
(1968) 05 MP CK 0001
In the Madhya Pradesh High Court
Case No : F A. No. 49 of 1967

Kamal Narain Sharma

APPELLANT

Vs

Dwarka Prasad Mishra And another

RESPONDENT

Date of Decision : 04-05-1968

Acts Referred:

Representation of the People Act, 1951 — Section 116A

Citation : (1970) JLJ 342 : (1970) MPLJ 721

Hon'ble Judges : Shiv Dayal, J; S. P. Bhargava, J

Bench : Division Bench

Advocate : K. P. Munshi, for the Appellant; Y S Dharmadhikari, for Respondents No. 1, K. L. Mishra and S. L. Mishra, R. K. Pandey, for Respondents No. 2, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.

This appeal u/s 116-A of the Representation of the People Act, 1951 (hereinafter called the Act), has arisen from an election petition filed by the appellant for a declaration that the election of Shri Dwarka Prasad Mishra (hereinafter called the "respondent") to the Madhya Pradesh Legislative Assembly from Kasdol Assembly constituency in the bye-election held in May 1963, is void.

The appellant first contends that the trial of the petition was abruptly closed by the Tribunal and he was denied reasonable opportunity to fully cross-examine the respondent. Secondly, his applications for leave to amend the petition were wrongly rejected by the Tribunal. Thirdly, admission of certain documentary evidence was wrongly refused by the Tribunal. Before we proceed to decide these preliminary points, we must consider the preliminary objections raised for the respondent; first, the appeal must be dismissed as barred by time; and second, the appeal has become infructuous.

The judgment and order of the Tribunal is dated 28 December, 1966. The appeal

was filed in this Court on 1 July 1967. As provided in sub-section (3) of section 116-A of the Act, an appeal must be preferred within 30 days from the date of the order of the Tribunal. Application for certified copy was made on 29 December 1966. The copy was delivered to the appellant on 27 April 1967. This Court was closed for summer vacation from 7 May to 30 June 1967. This appeal was filed on the very day that the Court reopened after the vacation.

If the period from 29 December 1966 to 27 April 1967 and also the period from 7 May 1967 to 30 June 1967 are excluded u/s 12(2) and section 4 of the Limitation Act respectively, from computation of the period of limitation, it must be held that this appeal was preferred within time. But, if either period is not so excluded, the appeal is clearly time-barred.

Shri Dharmadhikari, learned counsel for the respondent, contends that neither section 12(2) nor section 4 of the Limitation Act has any application to an appeal u/s 116-A of the Act. This question will have to be examined in the light of the provisions contained in section 29(2) of the Limitation Act, 1963. It reads thus:-

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 in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

The applicability of this section to an appeal u/s 116-A of the Representation of the People Act was examined from different angles, and a variety of arguments were considered by their Lordships in Vidyacharan Shukla Vs. Khubchand Baghel and Others,

Although to that case the Limitation Act of 1908 was applicable yet, as there is no difference between section 29 (2) of the 1908 Act and section 29(2) of the 1963 Act, so far as the application of section 12 is concerned, that case is authority where there is the question of applicability of section 12 of the 1963 Act read with section 29(2) of that Act. Their Lordships held that by virtue of section 29(2) the provisions of section 12 of that Act apply to any appeal u/s 116-A of the Representation of People Act. That high and binding authority clinches the issue. For the same reasons it must be held that section 4 of the Limitation Act is also attracted with the aid of section 29(2) of that Act.

It was an argument advanced by Shri Dharmadhikari that the appellant was not entitled to the exclusion of the period of Summer Vacation inasmuch as there was no absolute prohibition in the sense that no appeal could be filed during the summer vacation. In our opinion there is no substance in this argument. The order of the High Court was in these words:

No application or appeal will be received or filed during the Summer Vacation except the following-

- (1) Jail Appeals section 420 of the Code of Criminal Procedure.
- (2) Appeals accompanied by urgent applications.
- (3) Application of urgent nature accompanied by an urgent application.
- (4) Bail applications.

In our opinion, the effect of that order was that no appeal (other than Jail Appeals u/s 420, Criminal Procedure Code) could be filed or received during the summer vacation. The exceptions were provided so that a relief which could not await the reopening of the Court after the Summer Vacation could be given by the Court during the Summer Vacation. Such reliefs are generally interim and are meant to preserve status quo. The procedure in such a case is that an interlocutory application is made, and since it can be made only in a pending appeal, the appeal is also permitted to be filed. But this exception could not take away the benefit u/s 4, Limitation Act, which was available to an appellant who did not or could not file an appeal and whose appeal could not be received under the High Court's order: "No appeal will be received or filed during the Summer Vacation."

We hold that Vidhya Charan Shukla's case (supra) is equally applicable to section 29(2) of the Limitation Act, 1963, and, therefore, to an appeal u/s 116-A of the Representation of People Act, 1951, the provisions of section 12 apply by virtue of section 29(2) of the Limitation Act. We further hold that for the same reason section 4 of the Limitation Act also governs such appeal u/s 116-A of the Act. Therefore, in this case the appellant is entitled to the benefit of section 12 and also section 4 of the Limitation Act, 1963, and this appeal was filed within the prescribed time.

The second preliminary objection is based on two contentions. The first is that since new election has been held in the course of the general elections of February 1967 and the Assembly to which the respondent had been elected has been dissolved, no order u/s 100 or 98 of the Act can now be made and the election petition and the pending appeal have, therefore, become infructuous. Incidentally, it was argued that the respondent ceased to be a "returned candidate" as soon as fresh election was held and at one particular time there can be only one returned candidate from a particular constituency, In our opinion, this contention is untenable.

The result of the bye-election was declared on 5 May 1963. The election petition was presented to the Election Commission on 19 June 1963 and was decided by the Tribunal on 26 December 1966. Application for certified copy of the judgment was made on the very next day, but was supplied to the petitioner on 27th April 1967. The High Court was closed from 7 May 1967 to 30 June 1967. This appeal was preferred on 1 July 1967. In the meantime that is, in February 1967, general

elections were held.

It seems to us clear that a legal proceeding cannot be put an end to as having become infructuous, if the determination of any question in issue will have operative effect on the right of the parties or will subject them to a penalty.

The scheme of the Act is that section 123 defines corrupt practices for the purposes of the Act. u/s 100, Commission of any corrupt practice is a ground for declaring the election to be void. Section 98 empowers the Tribunal to declare the election of all or any of the returned candidates to be void. And, section 99 further enjoins the Tribunal to record a finding whether a corrupt practice has or has not been proved to have been committed at the election and the nature of the corrupt practice and also to record the names of all persons, if any, who have been found proved at the trial to have been guilty of that corrupt practice and the nature of that practice. Sections 140 and 141 then enact that a corrupt practice as specified in section 123 entails a disqualification for membership of Parliament or of Legislature of every State and a further disqualification for voting at any election for a period of six years counting from the date on which the finding of such practice takes effect under the Act. Thus, it will be seen that the consequence of the finding that the returned candidate has committed a corrupt practice is not merely that he ceases to be a member of the Assembly, but also that he incurs certain disqualifications. Further more, apart from the returned candidate, every other person, who is named u/s 99, will also incur such disqualifications.

An election petition in which there are allegations of corrupt practices cannot be dismissed as infructuous merely because during its pendency, the returned candidate has ceased to be a member of the Legislature or because the Assembly to which he was returned has been dissolved. The matter would be different, if the allegations in the election petition are not of the commission of a corrupt practice, but it is based on other grounds enumerated in section 100 of the Act.

The expression "returned candidate" is defined in section 79(f) of the Act thus :-

"Returned candidate" means a candidate whose name has been published under section 67 as duly elected.

This means that once a candidate is declared a returned candidate, he does not cease to be so for the purposes of an election petition until that petition is finally decided. This will be so in spite of the returned candidate having ceased, for any reason, to be a member of the Assembly, or the Assembly itself having been dissolved. His election can, therefore, be declared to be void u/s 98 and for the purpose of that section, he continues to be a returned candidate.

We are not persuaded to accept Shri Dharmadhikari's contention that section 99 of the Act is dependant upon section 98 and, therefore, the petition can be dismissed as infructuous as in the circumstances of the present case, and there

would remain no occasion for making an order u/s 99. We are clearly of the opinion that the opening words of section 99 "at the time of making an order u/s 98" are merely indicative of the stage at which the Tribunal will record an order under that section. To put it differently, an order under that section can be made only in the final decision of the Tribunal but not at an interlocutory stage. Moreover, as we read section 98, it is omnibus in its scope and it will include every final order. Once the trial has commenced, it must be concluded by an order either under clause (a), or under one of the other clauses (b) and (c). If the order does not come either under clause (b) or clause (c), it must necessarily fall within clause (a). The expression "dismissing the election petition" is wide and comprehensive enough to include dismissal of all kinds, and for any reason whatever. In this view of the matter, even if the election petition is to be dismissed as infructuous in the sense that now neither the petitioner nor any other candidate can be declared to have been duly elected, nor can a bye-election be held, such order will still be tantamount to dismissal within the meaning of section 98(a) and an order u/s 99(1)(a) will have to be made.

Shri Dharmadhikari relied on *Yamuna Prasad v. Jagdish Prasad Khare* 13 E L R 1. But in that case, their Lordships did not hold that the election petition became infructuous only because during the pendency of the appeal to the Supreme Court, the Assembly ceased to exist. While dismissing the appeal the Supreme Court remarked that the Court was "reluctant to decide an important legal question of this kind in this appeal." It appears that the question which arose in that appeal was how the wasted votes which were of a large magnitude, would have been distributed between the successful candidate and the person who got the next largest number of votes. Their Lordships observed:-

The question that arises is whether having regard to the decision in *Vashit Narain Sharma Vs. Dev Chandra and Others*, , this was a permissible mode of deciding the matter and whether such evidence was relevant and admissible. This is a question which we do not think, it is expedient for us to decide in the circumstances of this case as they exist at present. The Vindhya Pradesh Assembly to which the successful candidate was elected is now no longer in existence and the new elections are coming in very shortly. The result of our decision One way Or the other has no direct value to the parties concerned and that is emphasised by the fact that the respondents have not appeared before us we are reluctant to decide an important legal question of this kind.....

It is obvious enough that that decision of their Lordships is not apposite to this case.

Shri Dharmadhikari further relied on the following statement in 14 Halsbury (Simonds) 286 (para. 509) :-

A parliamentary petition drops by the fact that parliament is dissolved while the petition is pending

This statement is based on two cases, *Carter v. Mills* (1874) L R C P 117 and

Marshall v. James (1874) L R C P 117. 5. (1874) L R 9 C P 702, There is nothing to show in the report that in the former case there was any allegation of a corrupt practice. In the latter case, the question was whether coats could be taxed. What is more, we will not be guided by the old parliamentary practice of England on which an order of the dropping off an election petition could be made. Our procedure is governed by the Representation of the People Act and the Code of Civil Procedure.

In Sanjeevayya v. Election Tribunal AIR 1967 SC 1211 their Lordships held that an election petition for declaration that the election of a returned candidate be declared void has to be continued and disposed of according to law notwithstanding the resignation of the returned candidate. It has been observed thus:-

When an election petition has been referred to a Tribunal by the Election Commission and the former is seized of the matter, the petition has to be disposed of according to law. The Tribunal has to adjudge at the conclusion of the proceeding whether the returned candidate has or has not committed any corrupt practice at the election and, secondly, it has to decide whether the second respondent should or should not be declared to have been duly elected. A returned candidate cannot get rid of an election petition filed against him by resigning his seat in the Legislature whatever the reason for his resignation may be.

With the utmost respect, we would adopt the same reasoning to a case where the returned candidate ceases to be a member of the Legislative Assembly to which he was elected by reason of such Assembly having been dissolved.

For the reasons stated above, we are of the view that once the Election Tribunal becomes seized of an election petition it is statutory obligation of the Tribunal to give a decision on all matters which arise under the Act, unless it is shown that the determination of any such matter has been rendered unnecessary or that the Tribunal's power to deal with it has been abrogated. As a combined effect of sections 98 and 99 of the Act, it is not only to be seen whether any relief appropriate u/s 100 or 101 should be granted or not, but also to record a finding whether any corrupt practice has or has not been proved to have been committed at the election, because that will entail future disqualifications under sections 140 and 141 of the Act. Even if it can be said that in consequence of the dissolution of the Assembly and fresh election having been held, the necessity for making a declaration that the election is void in respect of the seat to which the election petition relates, may not subsist, but the need for recording a finding u/s 99 about commission of corrupt practices is not taken away.

In the present case, the election has been challenged on the ground of corrupt practices as defined in section 123 of the Act. It is alleged that the respondent, through his agent, offered Rs. 50,000 to the appellant for withdrawing from the contest (sub-section 1); false statements were published against the appellant

(sub-section 4) ; the respondent hired or procured vehicles for conveyance of electors (sub-section 5); and the respondent incurred or authorised expenditure in excess of the prescribed limits (sub-section 6). The petition or the appeal cannot, therefore, be dismissed as infructuous.

The second limb of the respondent's second preliminary objection is that since in the fresh general elections, the respondent has been returned from another constituency (Katangi) to the Legislative Assembly which was reconstituted in March 1967, it is only the Governor who, in exercise of his powers-under Article 192 of the Constitution, can unseat him by declaring that he has incurred a disqualification; and the Election Tribunal or the High Court, an appellate authority, has no jurisdiction to adjudicate upon the matter. In our opinion this contention is misconceived.

It is true that the effect of a finding recorded u/s 99 of the Act that a member of the Legislative Assembly committed a corrupt practice is that, by virtue of Article 191 of the Constitution, read with sections 70 and 140 of the Act, he becomes disqualified for continuing as such member. It is also incontrovertible that it is the Governor who alone is the competent authority to adjudicate on the question whether such a member has become subject of a supervening disqualification, although his decision has to be in accordance with the opinion of the Election Commission. (See *Brundaban Nayak Vs. Election Commission of India and Another*, . But, it is the Tribunal or the appellate Court, and not the Governor, which will decide whether a corrupt practice has been committed or not. This is because section 7 comes into play only when a finding that a corrupt practice was committed has been recorded "in proceedings for questioning the validity or regularity of an election".

Indeed, we do not see that Shri Dharmadhikari's argument has any bearing on the question whether an election petition or an election appeal becomes infructuous if during its pendency the Assembly has been dissolved. It is not as if the Tribunal had any power under Article 192 of the Constitution, which ceased to operate because of the dissolution of the Assembly. It cannot be deduced from anything contained in Articles 191 and 192 of the Constitution, or sections 7, 92 and 140 of the Act, that the applicability of these provisions is confined to corrupt practices committed during the election at which such member was returned to the Legislative Assembly. Therefore, the dissolution of the Assembly and its reconstitution makes no difference to the question whether he has become subject of the disqualification under sections 140 and 141 of the Act.

Both the preliminary objections are overruled. The respondent did not press his preliminary objection that the security filed in this Court was not according to law.

This brings us to the preliminary points raised by the appellant, which we have stated at the outset. The first is that the cross-examination of the respondent was abruptly closed and the petitioner was wrongly denied reasonable opportunity to fully cross-examine him. To appreciate this contention, it is useful

to see what path was traversed by this case.

The election petition was presented to the Election Commission on 19 June 1963. The Election Commission entrusted the petition for trial to Shri S. R. Vyas, District Judge, Raipur. In this written statement dated 26th August 1963, the respondent raised an objection that the affidavit filed by the petitioner in support of the election petition was invalid. On 31st October, 1963, the Tribunal overruled the objection. The respondent then filed a petition under Article 226 of the Constitution which was allowed on 15 April 1964 by a Division Bench of this Court [1964 M P L J 682 : 1964 J L J 472]. Aggrieved by that order the petitioner preferred an appeal to the Supreme Court. On 17 August 1965, the Supreme Court allowed the appeal and set aside the order of this Court and the case was remanded to the Election Tribunal, Raipur, for hearing the election petition merits (1966 M P L J 765 (SC) : 1966 J L J 293). Since in the meantime, Shri S. R. Vyas, District Judge, was transferred from Raipur, a new Tribunal was constituted at Raipur for the trial of this particular election petition.

Thus, the respondent's objection occupied two years. The trial then commenced at Raipur. The new Tribunal examined the witnesses produced by petitioner upto 8 July 1966, on which date the petitioner closed his case. respondent applied for issuance of commission for his own examination, at Bhopal. This request was opposed by the petitioner but his objection was over-ruled. The Tribunal issued a commission to the District Judge, Bhopal for the cross-examination of the respondent as his own witness. The learned District Judge appointed Shri M. J. Waswani Advocate as Commissioner. The examination-in-chief commenced on 11 August 1966 and was continued on 12th, 13th, 15th and 17th August. On the last mentioned date an adjournment was sought on behalf of the respondent on an administrative ground. The prayer for adjournment was opposed by the petitioner, but the Commissioner allowed the request and fixed the 1st September. However, before that date, that is, on 30th August, another application for adjournment was made on the ground of the respondent's illness. The Commissioner at once accepted this request and fixed 5th October and intimated the Tribunal as also the petitioner telegraphically. The statement of the respondent was then recorded from the 5th to the 8th October, on which date the examination-in-chief concluded. From the 10th to 13th October, the respondent was cross-examined. The cross-examination remained unconcluded. On the 14th October, Shri Ram Panjwani, learned counsel for the respondent, moved the Commissioner for referring his application to the Tribunal for decision and for suspending the "cross-examination of the respondent. The learned Commissioner heard arguments on this application on the 14th and 15th October and, by his order dated 17 October 1966, he granted the application and referred the matter to the Election Tribunal seeking certain directions.

In this connection, Shri Dharmadhikari told us that a dispute arose before the Commissioner regarding the admissibility of questions in cross-examination because the petitioner aimed at harrassing the respondent by asking him

inconvenient and irrelevant questions. Shri Munshi told us, in reply, that it was the respondent who in examination-in-chief came forward at great length to recount his talents and achievements which were not in issue and this was aimed at creating prejudice in his own favour. It, therefore, became necessary to refute him.

On the 24th October, the Tribunal heard the counsel for the parties. By its order of the 25th October, the Tribunal, exercising its powers u/s 151, Civil Procedure Code, directed afresh commission to be issued to shri R. L. Murab, District Judge, Bhopal, to himself, resume further recording of the cross-examination of the respondent and fixed 27th October 1966 for the parties to appear before the Commissioner. This time the Commissioner was clothed with all the powers of the Court under Chapter X of the Evidence Act.

It appears that the petitioner forthwith approached the Tribunal to give, him more time and fix another date, as it was not possible for him, and his counsel to appear at Bhopal on the 27th October. The Tribunal: directed him to move the Commissioner in the matter. On the same date, that is 25th October, the petitioner promptly gave a telegram at 16.25 hours to the Commissioner requesting him for an adjournment as he required at least 20 days for cross-examination and the witness (respondent) was reported to be going to Delhi. In this telegram, he requested the Commissioner to fix such a date that the case would proceed day to day after the return of the witness from Delhi, and to intimate him of the date so fixed. The petitioner's telegram and also the telegram given by the Tribunal to the District Judge intimating that a fresh writ of commission was issued in his name for resuming the evidence of the respondent, were both received simultaneously by the learned District Judge, on the 26th October at 11.30 hours. The same day, he gave the following telegram to the petitioner:-

As per direction of the Tribunal 27th fixed at same place and time.

(No time or place had been fixed in the telegram given by the Tribunal, for had the commission papers been received by the Commissioner by then). There is no specific reference to the petitioner's telegram. Then on the same day the petitioner and his counsel, Shri Munshi, Advocate, Raipur, gave two Separate telegrams to the Commissioner stating that the counsel was unable to attend on the 27th and praying that 16th November be fixed after ascertaining that the witness would be present at Bhopal. In his order passed on the 27th October, the Commissioner acknowledged these two subsequent telegrams and observed that the Tribunal had fixed that date and that the prayer for adjournment was opposed by the respondent's counsel who requested him to close the cross-examination. The Commissioner then closed the cross-examination and returned the commission papers.

After hearing the learned counsel for the parties we have formed the view that the appellant's contention is right for the reasons we will presently State.

The learned counsel for the appellant laid emphasis on the statement of Shri Ram Panjwani made before the Tribunal on the 24th October that the respondent was willing to appear before the Tribunal at Raipur for his further cross-examination. (This fact which was recorded by the petitioner in his application dated 26-10-66 was not called by the Tribunal, in his order dated 29-10-66 or any other order, as false or incorrect). There was then no need at all to call in aid his inherent powers u/s 151, CPC to issue fresh commission. Before us there was some debate on the question whether the Tribunal could delegate its judicial function to the Commissioner. However, in our opinion, all that is not material for the purposes of the point we are on.

It is a usual practice in Courts to fix dates, as far as possible with the consent of the parties unless either of them is found, unreasonable. We do not say that this is either a hard and fast rule, or that a Court is bound to observe it. In this case, it was on the 25th October that the Tribunal was going to fix the 27th October, and that too for the parties to appear at Bhopal for further cross-examination of a very important witness. It is also usual with the Courts to reasonably accommodate counsel coming from other places, in the matter of fixing dates of hearing. We are told by both the learned counsel that one had to leave Raipur on the 26th morning to be able to appear before the Commissioner at Bhopal on the morning of the 27th. This means that the counsel had to start from Raipur almost at once, so to say. It is a matter of common knowledge that a counsel when he has to be out of (sic) for a number of days, has to make suitable arrangement for his work already fixed in local Courts. With all this in view it would have been only fair and just to extend the date at least by a few days, more so when the commission had been issued for the convenience of the respondent.

It is worthy of note that the petitioner acted with diligence and promptitude in seeking adjournment from the Commissioner as directed by the Tribunal. When the petitioner forthwith approached the Tribunal for extending the date, he was not told firmly and unequivocally that the date could not be changed, instead the Tribunal directed the petitioner to move the Commissioner. He (petitioner) then complied with the direction and promptly (at 16.25 hours) gave a telegram to the Commissioner. On the 26th October the petitioner made an application to the Tribunal to recall the commission and examine the witness at Raipur. In that application he also stated that the (sic) fixed for resuming the respondent's statement was much too short. This application remained pending without orders and was rejected on the 29th October (after return of the commission from Bhopal) mainly on the ground that the Tribunal's powers to fix dates of hearing without any discussion and consent of the parties cannot be questioned" and "there was sufficient time for the petitioner to appear before the District and Sessions Judge, Bhopal." In that order, the learned Tribunal observed :-

The counsel for the petitioner made an oral request to reopen the examination of the respondents No. 1 on commission and the petitioner be given an opportunity,

as exercised of the (sic) by the Commissioner, Shri R. L. Murab, WAS not sound, nor proper. He farther stated that the right of cross-examination is a valuable right which should not be denied and by reopening the commission no injustice or inconvenience will be caused to respondent No. 1.

But this request was rejected, saying:-

Justifiable cause should have been shown to the Commissioner at Bhopal for seeking an adjournment which was not done.

At the other end, the learned Commissioner in his order of the 27th October acknowledged the receipt of the writ of commission and the two subsequent telegrams from the petitioner and Shri Munshi, his counsel, praying for adjournment; he observed that the Tribunal had fixed the 27th October; he mentioned that the respondent's counsel opposed the prayer for adjournment and requested him to close the cross-examination; he remarked that the prayer of adjournment upto 16th November was not justified, and closed the cross-examination.

It seems to us clear that (1) the Commissioner was wrong if he thought that he was powerless to fix another date as the 27th October had been fixed by the Tribunal itself. It is uncontestable that the Commissioner had the power to fix another date, grant adjournment, although, it was in his discretion which date to fix. (2) The learned Commissioner should have seen that the petitioner was prompt in his request for fixing another date and that the date fixed was so short that there was no time for the petitioner to start from Raipur after receiving his (Commissioner's) telegram of the 26th. There was also indication in the petitioner's telegram of the 25th that he was not sure whether the respondent was available at Bhopal for his cross-examination on the date fixed and the immediately following days. (3) The learned Commissioner should have seen that the petitioner's counsel had his own difficulties. and that in such cases Courts reasonably accommodate counsel coming from. other places. On the other hand, a short adjournment would have meant no inconvenience to any body else; the respondent, as the Chief Minister resided at Bhopal and his statement was to be recorded at his own residence; his counsel Shri Ram Punjwani was a local Advocate; and he (Commissioner) himself was there. Above all, even if it meant inconvenience to other side it could be compensated by costs. (4) Further, the Commissioner should have seen that the respondent's counsel was neither justified nor reasonable in opposing the petitioner's request for adjournment when on two previous occasions he had taken adjournment from the then Commissioner. On the first occasion (14th August) recording of the respondent's deposition had to be interrupted and the petitioner's counsel had to return to Raipur to come back to Bhopal again when examination-in-chief was to be resumed on the 1st September which was fixed. On that occasion the petitioner's objection to adjournment was rejected and no costs were allowed to him. On the second occasion (30th August) adjournment was sought on the ground of respondent's; indisposition and the medical advice for 10 days" rest.

This request was readily and rightly accepted and adjournment was granted, fixing the 5th October. Therefore, the learned Commissioner's order gives an impression that the discretion was not evenly exercised. (5) The Commissioner should have further seen that on most of the issues there had been no cross-examination and this would cause serious prejudice to the trial of the election petition if the cross-examination was closed in its midst. On the other hand, the respondent could be compensated by costs. (6) It clearly appears that the learned Commissioner did not bear in mind the celebrated principles which must always be remembered when one deals with an election petition. It would have been only in the interest of maintenance of purity of elections that evidence should not have been stopped, except as the extreme step. This was for the first time that the Commissioner was approached for an adjournment. It was not as if it appeared that the petitioner was trying to protract the proceeding. (7) Even if the learned Commissioner thought that 20 days would mean too long an adjournment, he could have fixed a nearer date. Even if he wanted to be very strict, the minimum which a judicial mind should have been persuaded to do was to fix a date after four or five days, to intimate the petitioner of such date, and to warn him that no longer date could be fixed nor any further adjournment would be granted.

The Commissioner seems to have thought that as the date had been fixed by the Tribunal he could not extend it. The Tribunal, on the other hand, left it entirely to the Commissioner to exercise his discretion. Neither knew the view point of the other. But, at least on the 29th October when the Commission papers came back to him, the learned Tribunal should have seen all what we have stated above and should have either asked the respondent to appear before himself or reopened the commission. That alone would have been in the interest of justice. See observations in *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, .

While dealing with an election petition, the following principles must always be present to the mind : (1) Though the election of a successful candidate is not to be lightly interfered with, the purity of the election process must be safeguarded and it must be seen that people do not get elected by flagrant breaches of the law or by corrupt practices per *Jagan Nath Vs. Jaswant Singh and Others*, and *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, . In the latter case, their Lordships approved the following observations in *Sreenivasan v. Election Tribunal* 11 ELR 278:-

An election is an essential part of the democratic process. The citizens at large have an interest in seeing that they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. In a civil action, the only persons who are interested are the individuals arrayed as plaintiffs or defendants, but that is not so in an election petition.

As was said in *Tipperary County case* (1875) 3 O&H. 19 (25), "a petition is not a suit between two persons but is a proceeding in which a constituency, itself is the principal party interested." We find ourselves in respectful concurrence with their

Lordships of the Punjab High Court, when they observed in *Sadhusingh v. Shamshersingh* AIR 1965 P&H 34 :-

Our law of election is thus very rightly zealous in checking such practices in the election process, and Tribunals and Courts dealing with election petitions are no less so in effectively enquiring into allegations of such practices. An election petition is, for the foregoing reasons, not a matter in which the only persons interested are the candidates striving against each other; the Tribunal has, therefore, a solemn duty to look at the matter from a somewhat broader point of view, and the approach adopted in a private action is not to be strictly adhered to in the trial of election petitions.

(2) It is essential that an election petition, must be decided expeditiously but justice is not to be sacrificed for the sake of speed. If due to the cropping up of extraordinary causes the disposal may be inevitably delayed, matters cannot just be rushed up in a way that the parties are shut out from bringing the entire material on record. (3) It is a very celebrated rule which is followed in all Courts and Tribunals that a discretion must be exercised with a judicial mind. To respectfully borrow the language of Lord Halsbury L. C. "an extensive power is confined to the justices in their capacity as justices to be exercised judicially; and "discretion" means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself." *Shore v. Wakefield* (1891) AC 173, See also *Reeka's case* (1598) 5, Rep. 99-B and *Wilson v. Bastall* (1792) 4 Ter Rep. 757. The following statements in 27, C. J. S. 289 are illuminating:-

The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard and fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. "Discretion" is further defined as meaning equitable decision of what is just and proper under the circumstances; exercise of caution; judgment or soundness of judgment; knowledge and prudence; nice discernment; and judgment directed by circumspection.

Judged by these tests and for the reasons already recorded, we are of the opinion that the learned Commissioner did not exercise his discretion judicially or evenly, when he closed the respondent's cross-examination abruptly, and, the Tribunal erred in not redressing the error. If time factor was weighing heavily on their minds it should have been recalled that for no fault of the petitioner the trial of his petition had been hampered for two years. Denying the petitioner the right to cross-examine the respondent fully has resulted in serious prejudice in the trial of the election petition and caused miscarriage of justice. The

respondent must, therefore, be recalled for farther cross-examination. The learned counsel for both the sides told us at the hearing that, should we decide to recall the respondent for further cross-examination, the evidence should be recorded in this Court itself instead of by any Commissioner.

The next point urged for the appellant is that the Tribunal erred in refusing him leave to amend the petition as he merely wanted to amend or amplify the particulars of the corrupt practices which had already been alleged in the petition and that this was necessary for ensuring a fair and effective trial of the petition. We have carefully scrutinised the applications filed by the petitioner and the orders passed by the Tribunal on them. The principles are now well settled. In the leading case, *Harish Chandra Bajpai Vs. Triloki Singh*, it was held that the election Tribunal had undoubtedly the power to allow an amendment in respect of any particulars of corrupt practices or to permit new instances to be included, provided the grounds or charges were specifically stated in the petition, but new grounds or charges could not be permitted to be raised, nor the character of the petitioner could be permitted to be so altered as to make in substance a new petition. It was also held that the application of Order 6, rule 17 of the CPC to the proceedings before the Election Tribunal was not excluded by section 83(5) of the Act, as it stood before the amending Act of 1966 (No. XXVII of 1966). Now the relevant provision is contained in section 99(5) of the Act. In *Babulal Sharma v. Brijnarayun Brijesh* 1939 M P L J 906 (FB) : 1958 J L J 98 (FB), Full Bench of this Court held that *Harishchandra v. Trilokisingh* (supra) is good law even after the amendment of the Act in 1956. If a corrupt practice has been alleged in an election petition, the Tribunal has power to allow amendment of the petition by adding new instances and particulars of such corrupt practice.

In *S.M. Banerji Vs. Sri Krishna Agarwal*, , their Lordships observed :-

Courts and Tribunals are constituted to do justice between the parties within the confines of statutory limitations and undue emphasis on technicalities or enlarging their scope would cramp their powers, diminish their effectiveness and defeat the very purpose for which they are constituted. It must be made clear that within the limits prescribed by the decisions of the Supreme Court the discretionary jurisdiction of the Tribunals to amend the pleadings is as extensive as that of a civil Court. The same well settled principles laid down In the matter of (sic) in a suit should also regulate the exercise of the power of an (sic) by a Tribunal.

Under Order 6 rule 17, Civil Procedure Code, their Lordships laid down the principles which must govern an application for leave to amend pleadings. See *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, ; *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, and *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, . In the last mentioned case, their Lordships said :-

It is also well recognised that where the amendment does not constitute the addition of ft new cause or raise a different case, but amounts to no more than a

different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation.

Their Lordships have further said that the expression "cause of action" in the present context does not mean every fact which is material to be proved to entitle the plaintiff to succeed as was said in *Cooke v. Gill* 1873 8 C P 107 (116) , in a different context, "That expression for the present purpose only means a new claim made on a new basis constituted by new facts". Reference was made to *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, , *Robineon V. Unices Property Corporation Ltd.* (1952) 2 All E R 24 and *Daman v. J. W. Mills* (1958) 1 All E R 303. In *Keshavprasad v. A. D. Mani* 1961 M P L J 1021 : 1962 I L J 132, it is observed that it is not necessary to give in the petition itself an indication of the proof of the allegations on which the election is sought to be set aside.

We will bear in mind and will judge the petitioner's applications for amendment in the light of these principles.

Shri Dharmadhikari in fairness, conceded that the amendments as prayed in the petitioner's application dated 25th March 1966, and in Para. 1, clauses (ii), (iii), (v) and (vi) of the application dated 6th December 1965 should have been allowed without objection. In our opinion, this concession is right. Even otherwise, we would have allowed these amendments as they are either verbal or for correction of clerical errors. There could be no legitimate objection to their being allowed.

It was urged for the appellant that the Tribunal erred in rejecting his prayer for the following amendments and that they should be allowed here. Paragraph 7 of the petition relates to the charge that the respondent incurred or authorised election expenses in excess of the permissible limit of Rs. 7,000 while his return of expenses is of about Rs. 6,380. Instances are given in clause (b) (ii) to (b) (viii).

(a) In paragraph 7 (b) (ii) the petitioner alleged that the respondent incurred an expenditure of Rs. 15,000 on petrol. A list of vehicles was also gives in that paragraph of the petition. By this application dated 6 December 1965, the petitioner sought leave to amplify that instance of expenditure by supplying the following particulars. The respondent purchased about 17241 litres of petrol at the rate of Rs. 0.57 per litre from the Petrol Pumps J. Shukia and Co., Raipur, S. V. Shukla and Sons, Raipur, and from the petrol pump of Nawalchand Nathmal of Bhatapara. About 14911 litres of petrol, worth Rs. 12,974.34 P. has been entered fictitiously as supplied to M. P. Transport Co. Private Ltd., Raipur, Shri Chakrapani Shukla of Baloda Bazar and the Janpad Sabha, Baloda Bazar, while, in fact, this was expenditure incurred by the respondent in connection with the election work. It must be noted that the petitioner did not seek to add to the list of vehicles already given.

(b) In paragraph 7 (b) (iii) of the petition it is averred that the respondent had opened six election offices, engaging about 100 workers at each place, and

incurred or authorised expenditure on board and lodging of these persons, and on publicity and also in purchasing kerosene oil and stationary. In his application dated 19th November 1965, the petitioner sought leave to amplify the particulars by stating the needs and description of the agents through whom the expenses were incurred on election publicity,

(c) By his application dated 6 December 1965, the petitioner sought leave to further amplify the particulars of paragraph 7 (b) (iii) of the election petition as follows. Out of the total of Rs. 15,000, the respondent had showed in the return of his election expenses only Rs. 2,200 and suppressed Rs. 12,800. Much of the purchases were made in the name of Chakrapani Shukla of Baloda Bazar and have been thus shown in his name in the books of account of various dealers and merchants, that is, Annapurna Rice Mills, Baloda Bazar, Ganpatlal Kaluram of Baloda Bazar, Sharma Sound Service of Bhatgoan, Raman Cycle Stores of Baloda Bazar, Suresh Cycle Stores of Baloda Bazar and Govindlal of Baloda Bazar.

(d) By his application dated 6 December 1965, the petitioner sought to add a new instance of the expenditure incurred, but not shown in the return of the election expenses. Expenses were Incurred on cloth and printing of 102 banners and 17 boards. They were painted at Bhartiya Chitra Mandir, Raipur, and Rs. 125 was paid as painting charges. Cloth about 140 yards of 33" width, 34 yards of 45" width, and 103 yards of 54" width was purchased for Rs. 625. These expenses were incurred over and above Rs. 570 shown in the return of expenses.

(e) By the same application of 6 December 1965, the petitioner sought to introduce another new instance of such expenditure. It is averred that the respondent paid Rs. 200 in the shape of application fee and Rs. 50 as deposit in the office of the Congress Committee, Bhopal, under receipt No. 113 dated 25 March 1963, when he sought the Congress ticket for contesting the bye-election. It is averred that this amount of Rs. 700 was not returnable to the respondent.

(f) By the same application, the petitioner sought leave to add yet another new instance that the respondent incurred an expenditure of Rs. 900 on two Cawwali parties (one of Idu Miyan of Madhapura, Raipur, and the other of Vahidul Hussain Tavish of Nomminpura, Raipur, which were taken from Raipur to Kasdol Constituency for election propaganda and Rs. 450 was paid to each party.

(g) By his application dated 6 December 1965 the petitioner further sought to add a new instance that Rs. 3,000 was incurred on entertainment of about 100 workers of the respondent at Kasdol election office and other agents and workers of the respondent during the period 15th April to 4th May 1963 and this sum was paid to one Ramji Agrawal of Baloda Bazar proper, who had opened a hotel at Kasdol during the said period,

(h) By his application dated 6 December 1965, the petitioner sought to add yet another new instance that sum of Rs. 1,000 was incurred on posters, > like Ex. D-3, which were extensively exhibited and displayed throughout the constituency during the period 15th April to 4th May 1963.

(i) By the same application dated 6 December 1965, the petitioner sought to add yet another new instance that about Rs. 1,750 was spent on about 500 Congress flags, worth not less than Rs. 2.50 per flag, and on about 1000 Gandhi caps, worth not less than Rs. 0.50 per cap given to and used by the workers of the respondent, while doing propaganda for him and also to electors in the Kasdol constituency, free of charge and not returnable. The respondent showed in his return only Rs. 317.65 and suppressed Rs. 1432.35.

Shri Dharmadhikari opposed these amendments. Having heard the parties, we have formed the view that the appellant's contention must be accepted. The reasons are: (1) These amendments are within the principles laid down by the Supreme Court in the decisions cited above, particularly in Harishchandra Bajpai (supra) and S. N. Banarjee (supra) and also in the Full Bench decision of this Court in Babulal Sharma (supra). See also Sangappa v. Shivamurti Swami A I R 1958 Mys. 120 : 13 E L R 365. Items (a), (b) and (c) above are meant to amplify the existing particulars. Items (d) to (i) above are new items of expenditure but they are sought to be added to show that the respondent incurred or authorised the expenditure in excess of the permitted limit of Rs. 7,000, which is a corrupt" practice within the meaning of section 123(6) of the Act. That ground for declaring the election void was taken in paragraph 7 of the petition, and some particulars were given in the petition. No new ground or charge was sought to be added nor was the nature and character of the grounds was being altered. (2) Election expenses are within the special knowledge of the candidate. The petitioner made application for amendments when further facts came to his knowledge. This is not to say that a petitioner can go on adding instances endlessly. In this case, the petitioner applied for these amendments while his evidence was in progress. (3) What is more, the appellant told us that material to substantiate these allegations is already on record and that he will not seek to produce any more witness except one, to whom we shall refer. Therefore, there will be no protraction of the trial if the amendments are allowed. (4) It is clear that if there is no material on record to support and prove those items of expenditure the amendments will be of no avail to the petitioner. But, if such material has already come on the record it will be unjust to ignore it on the mere ground of omission of these details in the petition. (5) It is only in respect of item (e) above that the appellant, as he told us, will apply to examine one-witness, who will be more or less a formal witness, and the appellant told to that he proposed to examine the office Secretary of the Madhya Pradesh Congress Committee, at Bhopal. Whether or not the respondent paid Rs. 700 to the Congress when he applied for the Congress ticket, should be fully known to him and he cannot be said to be taken by surprise. The appellant relies on a receipt and some other documents which come from the Congress Office itself. (6) The learned Tribunal rejected the application for amendment on the ground of delay. In our opinion the time factor could not outweigh the above considerations. Delay by itself is no ground for refusing leave to amend an election petition but regard must be had to the nature of the amendment AIR 1958 Mys. 120 : 13 E L

R 365 sought and the circumstances in which it is sought and it is in that context that delay will be one of the considerations. (See the decisions of the Sttpre(sic), Court cited above and also (sic) Singh v. T. R. (sic) A I R 1958 AH 705 : 16 E L R 70. The (sic) should, therefore, be (sic) If they are found to have been not proved they will be of no consequence.

Before we leave this point we must say that in the petitioner's application dated 18 November 1965 where he sought to introduce a list of the agents under paragraph 7 (b) (in) of the, election petition he has included, the 17 signatories of a pamphlet purported to be published by the Raipur District Congress Committee." This expression is vague and indefinite. The petitioner ought to have supplied better particulars of the pamphlet or should have given the names of the signatories, To that extent therefore; that application will be disallowed.

Now remains to consider the appellant's grievance that same of the, documentary evidence which he sought to produce before the Tribunal was wrongly refused. By his application dated 15 November 1965, the petitioner sought to produce in evidence certain documents (declarations, leaflets and, posters) relating to the publicity in the course of the respondent's declaration in regard to his manifesto to the electors as published in the shape of a post-card, on the reverse of which was published an alleged message of Pandit Jawaharlal Nehru to the electorate to vote for the respondent. The prayer was: "this honourable Tribunal be pleased to allow this petition and permit the petitioner to put in evidence and prove all the published matters issued by or on behalf of respondent No. 2 along with their corresponding declinational In our opinion, this application was rightly, rejected by the tribunal. This application was made u/s 151, Civil Procedure Code, read with section 90 (1) of the Act, under which the procedure under the CPC is made applicable to the trial of an election petition. No good ground was furnished in the application why this document could not be produced as required by Order 13, rule 1, Civil Procedure Code. The appellant's contention that this document should be admitted in evidence must be rejected.

By another application of the same date, that is, 15 April 1965, the petitioner prayed for requisitioning of records from the" office of the Returning Officer, Kasdol, pertaining to the bye-election of 1963; on the ground that" "through some inadvertence, the originals of the complaints dated 14-4-63 27-4-63 and 29-4-63 made by this petitioner to the returning officer were not kept on the record of the present proceeding, when P.W. 1 was examined Some other document included in the record was required by the petitioner. Since, in our opinion, this application also was rightly rejected by the Tribunal the appellant's contention that the record of the Returning. Officer should now be requisitioned must be rejected.

By another application dated 1 April 1965, the petitioner prayed that six documents, which Bisram Prasad Tiwari (P. W. 82} had brought with him and wanted to produce before the Tribunal in support of his statement that certain persons had worked as agents of the respondent during the bye (sic) and not as

members of the Congress Committee, be admitted in evidence. These documents are letters the contents of which are stated in that application. "The learned Tribunal rejected these documents on the ground that the list of documents did not refer to these letters, that these letters rehearsed to extraneous matters, and that it was a back door method to get these letters on the record. For the same reasons, the learned Tribunal refused to give certified copies of those letters. Since, in our opinion, the petitioner's application dated 1 April 1966 was rightly rejected by the Tribunal, the appellant's contortion that they should be now taken on the record cannot be accepted,

"Now remains the petitioner's application dated 29 June 1966 for admitting in evidence five documents, They are these: Document No. 1 is a letter dated 3 May 1963 purporting to have been written by Rameshwar Dayal Totla, governor of the M. P. Congress Committee, to Pandit Jawharlal Nehru, giving his report about the buy-election. The petitioner wanted to show that about 75 jeeps were employed and that more than a lac of rupees was spent. Document No. 2 is a report dated 27 March 1963 sent by the said Rameshwar Dayal Totla to the All India Congress Committee, to say that Rs. 700 had been paid by Shri D. P. Mishra as application fee and deposit money. Document No. 3 is a printed procedure for selection of candidates approved by the working Committee of All India Congress Committee. Document No. 4 is the application form for Congress ticket, purporting to have been (sic) by the respondent and presented to the M. P. Congress Committee. It is also mated that the respondent No. 1 paid Rs. 700 to the Congress Committee, on 25 March 1963 vide receipt No. 113. Document No. 5 is the audit report of the M. P. Congress Committee for the period 4 February 1963 to 28 November 1963 by K. K. Mankeshwar and Co., Chartered Accountant, Nagpur, and it contains the amount of Rs. 700 paid by the respondent. It also purports to bear the signature of Ramnarayan Purohit, Office Secretary of the M. P. Congress Committee. In this application dated 29 June 1966, the petitioner stated that he had sought from Ramnarayan Purohit production of the original application form, the counterfoil of receipt No. 113, the original account books, a copy of Rameshwar Dayal Totla's letter to Pandit Jawharlal Nehru, and Rameshwar Dayal Totla's report to the All India Congress Committee and the procedure for selection of the Congress candidates. These documents were not in the custody of the petitioner.

In our opinion, Tribunal was right in rejecting the document No. 1 and document No. 2. Rameshwar Dayal Totla had been given up as a witness and the documents would have remained not proved and of no consequence. Accordingly, the appellant's contention to admit these two documents cannot be accepted. But by the other three documents, the petitioner merely wanted to prove that the respondent paid Rs. 700 to the Congress while applying for the Congress ticket. His contention is that this was an expenditure within the meaning of section 77 of the Act. It seems to us clear that two questions arise: (1) whether the respondent actually paid Rs. 700 to the Congress; and (2) whether this is expenditure within the meaning of section 77 of the Act. Shri Dharmadhikari

conceded that in case we would allow the amendment of the petition in respect of the new instance of expenditure of Rs. 700 these three documents would have to be admitted in evidence as these two matters are intimately connected with each other. The concession, in our opinion, is right. Even apart from it, as we are granting leave to amend the petition so as to introduce this item of expenditure in paragraph 7 of the election petition, the production of these three documents must also be allowed.

In the result, we direct as follows:-

(1) The first respondent, Shri Dwarka Prasad Mishra, shall appear in this Court on 15 July 1968 for further cross-examination.

(2) The appellant shall amend his election petition as prayed by him in his applications dated the 18th November, the 1st December and the 6th December 1965, and also the 25th March 1966, except the words "and (iv) all 17 signatories and members of the Congress, on a pamphlet purporting to have been published by the Raipur District Congress Committee" which occur in paragraph 7 of the said application dated 18 November 1965. On or before 3 July, 1968, the appellant shall file requisite number of copies of the amended petition to be included in the paper book. By the same date, the respondent may, if he so desires, file a supplementary return to answer the averments which we have allowed to be introduced in the election petition by way of amendment.

(3) Documents Nos. 3, 4 and 5 in the petitioner's application dated 29 June 1966 shall be admitted in evidence subject to their being proved according to law. Rest of this application dated 29 June 1966 and also the petitioner's application dated 15 November 1965, and another of 15 November, 1965 and that of 1 April 1966 are held to have been rightly rejected by the Tribunal.

(4) The appellant shall, on or before 3 July 1968 furnish the name, description and full address of his witness (only one) whom he desires to examine regarding his allegation that the respondent while seeking the Congress Ticket, paid to the Congress Rs. 200 as application fee and Rs. 500 as deposit and these were election expenses. The appellant shall also keep ready the process fee and a sum of Rs. 50 to be deposited in advance to meet the travelling expenses and diet money of his witness.

(5) The respondent shall, on or before 3 July 1968, file his list of witnesses (indicating in respect of each, the point on which he will be examined) and shall keep ready process fee and Rs. 50 per witness to be deposited for meeting the expenses of his witnesses who may be allowed to be examined.

(6) The parties shall be heard on 3 July 1968 on their applications which they may make for examination of, and summoning, their witnesses.