

(1981) 04 KAR CK 0006

In the Karnataka High Court

Case No : Misc. Petition No. 3 of 1980 in Election Petition No. 74 of 1978

B. Ganganna

APPELLANT

Vs

Returning Officer, M.A. Venkataswamy and Others

RESPONDENT

Date of Decision : 15-04-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, 151

Citation : AIR 1982 Kar 156 : (1981) ILR (Kar) 1543 : (1981) 2 KarLJ 290

Hon'ble Judges : N.D. Venkatesh, J

Bench : Single Bench

Advocate : T.P. Sathish Chandra Kumar, for the Appellant; B.S. Keshava Iyengar A.G. and T.R. Rangaraju, for Kesvy, for the Respondent

Judgement

1. Misc. Petition No. 3 of 1980 is an application, filed by the petitioner -in Election Petition No. 74 of 1978, under S. 151 of the CPC requesting this Court to restore to file Election Petition No. 74 of 1978 dismissed for default (vide order-sheet dated 23-11-1980).

2. The facts are like these: Challenging the election of the 2nd respondent (in E. P. No. 74/78) from the Legislative Assembly Constituency No. 63, Kallamballa, to the Karnataka Legislative Assembly in the general elections held in the month of Feb., 1978, the petitioner had filed E. P. No. 74/78. The contesting respondents had filed their written statements. In the light of the rival pleadings the Court had framed issues. After framing the issues the petition had been set down for evidence of the petitioner. On 23-11-1980 neither the petitioner nor his witnesses were present and, therefore, the petition was dismissed for default. The note made in the order-sheet maintained in Election Petition No. 74 of 1978 re. the framing of the issues, posting the petition for petitioner's evidence, and the order dismissing the election petition for default are extracted below:

"25-10-79: Issues framed. Petition posted for petitioner's evidence from 10-12-1979 and onwards. Meanwhile the petitioner may file his witness list, serve a copy of the same on the other side indicating therein whom he proposes to

examine on 10-12-1979 and the succeeding days.

10-12-1979: Since the Court is engaged in hearing arguments in E, Ps. 8/78 and connected cases. this petition is adjourned for evidence of the petitioner to 23-1-1980.

23-1-1980. The petitioner absent. Shri Satishchandra Kumar, learned counsel for the petitioner, requested for an adjournment stating that the petitioner is unwell and, therefore, could not come to the Court. I am not convinced of this say. No steps have been taken. No witnesses also are present.

The learned counsel for the 2nd and 6th respondents and the learned Govt. Advocate for the 1st respondent oppose any further adjournment in the matter. In the circumstances, request for an adjournment is refused.

Petition is dismissed with costs of respondents 1, 2 and 6.

Advocate's fee will be in two sets i. e, one set for Advocate for respondents 2 and 6 and another set for respondent 1. Advocate's fee is fixed at Rs. 250/- in each set.

Sd/ "

3. The averments of the petitioner in the affidavit he has filed with the application for restoration (Misc, Petition No. 3/80) are: that on the date of hearing he could not attend the Court being un.7 well; that he was under treatment during Jan., 1980; that he was advised complete rest; that he had, therefore, requested his Counsel to take an adjournment; that, in the circumstances, his absence was neither deliberate nor intentional; and, therefore, the Court, setting aside the order of dismissal, may restore to file the election petition. Along with his application he has also produced a medical certificate issued by a certain Dr. R. Gopalappa, a private Medical Practitioner, working at a place called Bukkapatna.

4. To Misc. Petition No. 3 of 1980 the 2nd respondent has filed his counter in the form of-a counter-affidavit. He states therein that the application-Misc. petition No. .3/80/- -filed as it is under S. 151 Civil P. C., is not maintainable; that the Court constituted as it is and being invested with special powers under the Representation of the People Act 1951, (the Act) has no inherent powers to exercise u/s, 151, C. P, C., that the averments made by the petitioner seeking restoration of the election petition are not admitted; that the application of the type was not maintainable; and that, therefore, the same was liable to be dismissed.

5. Counsel for the 2nd respondent desired that the objections he had raised regarding the maintainability of the petition may be heard preliminarily. Both sides were accordingly heard on this aspect of the objections of the 2nd respondent.

6. The question is:

Is Miscellaneous Petition No. 3 of 1980 filed as it is under S. 151, C. P. C. not maintainable?

7. The election petitions should. "as nearly as may be" be tried in accordance with the procedure applicable to the trial of suits under the Civil P. C. (See S. 87 of the Act). It is debatable whether an Election Judge of the High Court trying an election petition "as nearly as may be" in accordance with the procedure applicable under the Code has inherent powers conferred on a Court by S. 151, C. P. C. However, it is not in dispute that if the petition is dismissed for default the party aggrieved can take recourse to an appropriate provision under the Civil P. C. to get that order set aside.

8. In the instant case the petition had been posted specifically for the evidence of the petitioner and his witnesses. The petitioner was absent. No witnesses also were present. In a situation like that, as provided in O. XVII R. 3 (b), the Court proceeded under O. XVII R. 2 and dismissed the petition for default. The petitioner, in order to get that order set aside and to get the petition restored, could have filed an application under O. IX, R. 9 C. P. C. Instead he has invoked S. 151 of the Code, Counsel for the contesting respondent argued that when there is a specific provision available in the Code the petitioner could not have taken recourse to Section 151 of the Code. assuming that the Court while trying an election petition does have inherent powers as contemplated under S. 151. It is in this connection he places strong reliance on a decision of the Supreme Court in Arjun Singh Vs. Mohindra Kumar and Others, . The following observations made at para 19 in the said decision may be noted:

"On this submission, which we might mention has been urged for first time in this Court, the first question that arises is whether the Court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by S. 151 of Civil P. C. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

He also drew my attention to the following observations of the Supreme Court in Nain Singh Vs. Koonwarjee and Others, . While referring to the inherent powers vested in Courts under S. 151 of the Code the Court Observes that "inherent

jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific Provisions which would meet the necessities Of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of S. 151 of the code where a party had his remedy elsewhere in the Code and he neglected to avail himself of the same." The learned counsel for the Petitioner, On the other hand, placing reliance on a decision of the Supreme Court in *The Vice-chancellor, Jammu University and Another Vs. Dushiant Kumar Rampal*, argued that though a wrong provision is mentioned in the application the same could be construed as one made under the relevant provisions and the Court can proceed to consider the request. In Rampal's case (*supra*) the Vice-Chancellor of Jammu University had taken action, exercising his powers under the statute concerned against a teacher serving in the University. The order made by the Vice-Chancellor suspending the teacher did not recite the relevant statute the source of power, under which it was made. On that ground when the said order was attacked, the Court observed that "it is now well settled as a result of several decisions of this Court, that when an authority makes an order which is otherwise within its competence it cannot fail merely because it purports to be under a wrong provision of law. if it can be shown to be within its powers under any other provision; a wrong label cannot vitiate an order which is otherwise within the power of the authority to make". The facts in Rampal's case are

different from the facts of the present case. The statute of the University did confer power of placing an erring official under suspension under certain circumstances. Action taken by the Vice-Chancellor in keeping under suspension that official was sustained because the statute conferred such powers on the Vice-Chancellor. But the Code lays down specific procedures to be taken recourse to by the aggrieved in different contingencies. If a suit is dismissed for default or non-prosecution O. IX, R. 9 envisages that the aggrieved may apply for setting aside an order of dismissal and further provides that "if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing the Court shall make an order setting aside the order of dismissal " (underlining supplied). No doubt, the Code has invested the Court with jurisdiction and also power to deal with such a claim. But it also prescribes the route through which one has to pass through to tap that source. If the procedural law prescribes a particular method or mode of dealing with a situation the Court or the authority, while trying to deal with that situation, has to follow that procedure. The ratio laid down in *Arjun Singh's case* and *Nainsingh's case* apply on all fours to the facts of this case. The petitioner, in the circumstances, cannot invoke the inherent powers of this Court, assuming that it has such powers under S. 151 of the Code, to get the impugned order set aside when there is a specific provision available in law. In this connection, after referring to a large number of authorities dealing with this question, it is observed as follows at page 494 of *Sarkar on Civil Procedure* (6th Edition):

"Exercising of Inherent powers.- The majority view is that Court has no

jurisdiction to restore a suit or set aside an ex parte decree under S. 151 if no case can be made out as required by Order IX

Rr. 9 and 13"

Then, after referring to the voluminous Case law on the point and, in particular, to the two decisions of the Supreme Court Arjun Singh Vs. Mohindra Kumar and Others, and Nain Singh Vs. Koonwarjee and Others, , the learned author observes as follows: "In view of later Supreme Court decisions it is submitted that the majority view represents correct position of law."

9. In this view of the matter the objections raised by the contesting respondent as to the maintainability of this application have to be upheld.

10. For the reasons aforesaid Misc. Application No. 3 of 1980 is dismissed. No costs.

11. Application dismissed.