Municipal Act and touching the question of the propriety of making the Returning Officer a party to such election petitions. We shall notice only one such case. In *S. M. Solaiman v. Noor Mohammed*<sup>3</sup>, a case on election under sections 46 and 47 of the Calcutta Municipal Act, Sen, J., in the original court observed at page 661 of the report (Cal WN) as follows :

"In this case the Returning Officer, in my opinion, is a very necessary party. His conduct, to say the least, has been extraordinary. He fails to carry out the duties imposed upon him under section 9.

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These facts justify the petitioner in challenging the *bona fides* of the Returning Officer. I hold, therefore, that he is a necessary party and in the circumstances of this case I am of opinion that he should pay the costs of this application personally."

12. This matter came up on appeal before a Division Bench of this Court of Mitter and Sharpe, JJ. The decision of the Court of appeal is reported as *Nur Mahammad v. S. M. Solaiman*<sup>4</sup>, Mitter, J., at page 21 of that report dissented from the opinion of Sen, J., in the

<sup>348</sup> Cal WN 655: AIR 1944 Cal 395

<sup>449</sup> Cal WN 10

following terms :

"(1) As no substantial relief can be claimed or given in an application made under section 46 of the Calcutta Municipal Act against the Returning Officer, prima facie he would not be a necessary party. It is admitted that when there is no complaint against his conduct, he is not a necessary party;

(2) Our brother Sen, has, however, held that he is a necessary party where his conduct is impeached and for supporting that view he has relied upon paragraph 782 of Volume XII of Halsbury's Laws of England, (2nd edition). That passage is based on the statute law of England. Before 1868, Parliament itself through committees dealt with Parliamentary elections. In 1868 by the Parliamentary Election Act (31 and 32 Vict. Ch. 125) jurisdiction to deal with election petitions was for the first time conferred on the Courts of Common Pleas of England and Ireland. Section 51 of that Act provided that when an election petition complained of the conduct of a Returning Officer, 'such Returning Officer shall for all the purposes of the Act be deemed to be a Respondent'. The Tamworth case, *Hill and Walton v. Peel and Bulwer*<sup>5</sup>, was decided in 1869 and the observation of Willes, J., made in the course of the proceedings and reported at page 77 of the report must be taken to have been made in view of what had been enacted in section 51 of the Parliamentary Election Act of 1868. In the Municipal Corporation Act (45 and 46 Vict. Ch. 50) there is also an express provision to the effect that the Returning Officer may be made a party Respondent to an election petition, if there is a complaint in the petition against his conduct (Section 88, sub-section (2)). I do not, therefore, think that the practice prevailing in England is of any assistance to us. On the principle that a person is not a necessary party when no relief is claimed against him or when he has no interest in the eventual result of a judicial proceeding, I hold that a Returning Officer is not a necessary party to an application made under section 46 of the Calcutta Municipal Act, even when there is a complaint against his conduct;

(3) Even on the view that the Returning Officer is a necessary party, I do not think that the evidence is sufficient to establish bad faith on his part."

13. Having regard to the final conclusion that the evidence in that case was not sufficient to establish bad faith, the observation that even in case of bad faith the Returning Officer is not a necessary party becomes obiter. The main reason in the above observations for holding, if it can be said that it was actually held, that the Returning Officer was not a necessary party was that no relief was claimed against him. Now that is a significant point of distinction from the present question before us under the Representation of the People Act, 1951. Under section 46 of the Calcutta Municipal Act, which Mitter, J., was interpreting, election Court could not declare a person elected and all that it could do was to set aside an election and direct holding of a fresh election. But here under the Representation of the People Act the Election Tribunal is given the power expressly not only to declare the election void but also to declare the petitioner or any other candidate to have been duly elected without going through any fresh election. See section

98 of the Representation of the People Act in contrast to section 46 (2) of the Calcutta Municipal Act which expressly said "If the Court sets aside an election or declares an election to be null and void, a fresh election shall be held".

<sup>5</sup>(1869) 1 O'M and H 75

14. Now the scheme of the election is that it is the Returning Officer who has to declare and certify the election of a particular candidate. See for instance Rule 66 which provides that as soon as may be after a candidate has been declared by the Returning Officer under section 53 or section 66 to be elected, the Returning Officer shall grant to such candidate a certificate of election. Section 66 of the Representation of the People Act, 1951, expressly says :

"When the counting of the votes has been completed, the returning officer shall forthwith declare the result of the election in the manner provided by this Act or the Rules made there under." Again section 67 of the Act casts upon the returning officer an obligation to report the result of an election to the appropriate authority. Therefore, when the relief is claimed that an election as declared is bad or that someone else is duly elected it is really a relief against the decision or the declaration or report of the Returning Officer. The observation of Mitter, J., is distinguishable on the grounds (1) that they relate to a different statute, namely, the Calcutta Municipal Act with significantly different provisions' and (2) that the observations are in the nature of obiter dicta at best because there the learned Judge was of the opinion that in the facts of that case there was no sufficient allegation even against the Returning Officer to justify his being made a party.

15. Coming now to other decisions in India it is necessary to notice one, which is directly on the point. In the case of *Returning Officer, Atmakur v. G. C. Kondaiah*<sup>6</sup>, the Election Tribunal, Nellore held that the Returning Officer was not a necessary or a proper party to an election petition, even though allegations were made against him in the petition. This is the direct authority against the petitioner before us and is by Shri C. Murahati Rao, the single Member Tribunal. At page 46 of that report the Tribunal observed :

"Merely because some allegations have been made against third respondent (returning officer) he need not be added as a party to the petition. According to the provisions of Section 82 of the Representation of the People Act, the returning officer is not a necessary party to the petition. If the allegations made by the petitioner in the main O. P. are proved, the Tribunal can take action under Section 90 of the Representation of the People Act. This is not the stage at which 3rd respondent (returning officer) should have been joined as a party to the petition. I am supported in my view by the rulings in *Amjad Ali v. B. C. Barua*<sup>7</sup>, and *S. B. Adityan v. S. Kandaswami, 14 Elec. LR 394* . Section 82 of the Representation of the People Act is quite exhaustive."

16. Although reference was made at the Bar in that case to the case of *Inayatullah Khan v. Diwanchand Mahajan*<sup>8</sup>, contending that Section 82 of the Representation of the People Act does not say that the Returning Officer is a "necessary" party, the Act equally does not say that he is not or can never be a "proper" party in an appropriate case. It is necessary, therefore, to notice the decision of 15 Elec. LR 219 : AIR 1959 Madhya Pradesh 58. This is the decision of a Division

Bench of the Madhya Pradesh High Court. At pages 255-56 (of Elec. LR) the learned Judges in that case observed :

<sup>6</sup>22 Elec LR 45

<sup>8</sup>15 Elec. LR 219 : AIR 1959 Mad Pra 58

<sup>7</sup>13 ELec. LR 285

"It was contended by the appellant that if allegations of corrupt practice of this type were to be made with regard to the conduct of the returning officer, he should have been joined as a party to the proceedings. Reference was made to Halsbury's Laws of England (Simonds Edition, Volume 14, paragraph 456 at page 255), to show that the returning officer is generally joined in the proceedings if allegations are made against him. Unfortunately, the reports on which the passage is based were not available and have not been placed before us for our consideration. Reference is also made to Section 99 of the Representation of the People Act to show that a returning officer should be joined, because the proviso says that no person who is not a party to the petition shall be named as having committed a corrupt practice unless and until he has been given notice to appear before the Tribunal and to show cause why he should not be so named. It was contended that inasmuch as the returning officer was charged with having favored the appellant, it was necessary if he was going to be named that he should be joined to the proceedings. It is more surprising that neither the appellant nor the answering respondent cared to summon the returning officer. The allegations at that time were in the process of proof and it would have been better if the Tribunal had summoned the returning officer just as it summoned Shri S. S. Paranjape, presiding officer of the Sevada polling station. It appears that such a contention was not raised before the Tribunal."

17. Apparently as the point was not raised before the Tribunal, though the point was noticed by the Madhya Pradesh High Court, no decision was given on the particular point whether the Returning Officer was or was not a necessary or proper party in an election petition and if so where and in what circumstances. This observation may have been the reason for the Election Tribunal here to say that the petitioner in the election petition, namely, Hare Krishna Konar has undertaken to examine the Returning Officer as a witness in this case and, therefore, there is no reason for impleading the Returning Officer as a respondent. For this purpose the Election Tribunal in the present case relied on the decision of *Nrishinha Kumar Sinha v. Satyendra Chandra*<sup>9</sup>, where the Election Tribunal of Calcutta observed at page 123 as follows :

"As various allegations have been made in the election petition against the Returning Officer, Sri A. R. Biswas, a copy of the election petition was served on him and he appeared at the time of hearing. There being an objection that the Returning Officer is a necessary party, an issue was framed on that point at the preliminary stage. During trial that issue was first taken up before entering into the merits and it was expugned after hearing the learned lawyers both parties as the final decision of the case does not depend on that issue. Neither party proposed to examine the said Returning Officer as his witness, but they wanted to have him as a court witness. The Tribunal did not deem it necessary to examine him as a court witness in the circumstances of the case and discharged him."

18. In the case of 2 Elec LR 121 (Ele. Tri. Cal), actually the election petition was served on the Returning Officer and he appeared at the time of hearing, but no such step has been taken in the present case before us.

<sup>92</sup> Elec. LR 121 (Ele. Tri. Cal)

19. It is difficult to understand how the petitioner in the election petition Harekrishna Konar who makes the allegations against the Returning Officer (1) that he was negligent : (2) that his conduct was improper and (3) and that his conduct was mala fide, would call him, the Returning Officer, as his own witness to prove charges against him. It appears to us incredible because a witness is called to support one's case and the Returning Officer on the face of it will not be a witness in his favor but a witness against him as his declaration of the election result shows. In that case what may happen is that immediately after one or two questions the Returning Officer has to be declared hostile by the petitioner in the Election Petition and he has to cross-examine his own witness which may not be in the facts of the case permissible at all, for a witness telling the truth is not necessarily hostile even though his evidence may go against the parties calling him. It is, therefore, difficult to imagine how the election petitioner, Harekrishna Konar, could call the Returning Officer as his own witness. Looking at the other side of the picture if he does not call him as a witness then the present petitioner will be forced to call him. That will be just the opportunity of the election petitioner to cross-examine the Returning Officer as the other side's witness. There is one more compelling reason. Calling the Returning Officer as a witness is not the same thing as making him a party to the petition. A witness does not disclose what his evidence is going to be at least to the party who is going to cross-examine him. Therefore, his evidence comes as a surprise for the cross-examining party. If the Returning Officer is joined as a party to the Election Petition then he has got to make out his case in his Written Statement or in answer to the election petition so that every one knows what his answers to the allegations in the petition are and they may come ready with their evidence oral and documentary to meet that evidence, a course which will be denied if he is just only called as a witness. The party calling him as a witness may know what the Returning Officer is going to depose but the party cross-examining him will be quite in the dark until his evidence is given. Then the cross-examining party may or may not be aimed with such documentary and other evidence which may be necessary to confront the Returning Officer.

20. Turning now to the two other cases which were relied on by the single Member Election Tribunal in the case of 22 Elec LR 45 (Ele. Tri-Nellore), it is plain that none of them is a case relating to a Returning Officer. The first case on which the Tribunal relied in the decision reported in 22 Elec. LR 45 (Ele. Tri-Nellore) was 13 Elec. LR 285 . This is the decision of a Division Bench of the Assam High Court. That case really proceeds on the interpretation of Section 91 of the Representation of the People Act and the procedure for naming a person at the stage where and when it can be done. The decision only says that such a person who is to be named cannot be made a party to an election petition at an earlier stage either under Section 82 or in exercise of any residuary powers or under Order 1, Rule 8 of the Civil Procedure Code. See the observations of Sarjoo Prosad, C. J. at page 287 of that report (Elec LR) . It is not an authority about Returning Officer either.

21. The other case relied upon was the decision of *S. B. Adityan v. S. Kandaswami*, a decision of the Supreme Court in<sup>10</sup> That decision is that the acceptance of gift as an inducement for withdrawing one's candidate or retiring from contest is not a corrupt practice under the Representation of the People Act, 1951, as amended by Act XXVII of 1956. This decision has nothing whatever to do with the question of joining a returning officer as a party to an election

petition. We cannot understand why this case was, cited by the Election Tribunal in 22 Elec. LR 45 (Ele Tri-Nellore) in support of the view it

<sup>10</sup>14 Elec LR 394

expressed that the Returning Officer was not a necessary or proper party to an election petition.

22. In this line of cases all that remains is to cite one more case, that is *Gidwani Choitram v. Agnani Thakurdas*<sup>11</sup>, It is an authority for saying that where there are allegations in an election petition of irregularities or illegalities committed by a Returning Officer or his subordinates, the Returning Officer is a "proper" though not a 'necessary' party to the petition. This is a decision of three members of the Election Tribunal of Bombay. It will be appropriate to quote the actual words and observations of the Tribunal at pages 200 to 201 of that report and they are :

"Turning now to Shri Kazi's grievance that respondent No. 8 (i.e. the Returning Officer) had been unnecessarily added and that the petition should be dismissed as against him ..... with costs, the Tribunal does not see any substance in this grievance. Section 82 of the Representation of the People Act, 1951, provides that the petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election. It is not stated anywhere in the said Act that the Returning Officer should not be made a party. Under the Civil Procedure Code a person may be made a party to an action either because he is a "necessary" party or a "proper" party. The Tribunal is not prepared to say that the respondent No. 8 is a necessary party to this petition, but in view of the allegations of irregularity and illegality made against him and his subordinates by the petitioner, the Tribunal thinks that the Returning Officer is a "proper" party. \* \*"

23. After a consideration of the different cases and authorities, we subscribe to the opinion expressed by the Bombay Election Tribunal in 1 Elec LR 194, quoted above as representing the sounder view. The distinction between a "necessary" party and a "proper" party under the Civil Procedure Code is the key to the solution of this point and reconciles both Section 82 and Section 90 of the Representation of the People Act, 1951.

24. The case of *Tahur Ahmed v. Humayun Reza* is a case of the Bengal Legislative Council from the Rajshahi Constituency. It is quoted in extenso and reported fully in Sen and Poddar's Indian Election Cases (1935-1951) at page 704. The Election Tribunal was a three-member Tribunal with Mr. Justice McNair as the President and Mr. A. F. M. Rahman and Mr. P. N. Choudhuri as Commissioners. In that petition the Returning Officer Mr. L. R. Fawcus was joined as a respondent. The view that we are taking is also in accord with the view expressed by the decision of the Election Tribunal in 1 Doabia's Election Cases p. 324 a case of election of Legislative Assembly of the Central Provinces, reported in Hammond's-Election Cases at page 293 where at page 294 certain observations were made explaining the position of the Returning Officer which will bear quotation as follows :

"What he, however, urged was that as the returning officer had suo motu given a decisions against the petitioner, the petitioner should have made him a respondent. If this contention is accepted as sound, every Judge who decides a case against a litigant would be a necessary party to an appeal against his decree or order. But it is urged that, while a Judge is a judicial officer, a returning officer is not and is therefore a necessary party to an

election petition which challenges the correctness

<sup>111</sup> Elec LR 194 (Ele. Tri. Bom)

of his order passed on the scrutiny of nomination papers. There is no substance in this contention. A returning officer is neither a purely ministerial officer nor a purely judicial officer. He partakes of both characters; for some purposes, such as giving notices, providing polling stations, etc. he is merely a ministerial officer; for others, such as determining objections to nomination papers and ballot papers he is a judicial officer. Therefore, even according to English law, under which it is necessary to make the returning officer a respondent in certain cases, there must be an imputation of misconduct to justify his being made a respondent, and it has been held that a *bona fide* though erroneous decision upon a point of law, e.g. upon the validity of a nomination paper, is not a complaint of misconduct so as to justify his being joined as a respondent. We accordingly overrule the contention of the respondent and hold that the returning officer was not a necessary party in this case."

25. Coming now to the actual provisions of the Representation of the People Act, 1951, these are the considerations which impell us to the conclusion that in an appropriate case where allegations of bad faith, misconduct and impropriety and not mere illegality are made in the election petition against a Returning Officer, the Returning Officer is a "proper" party though he is not a "necessary" party. There cannot be a hard and fast rule or an inflexible principle that a Returning Officer under no circumstances and in no case and on no facts, can be added as a party to the election petition. We do not read the specific sections of the Representation of the People Act on this point as leading to that result. Section 82 of the Act comes under Chapter II dealing with presentation of election petitions to Election Commission. The heading of Section 82 is "Parties to the petition." The significant words with which Section 82 opens are "A petitioner shall join as respondents to his petition." Then there are two sub-clauses (a) and (b). The two clauses under (a) and (b) indicate that they refer only to "candidates" of some kind or another and nobody else. That means that this is the minimum mandatory requirement of an election petition. We are not unmindful of the principle that an election Court exercises a special jurisdiction which is the creature of a particular statute and the rights of the parties must be found within the four corners of the statute and no right which is not so found should be imported and that reference to other cases on other statutes may be some times of no assistance and indeed may be misleading. That is well settled law. Reference may be made to such decisions as *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*<sup>12</sup>, *Sharafuddin Ahmed v. Shamsul Huq*<sup>13</sup>, and *Champalal Gupta v. Mohonlal Makkad*<sup>14</sup>, All that Section 82 says is that those particular classes of persons shall be added as respondents to the election petition. Section 85 goes on to say that if the person mentioned in Section 82 is not added as a respondent then the Election Commission shall dismiss the petition. But Section 82 is not enough on the point. To quote the expression of the Supreme Court in *Harish Chandra Bajpai v. Triloki Singh*<sup>15</sup>, it is the "irreducible minimum". It is quite true that Section 82 does not require the Returning Officer to be added as a party respondent. It is also not unreasonable to infer that by necessary implication as well as by obvious exclusion, Section 82 does not make the Returning Officer a "necessary" party to the election petition. But that only at best shows that the returning officer is not what is called a "necessary" party to the extent that his non-joinder will not lead to the penalty of

<sup>12</sup>1952-3 SCR 218

<sup>14</sup>41 Cal WN 488 at page 491

dismissal of the petition. But the Returning Officer may nevertheless in an appropriate case be a "proper party" who may be added as party to the election petition. That result will appear to follow from Section 90 of the Representation of the People Act which provides that subject to the provisions of this Act and of any rules made there under every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. It goes on to provide that the provisions of the Indian Evidence Act also shall apply and also goes on to provide that the Tribunal shall have the power to dismiss an election petition which inter alia does not comply with the minimum mandatory requirement of Section 82 as to parties. Now this provision in Section 90 brings into operation the Civil Procedure Code to the trial of election petitions. The word 'trial' in Section 90 of the Act has been liberally construed by the Supreme Court in AIR 1957 Supreme Court 444. At pages 453 to 454 Venkatarama Ayyar, J. observed :

"In our opinion, the provisions of Chapter III read as a whole, clearly show that 'trial' is used as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it under Section 86 until the pronouncement of the Award.

The second contention urged on behalf of the appellants is that if the provisions of the Civil Procedure Code are held to be applicable in their entirety to the trial of election petitions, then there was no need to provide under Section 92 that the Tribunal was to have the powers of courts under the Code of Civil Procedure in respect of the matters mentioned therein, as those powers would pass to it under Section 90 (2). But this argument overlooks that the scope of Section 90 (2) is in a material particular, different from that of Section 92. While under Section 90 (2) the provisions of the Civil Procedure Code are applicable only subject to the provisions of the Act and the rules made thereunder, there is no such limitation as regards the powers conferred by Section 92. It was obviously the intention of the legislature to put the powers of the Tribunal in respect of the matters mentioned in Section 92 as distinguished from the other provisions of the Code on a higher pedestal, and as observed in *Sitaram v. Yograj Singh*<sup>16</sup>, they are the irreducible minimum which the Tribunal is to possess."

26. The Supreme Court thereafter proceeded to negative the argument made to distinguish between power and procedure and observed at page 454 :

"We do not see any antithesis between 'procedure' in Section 90 (2) and 'powers' under Section 92."

27. From this it follows that the necessary implication of Section 90 of the Representation of the People Act is, that the trial of election petition shall be as nearly as may in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits subject no doubt to the provisions of the Representation of the People Act and to the rules made thereunder. The trial of election petition in the context of Section 90, therefore, must necessarily imply in the light of the observations made by the Supreme Court as quoted above, interlocutory proceeding dealing with addition of parties as proper parties :

<sup>16</sup> AIR 1953 Bom 293

28. Section 99 of the Representation of the People Act does not really provide for adding a party

to the petition. It contains inter alia provision for what is called "naming" a person who is not a party to the petition and the procedure that is to be followed where such a person has to be named. This has nothing to do with the procedure prescribed under the Civil Procedure Code which has no such provision. Section 170 of the Representation of the People Act, 1951 has been mentioned in this connection as giving an indemnity to the Returning Officer. That section, however, bars the jurisdiction of 'Civil Courts'. It says "No Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under this Act in connection with an election." We do not think that this bar on the civil courts as provided in Section 170 of the Representation of the People Act can operate to override the constitutional jurisdiction of this Court under Article 227 of the Constitution. Here we are not acting as an ordinary civil court questioning in any manner the legality of any action taken or decision given by the Returning Officer or by any other person appointed under the Act. Here we are superintending the work of the Election Tribunal which no doubt is appointed under the Act but over whom the Constitution of India gives powers of superintendence to this Court by expressly providing in Article 227 of the Constitution, that "Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction." Section 80 of the Representation of the People Act, 1951, expressly provides that no election shall be called in question except by an election petition presented in accordance with the provisions of this Part. Therefore, it follows that the only method of questioning of any election is by presenting an election petition as provided in the Act. The Tribunal tries such election petitions under Section 86 of the Act. The orders of this Tribunal are subject to appeals to this High Court as provided under Section 116A of the Representation of the People Act. Therefore, this High Court has superintendence over this Tribunal as if is working within the territories in relation to which this High Court exercises its jurisdiction within the meaning of Article 227 of the Constitution. That it can so exercise its powers under Article 227 of the Constitution over Election Tribunal is covered by such authorities as *Hari Vishnu Kamath v. Ahmad Ishaque*<sup>17</sup>, See also the observation of the Supreme Court in *Durga Sankar v. Raghuraj Singh*<sup>18</sup>

29. In this view of the matter that we are taking it is not necessary to embark at length on the English law on Election and Procedure. Reference to that law was made by the learned Advocate for the petitioner particularly to the well known passage in Halsbury's Laws of England, Volume 14 (Simonds Edition) Article 446 at page 255 where it is said :

"Where, however, a parliamentary election petition complains of the conduct of a returning officer, he will, for all the purposes of the Act, except as regards the admission of respondents in his place, be deemed to be a respondent." That is Sections 108(2) and 134(1) of the English Representation of the People Act, 1949. It is also said in that same paragraph 446 page 255 of the same volume of Simonds Edition of 14 Halsbury that "The allegation against the returning officer need not necessarily be one of wilful misconduct, and he may be joined as a respondent where the acts or omissions or negligence complained of are not personal but are those of his subordinates." In support of that view the learned Editor of the

<sup>17</sup>AIR 1955 SC 233 : (1955) 1 SCR 1104

<sup>18</sup>(1955) 1 SCR 267 at pp. 271-2: ( AIR 1954 SC 520 at p. 522)

Halsbury's Laws of England quotes the proposition : "If it is proposed to give evidence at the hearing of an election petition to implicate the returning officer he should be made a respondent" and the observation of Willes, J. in (1869) 1 O'M and H 75, with the comment, "It being proposed to offer evidence implicating the returning officer, Willes, J., refused leave to have him called as a witness, as no charge had been made against him in the petition." Then reference is made by the learned Editor of the same Volume of Halsbury to *Young v. Figgins*<sup>19</sup> for the proposition that "Seemingly, a returning officer who is so deemed to be a respondent is entitled to the same notices as to presentation of the petition, the proposed security, etc. as an ordinary respondent." The English Law dealing with the returning offices as a respondent is not the same as the Indian Law and therefore, it will be unwise to rely on English decisions as such. It will be more unwise to rely on them where on a proper construction of the language of our own statute and our own Representation of the People Act, 1951, we draw the conclusion both expressly as well as by necessary implication of the specific sections quoted above that in an appropriate case where allegations of bad faith, negligence and impropriety are made against the returning officer he can certainly be joined as a "proper" party at least under the provisions of the Civil Procedure Code which are expressly made applicable to the trial of the election petitions.

30. Before conclusion we need only add that apart from the charges of negligence, mala fides, and impropriety made in the election petition one of the serious questions raised in the election petition is the system of proportionate representation and wrongful and inaccurate determination, ascertainment and counting of quota by the returning officer under the system. That consideration on the facts of this petition, will also in our view make the Returning Officer a proper party.

31. For the reasons stated above we make the Rule absolute, set aside the order of the Tribunal dated the 3rd January, 1961 and direct the Tribunal to add the returning officer as a party as prayed for by the petitioner before us.

32. There will be no order as to costs.

**N. K. Sen, J.**

33. I agree.

Rule absolute.

<sup>19</sup>(1868) 19 LT 499