MADHYA PRADESH HIGH COURT

Sunderlal Mannalal

Vs.

Nandramdas Dwarkadas

Misc. Petn. No. 205 of 1957
(M. Hidayatullah, C.J. and B.K. Chotjdhuri, J.)

16.10.1957

ORDER

M. Hidayatullah, C.J.

1. This petition under Article 226 of the Constitution seeks a writ or prohibition against the Election Tribunal, Ujjain, in a matter of the trial of Election Petition No. 101 of 1957. which was dismissed on 10-9-1957 in default of the appearance of the petitioner before the Tribunal but was restored four days later. The petitioner also seeks a writ of certiorari quashing the order of restoration passed on 14-9-1957.

2. The facts of the case are simple. This case was made over to Sri Manzarali Razvi. who was appointed Election Tribunal, Ujjain, by the Election Commission. The case was listed for 10-9-1957 for hearing and was dismissed at 12-10 P.M. in default of the presence of the present respondent No. 1 or his counsel. It appears that an application for restoration supported by an affidavit was made by the counsel for respondent no. 1 on the same day at 12-30 P. M.

In the affidavit it was stated by Sri B. E. Nahata, counsel for respondent no. 1, that respondent No. 1 having lost his mother-in-law asked the council to attend the hearing at Ujjain, that Sri Nahata left Mandsaur and reached Badnawar, when the car in which he was travelling started to give trouble, and that ten miles after BarNagar the car stopped at a river and the progress was delayed. The counsel therefore requested that the case be restored and heard. A notice of the application was served by Sri Manzarali upon the junior counsel of the present, petitioner, who at first declined to take the notice but insisted that fresh costs should be obtained from the party before the notice was served on him.

The notice was in fact received by Sri Bhargava, who on the date when the restoration

took place made many contentions, to which we shall refer later.

3. The gist of the matter is that no reply to the affidavit was filed, though it is complained that no opportunity was given. But we feel that in view of the service of the notice on Sri Bhargava on 10th September and the postponement of the case by four days before the restoration order was made there was ample opportunity for the present petitioner to have filed a reply to the affidavit if he had cared. We leave out of consideration the contentions which Sri Bhargava made at the time of the hearing of the petition on the 14th September.
One of his contentions was that he was not competent to receive the notice because his work had finished when the original petition had been dismissed on 10th September. He, however, asked for security, and Sri Manzarali ruled that having insisted upon fresh security he had acted for the party and therefore was liable to be served with the notice of the application for restoration. In our opinion, Sri Manzarali, the Tribunal, in deciding this way was perfectly right. It appears that having gained a position in which the election petition had been dismissed an attempt was made to keep the order going but it failed.

4. We now come to the merits of the application which has been made before us. It is contended that under the Representation of the People Act there is no power to restoration. It was frankly admitted that there is also no power of dismissal; but it was contended that under sections 98 and 99 the Tribunal once it has dismissed the election petition and awarded costs is functus officio and cannot thereafter restore the election petition because no such power is conceded' by the Act. It was also contended that against that order there was only an appeal under section 116A of the Representation of the People Act. Section 98 deals with the ultimate disposal on merits of the election petition and not with interlocutory orders of this character. In fact, section 116-A might not be adequate as a remedy in such cases if it is at all in point.

5. We had occasion to deal with the powers of the Election Tribunal recently in a case filed by Sri Kamath : *Hari Vishnu Kamath v. Election Tribunal, Jabalpur,* [1] There we had shown that the Tribunal is invested with certain enumerated powers under S, 92 of the Representation of the People Act. But a general provision exists in the Act which allows the Election Tribunal to act in accordance with the Civil Procedure Code as far

as it may be made applicable. In fact, the injunction to the tribunal is to try the election, petition, as nearly as may be, in accordance with the Civil Procedure Code and the chapter applicable to the trial of suits in the Code. Now the Act does not give any power of dismissal. But if is axiomatic that no Court or tribunal is supposed to continue a proceeding before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which every tribunal possesses. Reference was made to the Bill in which Section 111-A had been proposed and was not accepted by the Select Committee. We do not think that the citation of the Bill or of the Select Committee Report is proper; but we mention this fact because the citation instead of supporting the present petitioner in fact goes against him. The intention, if any, in deleting the proposed Section 111-A must have been to leave the powers exercisable under the Civil Procedure Code intact. Now, the Civil Procedure Code also provides for dismissal of suits under the 9th Order. There is also an additional power of the Court to say that a particular proceeding before it is not being prosecuted and therefore is being struck off. The order which was made on the 10th September, was of this nature. In our opinion, no express provision in the Act was necessary to empower the Court to make the order of dismissal in default.

6. That being the position, the question arises whether having once dismissed the petition the tribunal must be deemed to be functus officio, as has been contended before us. Here the facts of the case are most eloquent. Between the hour of 12 noon and 5 minutes past 12 noon there was a telephonic communication going on between the party in default and the Superintendent of Collectorate Office. The Superintendent of the Collectorate Office was informed that there had been a slight delay on the road and that the counsel for the party would appear a little later. The Superintendent sent a chit to the Reader of the Tribunal, which unfortunately reached just five minutes too late and was placed before the Tribunal at 15 minutes past 12. In other words before the order was made by the Tribunal there was an attempt to communicate to the Tribunal the fact of the unfortunate delay which had taken place on the road and to seek for a little indulgence of time. But for the fact that there was a delay of five minutes, the communication would have arrived in time and we have no doubt whatever that the Tribunal would have adjourned the case a little while to enable the counsel for the petitioner to appear before it. The little delay was noticed by the Election Tribunal, which permitted the counsel to put in an application for restoration immediately and also called the counsel for the present petitioner to take notice. The Senior Counsel had immediately left Ujjain and gone back to Indore. In fact, he had

been insisting that the case be taken up early so that he might be able to return to Indore forthwith. In the absence of the senior counsel, the notice of the application for restoration was served upon the junior counsel who, as has already been stated, raised a number of contentions to avoid service.

7. The delay in this case is both unfortunate and very slight. There is no doubt that counsel did appear 20 minutes after the order had been made. There is also enough material to show that counsel attempted to communicate to the Tribunal the reason of his delay and succeeded in sending a message to the Superintendent of the Collectorate before the order had been passed. The delay which took place was between the receipt of the message by the Superintendent of the Collectorate and its communication to the Tribunal. This involved a delay of just five minutes.

8. No doubt, the Act does not lay down in so many words that a petition dismissed in these circumstances can be restored; but we take it that the inherent powers which every Civil Court exercises are vested in the Tribunal It is the inherent right of a Court to restore proceedings dismissed by it ex debito justitiae when sufficient cause has been made out, not for the absence but for the slight delay of five minutes. If this were not so, parties will be able to play hide and seek. In our opinion the petition which has been made before us is frivolous. The Election Tribunal did posses the inherent power to restore the petition debito justitiae and, if we may say so, has acted quite correctly in restoring it.

9. The petition fails and is dismissed without notice to the other side. The application for stay also fails and is dismissed.

Petition dismissed.

Cases Referred.

1. Misc. Petn. No. 155 of 1957, D/-9-9-1957 : AIR 1958 Mad Pra 168