PATNA HIGH COURT

Shah Mohammad Umair

Vs

Ram Charan Singh

Misc. Judicial Case No 78 of 1953

(Ramaswami and Sinha, JJ.)

08.09.1953

JUDGMENT

Sinha, J.

1. This is an application under Articles 226 and 227 of the Constitution, and arises out of an election petition filed by the petitioner, Shah Mohammad Umair, for a declaration that the election of Ram Charan Singh, opposite party no. 1 to the Bihar Legislative Assembly from the Kurtha Constituency was void, and also for a declaration that the petitioner had been duly elected. Three other persons, besides Ram Charan Singh, namely, Parasnath Sharma, Rajaram Singh son of Sri Dukharan Singh, and Rajaram Singh son of Sri Mukhlal Singh, were made respondents to the election petition. These three persons and the opposite party no. 1 and the petitioner were validly nominated candidates at the election, that is to say, they had not withdrawn their candidature. There were three other persons, namely, Siasaran Singh, Ramprakash Mahton and Balmiki Mahton, who were duly nominated candidates for the election, but, within the time allowed, they had withdrawn their candidature and they were not in the field at the time of the actual election. These three persons were not made parties to the election petition. A point was raised on behalf of Ram Charan Singh, the only contesting respondent, that the election petition should be dismissed on the preliminary ground of non-joinder of these three persons and that the Election Tribunal need not go into the merits of the petition. Issue No. 2 ran as follows :

> "Is the petition liable to be dismissed on the ground of non-joinder of parties?" Sometime later, the petitioner filed an application for amendment of the election petition by adding the aforesaid three persons as respondents.

2. The election petition was heard on issue no. 2 only and also on the question as to whether the petition for amendment should be allowed. The Election Tribunal, by a majority of 2 to 1, held that the election petition was not maintainable because of the non-joinder of the aforesaid three persons, and the amendment of the petition sought for should not be allowed; and the election petition was dismissed.

3. Article 329, sub-clause (b) of the Constitution provides that

> "no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

In accordance with the provision aforesaid, the Representation of the People Act (43 of 1951) providing

> "for the conduct of elections to the House of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections,"

was enacted by Parliament in 1951. This Act will hereafter be referred to as the Act in the course of my judgment.

4. Section 80 of the Act says that

> "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part" (Part VI)"

and section 81 lays down the procedure for presentation of election, petitions. It says that

> "an election petition calling in question any election may be presented on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 to the Election Commission by any candidate at such election or any elector in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed."

The explanation to the section defines 'elector' and mentions the authority to whom the election petition should be presented and the manner in which it should be presented, namely, by the person making the petition, or by a person authorized in writing in this behalf by the person making the petition; or by registered post.

5. Section 82 runs as follows :

> "A petitioner 'shall join' as respondents to his petition all the 'candidates who were duly nominated at the election' other than himself if he was so nominated."

The important words have been underlined (here in ' ') by me. Section 83 deals with the contents

of the petition; section 84 mentions the relief that may be claimed. Section 85 is in the following words :

> "If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition.
> Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may, in its discretion, condone such failure."

6. Chapter III of Part VI dealing with trial of election petitions starts with section 86 and it deals with the appointment of Election Tribunal. Sub-section (1) of section 86 runs as follows :

> "If the petition is not dismissed under section 85, the Election Commission shall appoint an Election Tribunal for the trial of the petition."

Section 90 prescribes the procedure to be followed before the Tribunal. Sub-section (1) of section 90 says that

> "The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be published in the Official Gazette, and at any time within, fourteen days after such publication, any other candidate shall, subject to the provisions of section 119, be entitled to be joined as a respondent. Sub-section (2) says that the "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 (Act 5 of 1908), to the trial of suits."

The provisos to sub-section (2) are not important for the purpose of this application. By sub-section (3) of section 90, the provisions of the Indian Evidence Act are made applicable subject to the provisions of this Act; and sub-section (4) is in the following words :

> "Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

7. Section 91 deals with the procedure regarding appearance before the Tribunal. Section 92 defines the powers of the Tribunal and says that it shall have the powers which are vested in a Court under the Code of Civil Procedure when trying a suit in respect of the following matters :

> (a) Discovery and inspection;
> (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
> (c) compelling the production of documents;
> (d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence taken on affidavit; and

(g) issuing commissions for the examination of witnesses, and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act 5 of 1898).

Section 93 deals with documentary evidence and section 94 with secrecy of voting. Section 98 relates to the decision of the Tribunal, and it runs as follows :

> "At the conclusion of the trial of an election petition the Tribunal shall make an order :
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of the returned candidate to be void; or
>
> (c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or
>
> (d) declaring the election to be wholly void."

8. Section 99 mentions the other orders which may be passed by the Tribunal in case any charge is made in the petition of any corrupt or illegal practice having been committed at the election and also regarding fixation of the amount of costs payable specifying the persons by and to whom to be paid. Section 100 deals with grounds for declaring an election to be void, and section 101 enumerates the grounds for which a candidate other than the returned candidate may be declared to have been elected. Section 108 refers to withdrawal of petitions before appointment of Tribunal and section 109 with withdrawal of petitions after appointment of Tribunal. Section 110 prescribes the procedure for withdrawal of petitions before the Election Commission or the Tribunal. Sections 112, 113 and 114 deal with abatement of election petition on the death of the sole petitioner or of the survivor of several petitioners. Sections 115 and 116 refer respectively to substitution on death of petitioner and abatement or substitution on death of respondent. Section 115 says that

> "any person who might himself have been a petitioner may, within fourteen days of such publication (publication of the fact of death as provided for in sections 113 and 114), apply to be substituted as petitioner and upon compliance with the conditions of section 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit."

Section 117 says :

> "The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favor of the Secretary to the Election Commission as security for the costs of the petition."

Other sections of this Chapter are not relevant.

9. I have referred to these sections to show that the Act deals exhaustively in regard to the presentation of election petition, the parties to the petition, the contents of the petition, the relief's which may be claimed, the dismissal of the petition on preliminary grounds by the Election Commission, the appointment of the Election Tribunal, the procedure to be followed before such Tribunal, the powers of the Tribunal, the decision of the Tribunal and withdrawal and abatement of election petition and substitution.

10. Now the question for consideration is whether the Election Tribunal in question had any jurisdiction to dismiss the election petition on the ground that some of the candidates who had been duly nominated but who had withdrawn their candidature were not made parties to the election petition. Mr. Singh, learned counsel on behalf of the petitioner, has not challenged the decision of the Tribunal refusing to amend the petition. His sole contention is that the Tribunal had no jurisdiction to dismiss the petition on the ground of non-joinder of those candidates who though duly nominated had withdrawn their candidature and were not candidates at the actual election. It will be seen that section 85 makes it obligatory upon the Election Commission to dismiss the election petition if the provisions of section 81 (regarding presentation of petition), section 83 (regarding contents of the petition) or section 117 (regarding costs to be deposited by the petitioner) have not been complied with. The Commission has, however, been given the power under the proviso to that section to condone the delay on sufficient cause being shown by the petitioner for his failure to present the petition within the prescribed period. Section 86 says that if the petition is not dismissed under section 85, the Election Commission shall appoint an Election Tribunal for the trial of the petition. When the Tribunal is appointed, the Tribunal is also given the discretion under section 90(4) to dismiss the election petition on the grounds mentioned in section 85, namely, for non-compliance with the provisions of section 81, section 83 or section 117, but it is not obligatory upon the Tribunal to dismiss the petition on those grounds.

11. Now Section 82, which deals with "parties to the petition" finds no place in section 85 or section 90(4). It is obvious from the exclusion of section 82 from section 85 or section 90(4) that mere non-compliance with section 82 was not intended to make it obligatory upon the Election Commission to dismiss the election petition under section 85 or to give any discretion to the Election Tribunal to dismiss the petition under section 90, sub-section (4). The Tribunal in this case has held by a majority view that the word "shall" in section 82 makes it absolutely essential to join all candidates who were duly nominated at the election as respondents to the petition, and further that as the word "shall" is mandatory, non-compliance with the provisions of section 82 is fatal and the election petition was bound to be dismissed on such non-compliance. The questions that arise for consideration are : (1) whether the provision contained in section 82 is imperative and mandatory in the sense that failure to join all candidates, who were duly nominated at the election, entails dismissal of the petition on that ground alone, and (2) whether the expression "candidates who were duly nominated at the election", occurring in section 82, can cover the case of those candidates who had withdrawn their candidature after nomination.

12. Mr. Sen Gupta, the Chairman of the Tribunal, with whom Mr. Nirmal Krishna Ghose, another member, agreed, has held that these persons were necessary parties to the election petition under section 82, that the provision for dismissal for non-compliance is inherent in the section (section 82) itself; that the Election Tribunal is not only empowered but is bound to dismiss the election petition for failure to comply with the provisions of section 82, and that he had no discretion to

proceed with the election petition if there was no compliance with the provisions of section 82. That non-compliance, in his view, is fatal. The third member of the Tribunal, Mr. Govind Saran, has given a dissentient judgment and has held that these persons, who had withdrawn their candidature, were mere proper parties, that section 82 is merely directory and the election petition cannot be dismissed on failure to implead such persons. I find myself absolutely unable to accept any of the findings of the Tribunal, and, in my view, the Chairman and the other member have entirely misconceived the scope of the election petition, their jurisdiction and the provision of section 82 of the Act, and I mainly agree with the view of Mr. Govind Saran.

13. The mere use of the word "shall" does not necessarily make the provision imperative; the nature of the provision must depend upon the context and the collocation in which the word "shall" is used, and must be gathered from the intention of the Legislature from the four corners of the Act itself. The Parliament has prescribed that the Election Commission itself shall dismiss the election petition if there is failure to comply with the provisions of section 81, section 83 and section 117. If it was ever meant or intended that failure to comply with the provisions of section 82 should be fatal to the election petition, there was no reason why section 82 should have been omitted from section 85 or section 90(4). All the candidates, who were duly nominated and who had not withdrawn, have been made parties to the election petition. Those duly nominated candidates, who had withdrawn, under section 37, and whose names were not mentioned in the list of valid nominations, under section 38, had no interest greater than the interest of any other elector or voter. These persons were not candidates at the time of the actual election, and their position, therefore, can be no better than the position of any other elector of the constituency. As I have said, if the intention was that the election petition should be dismissed 'in limine' on the ground of non-joinder of a duly nominated candidate, who had withdrawn his candidature under the provisions of this Act, there was nothing to prevent the Parliament from saying so or from mentioning section 82 in section 85 which provides for dismissal of the petition by the Election Commission for non-compliance of the provisions of some of the sections mentioned in that section.
It has been seen that non-compliance with sections 81, 83 and 117 of the Act entails dismissal of the petition by the Election Commission itself as provide for by section 85. When, however, the petition survives the stage envisaged in section 85, and Election Tribunal is appointed, the non-fulfillment of the provisions of sections 81, 83 and 117, which entailed dismissal of the petition, under section 85, does not make it imperative for the Election Tribunal to dismiss the same, but makes it optional with the Tribunal to dismiss it or not to dismiss it (Section 90(4)). This also shows that the Act does not contemplate dismissal of the petition once the Tribunal has been appointed under section 86 on grounds (section 85) which made it obligatory on the Commission to dismiss the petition and much less on grounds not mentioned in section 85.

14. The provision of section 90(1) of the Act gives option to any other candidate to be joined as respondent to the petition subject to the provision of section 119 regarding security for costs, within fourteen days of the publication of the copy of the petition in the Official Gazette, at the instance of the Tribunal. This provision also lends support to the argument that the provisions of section 82 were not imperative, and failure to comply entailed no dismissal of the petition. If the Tribunal was authorised to dismiss the petition because all the duly nominated candidates were not made parties, the provisions of section 90(1) are bound to be made nugatory and useless. If the Tribunal had the option of dismissal on account of non-compliance of section 82, there was no meaning in giving other candidates, not mentioned in the petition, the right to be made party

respondents to the petition within the period mentioned in the section (90(1)). If the provisions of section 82 are mandatory, and the Tribunal is competent to dismiss the petition on account of nonjoinder of some of the duly nominated candidates, the compelling nature of the command of Parliament will disappear if, in their own right, the remaining candidates, not made parties originally in the petition, are made Parties under section 90(1); certainly, the compelling nature of the command of the Legislature cannot be made to depend upon this uncertain event. This also shows that the provisions of section 82 are not imperative.

15. There is still another aspect of the matter. The proceeding before the Election Tribunal is of a representative character. It is not merely a matter between two or more individuals. The matter is of very great importance to the entire electorate, viz., the right of being represented in the Legislature by a duly elected representative, and that matter falls to be decided by the Tribunal. For this reason, extraordinary provisions have been made in the Act in regard to withdrawal and abatement of the petition and substitution (sections 108 to 116). No withdrawal is permitted without the leave of the Election Commission or the Tribunal, as the case may be; withdrawal must be made with the consent of all the petitioners and the petitioner has to pay the costs to the respondents if withdrawal is desired. If the petition for withdrawal is made to the Tribunal notice of withdrawal is to be published in the Official Gazette and any person who could have challenged the election might, within the given period, apply for being substituted as petitioner, and, on compliance with section 117, regarding security, has a right to be substituted and continue the petition. Similar provision is made in regard to abatement of the petition on the death of the petitioner; the fact of abatement is to be published in the Official Gazette, and any person who could have been the petitioner, could be substituted and continue the petition; and like provision is made for substitution in case the respondent dies or does not intend to oppose the petition. Those provisions unmistakably indicate the importance given to the decision of the election petition on its merits and the representative character of the proceeding on election petitions.

16. The matter can be seen from still another point of view. According to the Act and subject to its provisions, the Code of Civil Procedure applies to the Election Tribunal in dealing with election petitions. Apart from the provisions which I have already mentioned, there is no provision for joinder of respondents to the petition except sections 82 and 90(1). The relevant provisions of the Code of Civil Procedure are to be found in Order 1, Rule 3, Rule 6 and Rule. 9. According to Rule 3 of Order 1, all persons may be joined as defendants against whom

> "any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

It is obvious that no relief was claimed or could have been claimed in the election petition against those nominated candidates who had withdrawn their candidature. Rule 6 refers to joinder of parties liablee on the same contract. This rule also, therefore, has no application. Rule 9 says :

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and

> interests of the parties actually before it."

In my opinion, upon the provisions of the Code of Civil Procedure also the Election Tribunal should have held that these persons were not necessary or even proper parties, and that it, had absolutely no jurisdiction to dismiss the petition on that ground. In the case of - *'Sital Prasad v. Asho Singh[1]',* it has been held that O. 1, Rule 9 of the Code of Civil Procedure is not subordinate to Order 34, Rule 1; but if no decree can be passed without affecting the rights of absent parties the suit cannot proceed in their absence and it should be dismissed. But if the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, then, even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present. In the light of these provisions of the Code of Civil Procedure, it cannot be said that the duly nominated candidates, who had withdrawn, were necessary parties to the petition.

17. I have endeavoured to get at the intention of Parliament in enacting this Act and the intention, as appears to me, is that non-compliance with the provisions of section 82 is not fatal. The mere use of the word "shall", torn from its context, cannot make the provision of that section obligatory and imperative. No general rule can be laid down as to whether a provision in a statute is imperative or mere directory, and, as was said in - *'Liverpool Borough Bank v. Turner[2]',*

> "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed."

This view was applied with approval in - *'Ashutosh Sikdar v. Behari Lal[3]',* where section 99 of the Transfer of Property Act was being construed, and the word "shall" found place in the section. To the like effect is the decision in - *'Dharendra Krishna v. Nihar Ganguly[4]',* In my judgment, on the various considerations set out above, the only reasonable interpretation of section 82 is that it is merely directory.

18. Upon a consideration of the whole Act, the interpretation which I have put on the construction of section 82 appears to be the only reasonable interpretation. Where the language employed in an Act is capable of two interpretations, the Court must always lean to the interpretation which is a reasonable one, and discard the literal interpretation which does not fit in with the scheme of the Act under consideration. This principle of construction has been reiterated only recently in - *'Birch v. Wigan Corporation[5]',* where Denning L. J., at page 142, makes the following observation :

> "When there is a fair choice between a literal interpretation and a reasonable one - and there usually is - we should always choose the reasonable one."

On the considerations mentioned above, I hold that the Tribunal had no jurisdiction to dismiss the election petition because of non-joinder of the three persons who were duly nominated but

had withdrawn their candidature.

19. The next question is whether these duly nominated candidates who had withdrawn their candidature, came within the provisions of section 82 - "all the candidates who were duly nominated at the election". I was first impressed with the argument that the expression "candidates who were duly nominated at the election" had reference to the candidates whose nominations were held valid and who had not withdrawn and were candidates even up to the time of the poll, and, therefore, this expression would eliminate candidates who, though duly nominated, had withdrawn their candidature. In this Act, sometimes the expression "candidates for election" and sometimes "candidates at the election" has been used, and I thought that these two different expressions were used with a purpose to draw distinction between the two. But it appears that these two expressions have been used indiscriminately and without any idea of drawing a distinction between the connotation of these two expressions. The expression "candidate for election" is used in section 32 and section 39. Section 32 relates to nomination of candidates for election, and it runs as follows :

> "Any person may be nominated as a candidate for election to fill a seat in any constituency if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act."

Section 39, sub-section (1) is in the following words :

> "Any person may be nominated as a candidate for election to fill a seat in the Council of States to be filled by election by the elected members of the Legislative Assembly of a State or by the members of the electoral college for a Part C State.........if he is qualified to be chosen to fill that seat under the Constitution and this Act."

20. Reading only these two sections together, I was of the opinion that the expression "candidate for election" has been used with reference to a candidate before he has withdrawn his candidature, and that the expression "candidate at the election" meant a "validly nominated candidate" (Rule 2(f) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951) that is to say a candidate who has been duly nominated and has not withdrawn his candidature. But section 40,
which refers to appointment of election agents, does not support this interpretation because sub-section (1) of that section in terms says that the appointment of election agents must be made before delivery of the nomination paper, and it runs as follows :

> "Every person nominated as a candidate at an election shall before the delivery of his nomination paper under sub-section (1) of section 33 or under that sub-section read with sub-section (4) of section 39, as the case may be, appoint in writing either himself or some one other person to be his election agent."

This is the only section brought to my notice in which the expression "candidate at an election" has been used in regard to a candidate whose nomination has not even passed the stage of scrutiny and withdrawal. The use of the prepositions "for" in sections 32 and 39 and "at" in

section 82 cannot, therefore, help in construing the expression "at the election" to mean a validly nominated candidate. If similar words and expressions used in different parts of the statute must be used in the same sense, I am unable to hold that "candidates who were duly nominated at the election" excluded these three persons in question.

21. In the case of - *'Sitaram Hirachand v. Yograjsing Shankarsing*[6]*',* it was held as follows :

> "The object of section 82 is that all parties who were concerned with the actual election and who contested the election should be before the Tribunal, but a person who did not contest the election and who withdrew from the fight does not stand in the same position as candidates who not only were duly nominated but who were candidates at the election."

It appears emphasis was laid on the expression "at the election" occurring in section 82, and it was pointed out that there was a difference between a person nominated as a candidate for election and a candidate at the election, I am unable to take the same view of the expression "candidate at the election" used in section 82 as was taken by their Lordships of the Bombay High Court and, it appears that the provision of section 40 of the Act was not brought to their Lordships' notice. The same view was taken in the case of - *'Sheo Kumar Pandey v. V.G. Oak'*[7]*,* and the decision of the Bombay High Court in the aforementioned case was quoted with approval. In this case also, it does not appear that the attention of their Lordships was drawn to the language of section 40 of the Act. I am, therefore, compelled to hold upon construction of the language used in the different sections that the candidates duly nominated but who had withdrawn their candidature are covered by the provisions of section 82 of the Act.

22. I have already held, however, that the provision is not mandatory, and the failure to join as respondents such candidates who were duly nominated but who had withdrawn their candidature does not entail the dismissal of the petition on that ground alone. Such persons, in my view, are not only not necessary parties but not even proper parties to the election petition, but, as the language of section 82 stands, they should have been made parties to the petition although the failure to make them
parties does not entail dismissal of the petition, and its non-compliance was a mere irregularity. I would, therefore, hold that the dismissal of the petition in the case in hand was without jurisdiction.

23. Mr. Singh, on behalf of the Petitioner, has not challenged the judgment of the Tribunal in regard to the amendment of the petition. I am, therefore, not called upon to deal with that point; but, if, as I have held a duly nominated candidate, who has withdrawn his candidature, is covered by the provisions of section 82, then, he should have been made a party to the petition, and if he was not made a party at the time of the filing of the petition, there was absolutely no bar to make him a party some time later by an amendment of the petition and to such an amendment which was of a formal nature, there was no question of limitation. Section 90(1) of the Act reads as follows :

> "The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each

> respondent and to be published in the Official Gazette, and at any time within fourteen days such publication, any other candidate shall, subject to the provisions of section 119, be entitled to be joined as a respondent."

Section 119 is to the following effect :

> "No person shall be entitled to be joined as a respondent under sub-section (1) of section 90 unless he has given such security for costs as the Tribunal may direct."

Reading these two sections together, it is clear that if any other candidate wants to be joined as a respondent, he must do so within fourteen days from the date of the publication in the Official Gazette, as required by section 90(1), and must deposit such security for costs as the Tribunal may direct. There is no other provision which bars the right of amendment of the petition.

24. Order 1, Rule 10 of the Code of Civil Procedure, sub-rule (2) entitles the Court, at any stage of the proceedings, either upon or without the application, and on such terms as may appear to the Court to be just, to order the name of any person to be struck off who was improperly joined whether as plaintiff or defendant, and to add the name of any person who ought to have been joined either as plaintiff or defendant and whose presence the Court thinks necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Sub-rule (5) of Rule 10 of Order 1 says that proceedings as against any person added as defendant shall be subject to section 22 of the Limitation Act and shall be deemed to have begun only on the service of summons. Sub-rule (5) of Rule 10, in my view, has no application to the present case. No relief can be asked for against a candidate who, though duly nominated, had withdrawn his candidature and was not a candidate at the time of the actual election. If this point had been pressed, I should have held that the Tribunal should have allowed the application for amendment of the petition by adding the names of those candidates who were duly nominated but who had withdrawn their candidature.

25. It is conceded that the Election Tribunal has been dissolved, and it is no longer in existence. In that view of the matter, a writ of certiorari under Article 226 of the Constitution cannot possibly issue. The petitioner has, however, invoked the aid of Article 227 of the Constitution. The relevant portion of Article 227 is sub-clause (1) which runs as follows :

> "Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

There is no doubt that this Court can exercise superintendence over the Election Tribunal in question, but the question is whether under this clause of the Article this Court can judicially interfere with the judgment and order of the Tribunal. In my opinion, the answer must be in the affirmative. The earliest enactment on the power of superintendence of the High Court is to be found in section 15 of the High Courts Act (24 and 25 Victoria, Chapter 104) of 1861. The relevant portion of section 15 was as follows :

> "Each of the High Courts established under this Act shall have superintendence over all

> Courts which may be subject to its appellate jurisdiction, and shall have power to call for Returns..........."

This Act was followed by the Government of India Act, 1915 (5 and 6 George V Chapter 61). Section 107 of that Act repeated almost all the provisions of section 15 of the High Courts Act, 1861, and it reads as follows :

> "Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,
> "(a) call for returns' etc................."

26. Both these Acts give the High Courts power of superintendence over Courts subject to their appellate jurisdiction. This Act was followed by the Government of India Act, 1935 (26 George V, Chapter 2), and section 224 of the Act having enacted all the provisions of section 107 of the Government of India Act, 1915, added another sub-clause (2) which ran as follows :

> "Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision."

Whereas under the earlier Acts the High Court used to interfere judicially with the orders and judgments of the Courts subject to its appellate jurisdiction, this right of judicial interference of the High Court was taken away for the first time by the Act of 1935.

27. It would serve no useful purpose to cite the many instances where the High Court's power of judicial interference was exercised under the Acts of 1861 and 1915. In the case of - *'Parmessar Singh v. Kailaspati[8]',* which was followed in - *'Manmathanath Biswas v. Emperor[9]',* it was held that a Chartered High Court had power under section 107 of the Government of India Act, 1915, to interfere with an order passed by a Magistrate under section 145, Code of Criminal Procedure, where the Magistrate had acted without jurisdiction or had exceeded his jurisdiction. Roe, J., one of the Judges constituting the Bench, upon a review of the previous cases, made the following observation which is worthwhile quoting :

> "the power of superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity had been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be."

28. The Act of 1935, however, found it necessary to take away that power of the High Court. This was the position when the Constitution was made in 1950, and sub-section (2) of section 224 of the Government of India Act, 1935, was deleted from Article 227 of the Constitution. This, in my opinion, clearly shows that the right of judicial interference of the High Court under the Acts of 1861 and 1915 were not only restored but enlarged by deleting the expression "subject to its appellate jurisdiction" occurring in the aforesaid Acts from the Constitution.

29. I am supported in the view, which I have taken of Article 227 of the Constitution, by a number of cases of different High Courts in India, and it is sufficient to mention the case of - *'Bimala Prosad Ray v. State of West Bengal[10]',* and that of - *'Girish Chandra Majhi v. Girish Chandra Maity'[11],* In the latter case, it was held that :

> "Where a tribunal has been set up under a Special Act, it is the duty of the High Court to see, in the exercise of its power of superintendence, that such tribunal acts within the limits of the statute creating it, and applies correctly and properly the laws it is authorised to administer."

30. Reliance was placed by Mr. Sahay, for the opposite party, upon certain observations of their Lordships in the case of - ' AIR 1953 Allahabad 633', already referred to, to the effect that the question as to the proper meaning of the words "duly nominated candidate at the election" in section 82 was a question of law on which the
Tribunal's view should be regarded as final and that it was well known that certiorari and prohibition would not issue to rectify pure errors of law. It was suggested that because the Tribunal had dismissed the petition in the exercise of its jurisdiction, the decision may be right or may be wrong, this Court ought not to interfere under Article 227 of the Constitution. I am unable to countenance this view in its entirety. If the Tribunal has decided a question of law which affects its very jurisdiction, then, in my opinion, this Court must interfere. The result of the decision of the Tribunal that the provisions of section 82 are mandatory has been the dismissal of the petition 'in limine' without its being tried on merits; that is to say on erroneous view of the law, the petitioner has been denied the right to fair trial. Thus it will be seen that because of its wrong decision the Tribunal has refused to exercise the jurisdiction vested in it to come to a decision on the merits of the election petition. I have already held that this is not a mere error of law in the exercise of jurisdiction but it was without jurisdiction to have dismissed the petition on the ground it has dismissed.

31. Mr. Sahay also referred to the judgment of Lord Esher, M.R. in the well-known case of - *'Queen v. Commissioners for Special Purposes of the Income Tax[12]',* in regard to the jurisdiction of inferior Courts or Tribunals, which has been followed by the Supreme Court in the case of - *'Brijraj Krishna v. S.K. Shaw and Bros[13].',* In my opinion, that judgment does not affect the present question and does not run counter to the view I have taken. Mr. Sahay also faintly argued that Article 329(2) of the Constitution prevented this Court from interfering with the judgment of the Tribunal. On being pointed out that the Article in question did not bar interference with the decision of the Tribunal set up under the Act enacted to carry out the very purpose of the Article of the Constitution, the argument was not pressed.

32. Mr. Singh referred to the case of the - *'Bharat Bank Ltd., Delhi v. Employees of the Bharat*

Bank, Delhi[14]', and to that of - *'Veerappa Pillai v. Raman and Raman Ltd[15].',* on the extent of the powers to issue writs of certiorari under Article 226 of the Constitution. But, as I have already indicated that no writ can issue under Article 226 in this case, no useful purpose will be served by reference to those cases. 1 would, therefore, hold that the view of the majority of the Tribunal was wrong and the view of Mr. Govind Saran, who gave a dissentient judgment was right in regard to the construuction of section 82 of the Act. I would, therefore, acting under the power of superintendence under Article 227 of the Constitution, set aside the order of dismissal of the election petition made by the Tribunal which was published in the Gazette of India (Extraordinary) in its issue dated the 5th February, 1953, at page 302, Part II, I would further hold that the petitioner is entitled to his costs of this petition; hearing fee ten gold mohurs.

Ramaswami, J.

32. The main question argued in this case is whether the provision of section 82 of the Representation of the People Act is imperative or merely directory. Section 82 states :

> "A petitioner shall join as respondents to his petition all the candidates who
>
> were duly nominated at the election other than himself if he was so nominated."

The argument put forward on behalf of the opposite party is that the provision of section 82 is imperative and the Election Tribunal was justified in dismissing the election petition on the ground that the petitioner had not impleaded three other persons, viz., Siasaran Singh, Ramprakash Mahton and Balmiki Mahton who are duly nominated candidates for the election. The argument proceeds upon a misconception. The question whether the provision of section 82 is imperative or directory must be answered in the context of the other provisions of the Act. Section 85 states :

> "If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition........."

Section 90(4) makes similar provision with respect to the election tribunal. Section 90 (4) states :

> "Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

34. It is manifest that section 85 and section 90(4) expressly enact that the election commission or tribunal may dismiss an election petition which does not comply with the requirements of section 81, section 83 or section 117. Section 82 is not one of the sections mentioned in section 85 or section 90(4) and these sections do not provide that an election petition may be dismissed for non-compliance with the provisions of section 82. If the provision of section 82 is examined in the context of section 85 and section 90(4) it is obvious that though section 82 is couched in mandatory form its provision is merely directory and non-compliance with section 82 does not affect the jurisdiction of the election commission or the election tribunal to hear and determine

the petition. In a case of this description, the principle to be applied is clear. The principle is embodied in the maxim 'expressio unius exclusio alterius'. The view that section 82 is not peremptory is also supported by the language of section 90(1) of the Act. Section 90 (1) states :

> "The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be published in the Official Gazette, and at any time within fourteen days after such publication, any other candidate shall, subject to the provisions of section 119, be entitled to be joined as a respondent."

35. It is therefore, open to the election tribunal to join as respondent any other candidate to the election petition under the provision of section 90(1) at any time within fourteen days after the publication of the notice in the Official Gazette. This is an additional reason for holding that the duty cast under section 82 upon the petitioner as to joinder of respondents is not imperative in its character. The majority of the Judges constituting the Election Tribunal had, therefore, no justification for dismissing the election petition on the preliminary ground that the provision of section 82 was not complied with. They have proceeded on a complete misconception of section 82 and on account of that misconception they have refused to exercise the jurisdiction vested in them by law.

36. In this case a writ under Article 226 cannot be issued for various reasons; but I agree with my learned Brother that we should exercise our power of superintendence under Article 227 and set aside the order of dismissal of the election petition made by the Tribunal on the 29th of January 1953.
Order accordingly.

Cases Referred.

[1] AIR 1922 Pat 651
[2](1861) 30 LJ Ch 379
[3]11 Cal WN 1011 (FB)
[4] AIR 1943 Cal 266
[5](1953) 1 QBD 136
[6] AIR 1953 Bom 293
[7] AIR 1953 All 633
[8] AIR 1916 Pat 292 (FB)
[9] AIR 1933 Cal 132
[10] AIR 1951 Cal 258 (SB)
[11] AIR 1951 Cal 574.
[12](1888) 21 QBD 313
[13] AIR 1951 SC 115
[14] AIR 1950 SC 188
[15] AIR 1952 SC 192