

MADHYA PRADESH HIGH COURT

Gulaher Ahmad

Vs.

Election Tribunal Chhatarpur

Misc. Petn. No. 189 of 1957, Decided on 23.1.1958, to quash the order passed by
Election Tribunal, Chhatarpur, 26.8.1957
(M. Hidayatullah, C.J. and B.K. Choudhuri, J.)

23.01.1958

ORDER

M. HIDAYATULLAH, C.J.

1. This is an application under Articles 226 and 227 of the Constitution of India directed against an order passed by the Election Tribunal, Chhatarpur in election petition no. 114 of 1957, on 26th August, 1957.

2. The election out of which the election petition arose was to the legislative assembly of Madhya Pradesh from Amarpatan constituency. The tenth respondent Sri Lal Behari Singh was a candidate but he retired from the contest under, Section 55-A of the Representation of the People Act, 1951 (hereinafter called the Act) on 19th February, 1957. At the election Sri Ram Hit Gupta, the second respondent was declared elected on 6th March, 1957. The petitioner, Sri Gulsher Ahmed, was also a candidate, and he filed the election petition challenging the election of Sri Ram Hit Gupta. In his petition he did not join Sri Lal Behari Singh. Before the Election Commissioner a contention was raised that the petition was liable to be dismissed in view of the non-joinder of Sri Lal Behari Singh. The Election Commissioner at first fixed the case for consideration of this objection, but later left the matter open for the decision of the Election Tribunal and did not express any opinion. When the petition came before the Election Tribunal, the preliminary objection was taken up for consideration at the instance of Sri Ram Hit Gupta. It may be mentioned that Sri Lal Behari Singh appeared and filed an application for being made a respondent to which the petitioner made no objection and thus Sri Lal Behari Singh came to be made a party to the dispute.

3. By the order dated 26th August, 1957 the Election Tribunal dismissed the petition, purporting to act under Sub-Section (3) of section 90 of the Act.

4. The aggrieved petitioner did not file an appeal under section 116-A of the Act. He presented a petition purporting to be under articles and 227 of the Constitution for getting the order of the Election Tribunal quashed. At the hearing, a preliminary objection was taken that the petition was incompetent because an adequate statutory remedy was available to the petitioner. We heard arguments on this objection and announced to the parties our opinion that the objection must be sustained. We stated at the time that the detailed reasons would be given later, and we do so now. We also agreed not to dismiss the petition there and then but to defer it for two days, while our reasons were being prepared.

5. The short question is whether an appeal can be said to lie from the impugned order under section 116-A of the Act. That section reads as follows :

"(1) An appeal shall lie from every order made by a Tribunal under section 98 or section 99 to the High Court of the State in which the Tribunal is situated.

... .."

It is clear that if the impugned order can be said to be an order under section 98 of the Act, however it may have been described by the learned Tribunal, an appeal was open, and it was the statutory remedy to be followed.

6. The learned counsel for the petitioner contended that the power to dismiss an election petition for breach of section 82 of the Act (which is the breach held to have taken place in this case) is given by the third sub-section of section 90 of the Act. That sub-section is not mentioned in Section 116-A and therefore no right of appeal against such an order is granted by the Act. The learned counsel also referred us to the words of section 98 which are as follows :

"Decision of the Tribunal.-At the conclusion of the trial of an election petition the Tribunal shall make an order -

(a) dismissing the election petition; or"

(The rest of the section is not material). The learned counsel drew our special attention to the words: 'at the conclusion of the trial of an election petition' which, he said, did not cover orders under Sub-Section (3) of section 90 of the Act. According to him, an order under that sub-section is an order in limine and is not an order 'at the conclusion of the trial'. The opposite party contended that the trial commences with the making over of the petition to the Election Tribunal and comes to an end with the dismissal of it, albeit without a detailed hearing, by an order under section 98 of the Act. According to the answering respondent, the power to dismiss an election petition for non-joinder of a respondent is derived from the third sub-section of section 90 of the Act, but it is exercised under section 98 of the Act.

7. There is a detailed examination of Chapter III of Part VI of the Act by their Lordships of the Supreme Court in *Harishchandra v. Triloki Singh*,¹ No doubt, their Lordships of the Supreme Court in that case were dealing with the second sub-section of Section 90, and incidentally also with the fourth sub-section, and did not refer to the third subsection, but the decision of their Lordships that the word 'trial' includes all the proceedings after the election petition is made over to the Tribunal for trial is relevant. Their Lordships in conclusion stated that, in their opinion, the provisions of Chapter III of Part VI of the Act read as a whole clearly showed that 'trial' was used as meaning the entire proceedings before the Tribunal from the time when the petition was transferred to it under section 86 until the pronouncement of the award. It is to be noticed that Sections 86 to 107 of the Act are included in Chapter III *ibid*. It is a canon of interpretation that the same word should, as far as possible, be given the same meaning, unless the context otherwise requires. We are concerned with the trial of an election petition. It cannot be gainsaid that the trial commenced with the making over of the election petition to the Tribunal. This readily follows from their Lordships' decision in the above-cited case. We also know that the trial once commenced need not be only a hearing in the shape of examination of witnesses and arguments on the testimony led, but may embrace preliminary stages, like recording of statements, filing of documents, and framing of issues. It would appear from this that the moment an election petition is made over to the Tribunal the trial for purposes of Chapter III commences. Once the trial commences it must necessarily go on till, to borrow the words of their Lordships of the Supreme Court, 'there is an award by the Tribunal'. It may take the shape of a pronouncement upon all the controversies set down for trial or it may take the shape of a preliminary controversy going to the root of the matter decided in limine. In the present case the controversy was, to begin with, whether in

the election petition as presented all the necessary parties had been joined or not. The penalty for non-joinder of necessary parties is the dismissal of the election petition. That dismissal can be ordered by the Election Commission, and where the Election Commission, as here, has failed to order the dismissal, by the Election Tribunal. The question is whether such an order can be said to be 'at the conclusion of the trial'. Now, the trial itself may not be of all the matters which the petitioner might have raised by his election petition. It may be a trial only of one fundamental matter, and the decision may be with respect to the petition as a whole. The power to dismiss an election petition for want of proper parties has been conferred by the third sub-section of section 90 of the Act. That power excludes the discretion of the Tribunal to allow joinder of fresh parties, and in effect circumscribes that discretion completely. Where to the satisfaction of the Tribunal in the course of the trial, it is made to appear that a party ought to have been joined as required by section 82 of the Act, the Tribunal is left no option but to dismiss the petition. Such an order concludes the trial of the election petition and must be taken to be an order under section 98 of the Act. Section 98 also gives power to dismiss an election petition at the end of the trial. The trial, brief as it may be for purposes of determining whether all necessary parties are present there or not, is a trial nevertheless brought to a conclusion by the order of dismissal of the election petition. In our opinion, the power exercised under Sub-Section (3) of section 90 is a power directly exercised under section 98 of the Act.

8. We are fortified in this conclusion not only by the reasoning of their Lordships of the Supreme Court in the above-cited case where it was stated that the trial commences when the Election Tribunal is made over the petition, but also by a reading of several other sections of the Act where Sections 98 and 99 are mentioned. In section 103 the Tribunal is required to communicate its orders to the Election Commission and to transmit the records of the case. It is there provided :

"The Tribunal shall, after announcing the orders made under Sections 98 and 99, send a copy thereof to the Election Commission and the records of the case to the District Judge of the district within which the place of trial appointed under section 88 is situate, or if such place is in a presidency town to the Chief Judge of the Court of Small Causes having jurisdiction there, as the case may be."

Again in section 106 it is provided:

"As soon as may be after the receipt of any order made by the Tribunal under section 98 or Section 99, the Election Commission shall forward copies of the order to the appropriate authority and. in the case where such order relates to an election to a House of Parliament or to an election to the House or a House of the Legislature of a State, also to the Speaker or Chairman, as the case may be, of the House concerned, and shall cause the order to be published

(a) Where the order relates to an election to a House of Parliament, in the Gazette of India as well as in the Official Gazette of the State concerned; and

(b) where the order relates to an election to the House or a House of the Legislature of the State, in the Official Gazette of the State."

Again in section 107 it is provided that every order of the Tribunal under section 98 or section 99 shall take effect as soon as it is pronounced by the Tribunal. Even in Section 116-B finality is given to the decision of the High Court on appeal under Chapter IVA of Part VI of the Act, and, subject only to such decision, to the order of the Tribunal under section 98 or section 99 of the Act, which is to be treated as final and conclusive.

9. It is impossible to think that the order passed by the Election Tribunal under section 90, Sub-Section (3), was not meant to be communicated to the Election Commission, that the record of the proceedings before it were not to be sent to the District Judge, that the order of the Tribunal was not to be communicated by the Election Commission to the Speaker or Chairman of the House or a House of the Legislature concerned, that the order was not to take effect as soon as it was pronounced by the Tribunal or that it was not to be final and conclusive.

10. The omission of Sub-Section (3) or section 90 from Section 116-A of the Act is on a par with an omission of that sub-section from other sections. The intention is that the trial, whatever form or length it may have, is only to be concluded by an order under section 98. Till an order under that section is passed, the trial must be deemed to be continued and the election petition must be deemed to be in the process of trial. When an order is made dismissing an election petition under Sub-Section (3) of Section 90, it is also an order at the conclusion of the trial dismissing the election petition under section 98 of the Act. In our opinion, an effective order cannot be passed by the Election Tribunal, except under section 98 of the Act. Any order of the Tribunal

dismissing an election petition may be sustained on the power derived by it from other parts of the Act, but it is referable only to section 98 for purposes of all the matters which are provided in the Act in various places, including an appeal against its order under section 116-A. To read it in any other way would be to create an amount of confusion in the intent and policy of the law which, we do not think, is open to us. We would also be required to say that there was no trial prior to the dismissal of the petition which, in view of the Supreme Court decision, would not be correct.

11. It was argued that an appeal is a creature of statute and there is no intendment with regard to an appeal. We entirely agree, but we do not think that the omission to mention Section 90, Sub-Section (3) in Section 116-A has the slightest effect of negating an appeal. In our opinion, though the power may be taken from Sub-Section (3) of Section 90, it is really exercised under section 98 of the Act, and an appeal follows as of right.

12. We must not be understood as saying that an election petition can be dismissed under Sub-Section (3) of section 90 alone. We are of the opinion that Sub-Section (3) of section 90 was introduced to curtail the jurisdiction to allow parties to be joined, subject to the law of limitation, as is possible under the Code of Civil Procedure. That discretion was taken away and the law directed the Election Tribunal, as also the Election Commission, to dismiss election petitions which did not include all necessary parties. But we are clearly of the opinion that the real dismissal of the election petition takes place by virtue of the power under section 98 and it makes out the termination of the trial of the election petition. It was contended that the trial must reach a conclusion before section 98 is reached. This the whole question. What the learned counsel was obviously thinking is 'trial' in the narrow sense of hearing witnesses and deciding upon testimony. Their Lordships of the Supreme Court in the above-cited case have pointed out that the word 'trial' is susceptible of two meanings, and that it, at any rate, in the sections to which their Lordships referred in the course of the judgment, bears a wide meaning. We are of the opinion that the same meaning must be given in relation to section 98 which also figures in the same Chapter. There also the word 'trial' means trial at all stages after the petition has been made over to the Election Tribunal for disposal. That trial comes to an end when the Tribunal thinks that there is no option but to conclude the trial by dismissing the petition. This is what happened before the Tribunal below, and we think that its order must be taken to be an order under section 98 read with Section 90 (3) of the Act with a right of appeal there from.

13. It has been laid down in a large number of cases that where there is an adequate alternative remedy, the powers under Articles 226 and 227 of the Constitution should not ordinarily be exercised. An election dispute is a dispute of a very special kind. An appeal is subject to its own rules in the matter of security and limitation. We should not by interposing our discretionary powers under Articles 226 and 227 of the Constitution create a parallel remedy which the law did not contemplate. It is to be noticed that the orders of the Election Tribunal are made final and conclusive subject to a decision by the High Court on appeal. The history of this amendment clearly indicates that the right of appeal was granted because the High Courts were exercising discretionary powers under Articles 226 and 227 of the Constitution. It was with a view of making a second scrutiny of the decision of the Election Tribunal that the right of appeal to the High Court was granted. In those cases, therefore, where the right of appeal can be invoked, it would be wrong for the High Court not to insist upon proper appeal being filed but to resort to the extraordinary jurisdiction under Articles 226 and 227 of the Constitution.

14. We accordingly hold that the petitioner in the present case had a right of appeal open to him, which he has not exercised, and we should not therefore interfere by exercising our v. extraordinary powers under Article 226 or Article 227 of the Constitution. We dismiss the petition incompetent with costs.

Petition dismissed.

Cases Referred.

1. AIR 1957 SC 444