

CALCUTTA HIGH COURT

Bhakti Bh. Mondal

Vs.

Khagendra K. Bandopadhyaya

Election Petn. Case No. 9 of 1967

(S.P. Mitra, J.)

07.06.1967

ORDER

S.P. Mitra, J.

1. This is an election petition in respect of the Dubrajpur Constituency in the District of Birbhum. The petitioner was a candidate in this constituency in the last General Election and had lost to the respondent no. 1 by a margin of 290 votes. The Returning Officer declared the result of the election on the 23rd February 1967. The petitioner wanted to present his election petition on the 17th April, 1967. There were doubts in my mind as to whether the petitioner came to this Court within time. The petitioner's Counsel then submitted to that he did not want to take the risk; and would make an application for condonation of the delay, if any, in presenting; the petition. Accordingly, an application for condonation, if necessary, has been made.

2. For the last two days I have heard arguments of the petitioner's counsel, the Advocate General (who is appearing for the District Election Officer and the Returning Officer, the respondents nos. 3 and 4 herein) and counsel for the respondent no. 1. This morning I was told by the petitioner's counsel that he did not wish to press the application for condonation of delay and was desirous of having my decision on the merits of the point raised by him, namely, that the petition was within time. I, accordingly, gave direction that there would be no order on the application for condonation of delay and no order as to costs of that application as well. I was proceeding to express my views on the principal point of the petitioner's counsel that the petition was not barred by limitation. At this stage the petitioner himself intervened. He said to me that his Counsel had withdrawn the application for condonation of delay without his instructions. He asked for my leave to discharge all his Advocates and submitted to me that he should be given permission to argue his case in person on condonation of delay. For ends of justice I have heard his arguments appearing in person. I would now express my views both on the merits and on the issue of condonation.

3. The petitioner's counsel first drew my attention to Section 81 of the Representation of the People Act, 1951. The relevant provisions of this Section are as follows :-

"An election petition calling in question any election may be presented by any

candidate at such election within 45 days from, but not earlier than, the date of election of the returned candidate...."

4. Counsel for the petitioner contends that the starting point of limitation is the date of election of the returned candidate. The emphasis, he says, is on the word "returned" and we have to look to Section 79(f) of the Act for the definition of a "returned candidate". The definition is that a "returned candidate" means a candidate whose name has been published under Section 67 as duly elected.

5. Now, Section 67 provides as follows :-

"As soon as may be after the result of an election has been declared, the Returning Officer shall report the result to the appropriate authority and the Election Commission and in the case of an election to a House of Parliament or of the Legislature of a State also to the Secretary of that House and the appropriate authority shall cause to be published in the Official Gazette the declarations containing the names of the elected candidates."

6. According to the petitioner's counsel limitation for presenting an Election Petition starts running from the date of publication in terms of Section 67 and the Election Petition in the instant case has been presented within 45 days of that date.

7. I am unable to accept this contention. If we substitute the definition of a "returned candidate" in Section 81 itself, the result is that the Election Petition is to be presented within 45 days from the date of election of the "candidate whose name has been published under Section 67 as duly elected". It is manifest that the date of the election may not be the same as the date of publication. If we now turn to Section 67A the position would be clear. This Section is as follows :-

"67A. Date of election of candidate. - For the purpose of this Act, the date on which a candidate is declared by the Returning Officer under the provisions of Section 53 or Section 66 to be elected to a House of Parliament or of the Legislature of a State shall be the date of election of that candidate."

8. There can be no doubt that the date of election referred to in Section 81 is the date on which a candidate in an election is declared by the Returning Officer to be elected. Indeed, in part V of the Conduct of Election Rules a form has been prescribed for grant of "Certificate of Election of Returned Candidate" under Rule 66. This is known as form No. 22 and I set it out as it appears at page 470 of the Manual of Election Law (Fifth Edition) published by the Government of India. The form is as follows :-

" Form 22

Certificate of Election
(See Rule 66)

I, Returning Officer for the Parliament/Assembly Constituency in the State of..... hereby certify that I have on the day of 19 ..., declared Shri of duly

elected by the said Constituency to be a member of the House of the People/Legislative Assembly and that in terms thereof I have granted to him this Certificate of Election.

.....

Returning Officer

for the Parliament/Assembly Constituency.

Place.....

Date.....

9. In the instant case the Returning Officer declared the respondent No. 1 elected to the West Bengal Legislative Assembly on the 23rd February 1967. The Election Petition should have been filed on or before the 10th April 1967, 9th of April being a Sunday. But as it was presented on the 17th April 1967, the petition was barred.

10. The learned Advocate General also agrees that it cannot be held that limitation would run from the date of publication and not from the date of declaration by the Returning Officer. He submits that the only Section which is attracted to this case is Section 67A.

11. The next question that arises is whether the relevant provisions of the Limitation Act can be attracted to Election Petitions. The two provisions I have in view are Section 29(2) and Section 5. Section 29(2) provides : "Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if, such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law." Section 5 prescribes : "Any appeal or application other than an application under any of the provisions of Order 21 of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

12. Learned counsel for the respondent No. 1 contends that the Limitation Act has no application to any of the provisions of the Representation of the People Act, 1951. Reliance is placed on Section 86 of the Act which says : "The High Court shall dismiss an Election Petition which does not comply with the provisions of Section 81 It is submitted that this Section confers a power on the Court coupled with a duty. This Court has the power of entertaining Election Petitions; but when it finds that the provisions inter alia, of Section 81 have not been complied with, the duty of the Court is to dismiss the application. My attention was also drawn to Section 116A which provides for appeals to the Supreme Court. The relevant provisions of Section 116A are as follows :-

"Section 116A. Appeals to Supreme Court -

(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall be to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under Section 98 or Section 99.

(2) Every appeal under this Chapter shall be preferred within a period of 30 days from the

date of the order of the High Court under Section 98 or Section 99 :

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period."

The argument is that in cases of appeals to the Supreme Court power has been expressly conferred on the Supreme Court to entertain an appeal after the expiry of the prescribed period provided that sufficient cause is shown. But in the case of the High Court no such power has been given. In fact, it is urged, the power that the Election Commission had under the Representation of the People Act, 1951, as it initially stood, has been expressly taken away in the case of a High Court. Reliance was placed on Section 85 of the Representation of the People Act prior to its amendments. The proviso to this section gave power to the Election Commission to condone on sufficient cause the failure to present a petition within the prescribed time. In the older provisions the election petitions had to be presented to the Election Commission and thereafter they went to the Tribunal for hearing. The Tribunal under Section 90(4) had power, however, to dismiss the petition "notwithstanding anything contained in Section 85."

13. According to counsel for the respondent No. 1 while amending the Act in 1966 the Legislature not only did not confer power on the High Court to entertain election petitions beyond time but had taken away the power which it gave to the Election Commission. In these circumstances, so far as the High Court is concerned, submits learned counsel for the respondent No. 1, no provisions of the Limitation Act can be called in aid of election petitions.

14. I do not accept these arguments. To my mind the Election Commission had to be given express power to condone delays because it was not a court; and in an application under Section 5 of the Limitation Act a petitioner has to satisfy the "Court". In this view of the matter, I do not think it was at all necessary to confer any express powers on the High Court. It is true that such express powers have been given to the Supreme Court. But it does not necessarily follow that a High Court's power has been taken away. It should be remembered that Section 116A provides for a direct appeal, as a matter of right, (whether of law or fact) to the Supreme Court. This appeal has no resemblance to appeals to the Supreme Court under the Constitution. There is no need to ask for a certificate of fitness or a Special leave to appeal. It is, therefore possible that the Parliament thought that in case of such direct appeals the Supreme Court should have an express power to condone delays. But I am not prepared to hold that because of the express power of the Supreme Court, a High Court's power has been impliedly withdrawn.

15. Section 3 of the Limitation Act contains the general law, namely, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed by the court. There is the same provision in Section 86 of the Representation of the People Act, 1951. But in spite of the general law the other provisions of the Limitation Act, specially those mentioned in Section 29(2) are applicable to proper cases and I do not see why they should not apply to election petitions. I am of opinion, therefore, that Section 29(2) can be relied on for condonation of delay in filing election petitions.

16. The second argument is based on Section 29(2) itself. It is contended that Section 29(2) consists of two parts and these two parts must be read conjunctively. The Supreme Court in

*Vidya Charan v. Khub Chand*¹, has said that the second part of Section 29(2) is not independent of the first part. The result is that if a period of limitation is prescribed for a suit, appeal or application in a special or local law which is different from the period prescribed by the Limitation Act, Section 29(2) would apply. In the instant case, argues learned Counsel for the respondent no. 1, for election petitions no period of limitation is prescribed in the Limitation Act at all. and the result is that Section 29(2) cannot conceivably be attracted. I do not accept this argument either, I think Article 137 which is the residuary article for "any other application for which no period of limitation is provided elsewhere in this Division" can be said to be the article for applications under the Representation of the People Act, 1951. According to this article the period is three years. But the special law with which we are concerned, for obvious reasons, prescribes that the petition must be presented within 45 days of the date of election. In other words, a period different from the period in the Limitation Act has been prescribed and Section 29(2) does apply. In any event, in the case of AIR 1964 Supreme Court 1099 *ibid* the Supreme Court has said that when the First Schedule of the Limitation Act prescribes no time limit for a particular appeal, but the special law prescribes a time limit to it, it can be said that under the First Schedule of the Limitation Act, all appeals can be filed at any time, but the special law by limiting it provides for a different period. In other words, according to the Supreme Court while the former permits the filing of an appeal at any time, the latter limits it to the prescribed period. The Supreme Court has said that this prescribed period is, therefore, different from that in the Limitation Act. Their Lordships of the Supreme Court are of the view that Section 29(2) would apply even to a case where a difference between the special law and the Limitation Act arises by omission to provide for a limitation to a particular proceeding under the Limitation Act. The Supreme Court, in this case, was concerned with the period for appeals to the High Court under Section 116A of the Representation of the People Act, 1951, as it stood before the amendment of 1966 and held that these appeals were governed by Section 29(2) of the Limitation Act. On this view of the Supreme Court it is permissible to argue that for election petitions to the High Court no period has been fixed by the Limitation Act and these petitions could, be ordinarily presented at any time. But when Section 81 of the Special Act says that that petition is to be presented within 45 days of the date of election, the period so prescribed is different from the period under the Limitation Act. From this point of view also I do not see. any difficulty in applying Section 29 (2).

17. The next argument of Counsel for the respondent No. 1 is that under Section 87 of the Representation of the People Act, 1951, an election petition is to be tried like a suit under the Code of Civil Procedure and Section 5 of the Limitation Act which permits extension of the prescribed period in certain cases does not apply to suits at all. It is meant for appeals and applications only. To test this contention on behalf of the respondent no. 1 let us consider the exact provisions of Section 87 which run thus :

"87. Procedure before the High Court. - (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits :

Provided that the High Court shall have discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that

¹ AIR 1964 SC 1099

the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay proceedings."

18. This section lays down that an election petition is to be tried as nearly as may be in accordance with the procedure applicable to trial of suits under the Code. The Court, in other words, has to follow as far as possible the rules of procedure applicable to suits. It is not incumbent upon the Court to follow all the rules. The proviso to Sub-Section (1) quoted above shows that the Court in its discretion may refuse to examine witnesses but this is not strictly speaking, permissible under the Code. Moreover, when a suit is decided in favor of the plaintiff, a decree is passed. But no decree is passed on an election petition. The Court under Section 98 makes "an order" either dismissing the petition or declaring the election to be void or declaring that any other candidate has been duly elected. These provisions also show that an election petition is not a suit. An election petition, it seems to us, is an application and there should be no bar to applying the provisions of Section 5 of the Limitation Act to such an application.

19. I am strengthened in this view by the definition of "application" in Section 2(b) of the Limitation Act, 1963. An application includes a petition.

20. I hold, therefore, that an election petition is an application; Section 5 of the Limitation Act applies to these applications; and in appropriate cases the Court has power when sufficient cause is shown to admit an election petition after the prescribed period. The Advocate-General also, accepts these propositions. He says, however, that whether or not 'Sufficient Cause' has been made out in the present case is a matter on which he does not intend to make any submissions to this Court.

21. The next question is whether the powers under Section 5 of the Limitation Act should be exercised on the facts and in the circumstances of this case. The petitioner has stated that the reason why he came to this Court on the 17th April, 1967 is that his Counsel had advised him that he had time till that date. We have, therefore, to consider how far an erroneous advice of Counsel may be a 'sufficient cause' within the meaning of Section 5.

22. In *Kunwar Rajendra Bahadur Singh v. Rajeshwar Bali*², the Judicial Committee has dealt with this question. In this case an appeal was filed before a District Judge within the period of limitation on the mistaken but honest advice of counsel who took the view that the valuation of the suit for the purpose of the appeal was Rs. 1,000. The appeal was dismissed on the ground that the value was in excess of Rs. 5,000. The District Judge directed that the memorandum of Appeal be returned to the appellant for presentation to the Chief Court. The appellant, thereupon, went to the Chief Court of Oudh. The appeal being time-barred a prayer for extension of time was made under Section 5 of the Limitation Act. The application for extension was dismissed on the ground that counsel did not exercise due care and attention and acted with gross negligence in the matter. The appellant thereafter came before the Judicial Committee. The Privy Council held that the counsel could not be deemed to have been negligent in valuing the appeal nor should his action be described as "gross negligence". The facts therefore, according to the Judicial Committee, disclosed a "sufficient cause" within the meaning of Section 5. At page 278

² AIR 1937 PC 276

the Privy Council observes :-

"Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the Section though there is certainly no general doctrine which saves parties from the results of wrong advice." At page 277 it is observed :-

"The Chief Court's refusal to admit the appeal was based on the view that counsel 'did not exercise due care and attention and acted with gross negligence in the matter'. If this opinion be correct, their Lordships will assume that in the present case it would suffice to justify the dismissal of the appeal. It clearly involves, however, that the view taken was not such as could have been entertained by a competent practitioner exercised reasonable care."

23. Along with these observations of the Judicial Committee we may take into consideration what Lord Justice Brett said in *Highton v. Treherne*³, The learned Lord Justice observed :-

"A suitor who suffers from want of due skill and care on the part of his legal adviser must take the consequences, but has a remedy against the legal adviser; but when there is a *bona fide* mistake, not attributable to negligence or want of due skill, it is otherwise. It seems to me obvious that this Court has jurisdiction and right to enlarge the time on the present occasion..... If there had been a *bona fide* mistake not attributable to want of reasonable skill at the time when the mistake was made and it had also been shown that the profession generally was in doubt as to the practice with respect to this matter, I should have thought that special circumstances existed upon which to grant an extension of time."

24. The principles enumerated above appears to have been followed by Indian Courts repeatedly. References, for instance, may be made in this connection to *Kshetramoni Dasi v. Surendra Mohan*⁴, *Chandramull Indrakumar v. J.N. Goenka*⁵, *Asaram v. State*⁶, *Bijanlata Basak v. Bhudhar Chandra*⁷, and *Mariambai v. Hanifabai*⁸,

25. The position in law as it appears from the above quotations seems to be that there is no general rule that whenever a wrong advice is given by a lawyer the party concerned may apply under Section 5. But circumstances of a particular case may give rise to sufficient cause envisaged by Section 5. An applicant applying for condonation of delay in such cases has to establish by evidence : (a) that the advice was given by a skilled or competent person; (b) that the lawyer who gave the opinion exercised reasonable care; (in other words, the advice was the result of a *bona fide* mistake not attributable to negligence or want of due skill) : and (c) that the view taken by the lawyer was not (sic) such as would have been entertained by a competent person exercising reasonable skill.

26. Bearing the above principles in mind, we have to examine the averments in the present petition for condonation of delay. The averments are as follows :-

"(1) That your petitioner filed an election petition on April 17, 1967, being 45

days from the date of the election of the returned candidate, namely, respondent No. 1, as required under Section 81 of the Representation of the People Act, 1951, as amended by Act 47 of 1966.

(2) That your petitioner met his counsel .. on April 6, 1967 for the purpose of filing an election petition; but he was advised by his counsel of file the election petition on April 17, 1967, as according to the petitioner's counsel, 45 days are to be counted from the date of the election of the returned candidate as duly elected under Section 67 and not Section 67A of the Representation of the People Act, 1951, as amended by Act 47 of 1966, which has referred to the date of the election of a candidate but not the returned candidate.

(3) That assuming 45 days are to be counted in terms of Section 67A of the Representation of the People Act, 1951 and the Election Petition was filed on April 17, 1967 only 7 day's delay has been made and such delay is due not to the fault or latches of your petitioner but on the instructions given by his Counsel.

(4) The petitioner submits that there is no period of limitation prescribed for election petitions; but there is a prescribed period.

(5) That in view of the patent ambiguity in the language of Section 67A read with Section 66 as amended by the Representation of the People Act, 47 of 1966, your petitioner submits that the delay may be condoned and. sufficient cause for condonation of delay under Section 5 of the Limitation Act has been made out."

27. There is no affidavit in this case be the lawyer concerned. The Court is not at all told by the applicant or by the lawyer through an affidavit that the advice was given after exercising reasonable care. The applicant when he argued in person submitted to me that the ingredients of reasonable skill and diligence of hit; counsel are implied in his averments in paragraph 2 of the petition. I am of the view that one of the conditions precedent for exercise of discretion under Section 5 of the Limitation Act cannot be satisfied by implication alone. The petition suffers from the defect that it is silent as to the manner in which the advice was obtained and the circumstances in which it was tendered. If there was a written opinion, a copy of the opinion should have been annexed to the petition. In that case, the Court would have had the opportunity of ascertaining the reasoning on which the opinion was based. If the opinion was oral, sufficient material should have been available to the Court to establish that there was no negligence or want of reasonable skill on the part of the lawyer concerned. Moreover, in my view, if Sections 81, 79(f), 67 and 67A were read together, it was impossible to come to the conclusion that the period of limitation for an election petition would start from the date of publication of the result in the Official Gazette.

28. I also wish to observe that the petition in the instant case does not appear to me to be a petition for condonation of delay simpliciter. On the contrary, the petitioner's primary contention is that he is within time and the petitioner wants the Court to accept this view : (vide especially paragraph 1 of the petition quoted above, which is verified as true to the petitioner's knowledge). But assuming that this view is not correct, the petitioner submits, the delay should be condoned

inasmuch as an erroneous advice was given to him. In my Opinion, a petition for condonation of delay cannot be made in this form. If the petitioner wants that the delay should be condoned, he should frankly admit that the petition is barred; but he should be excused for the delay owing to a wrong advice given by a competent lawyer who had exercised reasonable care and skill in giving the advice, on a matter which was capable of more than one interpretation. The averments in the petition before me, however, are of an altogether different nature.

29. Lastly, besides the principles discussed above, I cannot ignore the fact, while considering whether or not there is sufficient cause in the instant case, that the petitioner in his affidavit affirming the petition describes himself as a legal practitioner. When he argued in person, it seemed to me that he was a fairly experienced lawyer. I am reluctant to accept that he was not aware of the relevant provisions of the Representation of the People Act, 1951, particularly when he was a candidate in a hotly contested election and had lost by a narrow margin. In any event, it is permissible to say that he should have been conscious of these provisions as he was intending to challenge the result of the election. He has told me in course of his arguments, although nothing is stated in the petition, that when his lawyer gave that advice, out of "decency" or "courtesy" he accepted the advice and decided on filing his petition on the 17th April, 1967. The explanation did not appeal to me at all.

30. For all the reasons aforesaid I am of opinion that "sufficient cause" has not been made out in this application for condonation of delay and the application, which the lawyer had withdrawn but the petitioner personally pressed, is dismissed. I also hold that the election petition herein is barred by limitation and as such it cannot be entertained by this Court. The election petition is also dismissed. There would be no order as to costs.

Petitions dismissed.