

(1965) 01 PAT CK 0001
In the Patna High Court
Case No : A.F.O.O. No. 312 of 1963

Sawalia Behari Lal Verma

APPELLANT

Vs

Tribikram Deo Narain Singh and Others

RESPONDENT

Date of Decision : 05-01-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8
Representation of the People Act, 1951 — Section 90(1), 92

Citation : AIR 1965 Patna 378

Hon'ble Judges : Tarkeshwar Nath, J; S.C. Misra, J

Bench : Division Bench

Advocate : Shyam Kishore Prasad, for the Appellant; Balbhadra Prasad Singh and Tribeni Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—This appeal is directed against an order dated the 10th August 1963 of the Election Tribunal, Patna, in Election Case No. 354 of 1962. The appellant put in an election petition questioning the validity of the election of respondent Sri Tribikram Deo Narain Singh, respondent No. 1, to the Bihar Legislative Council. The petition was dismissed by the Tribunal by order dated the 5th of December, 1962. An application was filed under Order 9, Rule 9, Code of Civil Procedure, for restoration of the election case. The petition for restoration was also dismissed by the Election Tribunal on the 10th August 1963. The appellant feeling aggrieved by the order dismissing the application for restoration has come up to this Court.

2. A few dates, which are relevant, may be set out here. The election petition was filed on the 11th of June 1962 and the Election Commission sent the case for trial to the Election Tribunal, Muzaffarpur, on the 11th of July, 1962. It was received in the office of the Tribunal on the 19th of July 1962. The Member, Election Tribunal, Muzaffarpur, however, considered it improper to take up the trial of the case because he knew both the parties. Accordingly, it was

transferred to the file of the Election Tribunal, Patna, on the 30th of July 1962. The Tribunal fixed 16th of August 1962 as the date for appearance of the parties. On the 24th of September 1962, written statement was filed by respondent No. 1, and on the 27th of September 1962, issues were settled and the parties were directed by the Tribunal to file their documents and the list of witnesses before the 6th of November 1962. The appellant, however, prayed for further time to file list of witnesses as also documents, and the Tribunal granted time till the 8th of November 1962. On that date, the appellant prayed that two issues should be taken for trial as preliminary issues, but the Tribunal rejected the prayer for piecemeal trial on the 13th of November 1962, 17th of November 1962 was fixed for the hearing of the election petition. On that date, the appellant made a prayer for grant of one week's time to enable him to move the High Court against the order of the 13th November 1962, so that the further proceedings of the election case might be stayed by the High Court. The Tribunal granted the prayer and time was allowed till the 21st of November 1962.

3. It so happened, however, that even on the 21st of November 1962, a further application for a fortnight's time to take steps for the trial of the election case was filed. This petition was taken up on the 22nd November 1962, but as no one was present on behalf of the appellant to move that petition, it was rejected. The Tribunal, however, granted time to the parties till the 26th of November 1962 to file their respective lists of witnesses as also their documents. On that date, two petitions were filed on behalf of the appellant; one contained the prayer that the Tribunal should hold the hearing at Muzaffarpur as most of the witnesses belonged to that district and as such trial of the election case in that district would be more convenient to the appellant. That application was, however, rejected. On the 27th of November 1962, the prayer for serving interrogatories on the respondent, contained in another application, was also rejected and the case was ordered to be taken up peremptorily on the 5th December, 1962.

On the 5th of December 1962, however, a further application was filed on behalf of the appellant for time on the ground that the order of the 27th November 1962 rejecting the prayer for serving of interrogatories on the respondent made on behalf of the appellant was communicated to the lawyer of the appellant on the 1st of December 1962, and accordingly an application for certified copy of the order was made on that date. The certified copy of the order was made over to the counsel for the appellant on the 3rd December 1962. There-after arrangement was made for filing an application in revision in the High Court on the 5th of December 1962, which was the date for hearing of the election petition. The Tribunal, however, rejected the prayer for further adjournment giving reasons in an elaborate order, characterising the prayer as unjust and intended merely to delay the disposal of the election petition. The application for restoration, which was filed on the 20th December 1962, was too, as already stated, dismissed by the Tribunal.

4. Learned counsel for the appellant has contended that the order of the Court

below refusing to restore the election case is not justified in the circumstances of the case and as such it should be set aside. The main ground on which he has rested his argument is that on the 5th December 1962, when the Tribunal passed the order rejecting the prayer for adjournment of the case, he was not present before the Tribunal and that he was actually in the High Court making arrangement for drawing up a revision application to be filed in the High Court. When the application for adjournment was made, it was not rejected outright, but the Tribunal passed the order in Chambers, and accordingly, neither he nor the appellant could be present to respond to the calls when the case was taken up by the Tribunal and it was dismissed because the petitioner was not present to go on with the trial, In this connection, however, it is to be borne in mind that when the Tribunal passed the order on the 5th of December 1962, rejecting the prayer for adjournment of the case, it made the following note in the order sheet:

"Later. After the above rejection order of his petition of today the petitioner's counsel goes out of the court, Counsel for the contesting respondent No. 1 is present since very beginning and gives out that he is ready for the hearing of the case. It is called out several times and there is no response from the petitioner's side. It is already 1.20 P.M. In this circumstance the election petition is dismissed for default. No order for costs to the other side."

In view of this note in the order sheet, it is difficult to accept the contention put forward on behalf of the appellant that when the order rejecting the petition for adjournment was passed, neither counsel for the appellant nor the appellant himself was present before the Tribunal. There is nothing on the record to substantiate the statement made on behalf of the appellant and, accordingly, it cannot be accepted, as against the very clear order passed by the Tribunal in this respect.

5. Learned counsel has contended in the next place that in view of the fact that the order passed on the 27th of November 1962 was communicated to him on the 1st December 1962, as the signature on the order sheet would show beyond doubt, he made the application for a certified copy of the order to file an application in revision in the High Court with utmost promptitude on that very day, but the certified copy of the order was supplied to him on the 3rd December 1962, and as such it could not be said that there was undue delay on his part, when the application in revision to this Court could not be filed by the 5th of December 1962, only two days later. The Tribunal, according to the learned counsel, did not take into consideration this circumstance and as such is order rejecting the prayer for adjournment and directing the trial to proceed is patently unsupportable. The Tribunal stressed that the fact that the certified copy of the order was supplied to the learned counsel for the appellant on the 3rd of December 1962 was not brought to its notice, when in fact the certified copy itself would show that certified copy was supplied to him on that date, as was alleged on his behalf. That may be so, and in fact the Tribunal has referred to the fact that it was not stated that the certified copy of the order was supplied to the

counsel for the appellant on the 3rd of December 1962.

In my opinion, the contention urged on behalf of the appellant cannot be accepted. It is correct, no doubt, that the Tribunal has referred to this circumstance, and this also may have weighed with him in rejecting the prayer for adjournment. This however, is not the only ground on which he rejected the prayer for adjournment as also the application for restoration of the election case. In this connection the Tribunal has referred to the several orders passed by it, making it clear that the case was bound to be taken up on the next date because an election petition must be disposed of expeditiously, preferably within a period of six months from the date of the filing of the election petition. He has referred, in particular, to the order of the 27th November 1962, which order was admittedly passed in presence of the learned counsel for the appellant that the case would be taken up definitely on the 5th of December 1962. He has also considered that since this order was passed in presence of the learned counsel for the appellant and that he was aware of the order rejecting his prayer for serving of interrogations on the respondent, it was up to him to take steps earlier than the 1st of December 1962 and there was no reason why he should have waited up to the 1st of December 1962, when the order was communicated, for taking steps to obtain the certified copy of the order.

In my opinion, in view of the several orders passed by the Tribunal, saying that adjournment would not be granted and that the hearing would be taken up expeditiously, there was no reason why the appellant or his counsel should not have taken steps before the 1st of December 1962 for obtaining certified copy of the order and moved the High Court so that before the 5th of December 1962 proper order might have been passed by this Court, either rejecting the application or after admitting it, ordering stay of further proceeding in the election case. The position is still worse. As the Election Tribunal has mentioned, after the prayer for adjournment was rejected, counsel for the respondent was present before the Tribunal to go on with the trial, but counsel for the appellant walked out of the Court as if there was inherent right to the petitioner to have the case adjourned beyond the 5th of December 1962. In the circumstances, it cannot be held that the Tribunal was not justified in passing the order dismissing the election petition, for, it was a clear cast: where the appellant, for one reason or the other, appeared not to be serious in proceeding with the trial by leading evidence in the case.

6. Learned counsel for the appellant has urged in the next place that in any view of the matter, the Tribunal was not competent to dismiss the election petition even if the appellant could not be present to assist the Court by leading evidence in support of the allegations to the election petition. This argument appears to me to be rather far-fetched because if the appellant, who was interested in having the election set aside, was not prepared to adduce, necessary evidence or to go on with the proceeding doing his part, it is difficult to imagine how the Tribunal can keep the matter still hanging for an indefinite period nor is any

indication given in the Representation of the People Act, 1951, as to how the Tribunal would proceed in a situation like this. Learned counsel for the appellant has, however, urged that the dismissal of the election petition having been ordered under Order 9, Rule 8, CPC which the Tribunal had no jurisdiction to resort to, the order is not sustainable. He has drawn our attention in this connection to certain sections of the Representation of the People Act, 1951, but mainly to Sections 90 and 92. It is clear that the provisions of the Act contained in Sections 82 to 90 are not of much importance so far as the decision of the present controversy is concerned. Learned counsel has contended that the only power vested in the Tribunal for dismissing an election petition in terms of Section 90 is contained in Sub-section (3), which provides that:

"The Tribunal shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 notwithstanding that it has not been dismissed by the Election Commission u/s 85," (Explanation: An order of the Tribunal dismissing an election petition under this sub-section shall be deemed to be an order made under Clause (a) of Section 98.)"

Learned counsel has contended that apart from this provision, the Tribunal is bound to decide the case on merits because there is no other situation in which it is open to the Tribunal to dismiss an election petition. The Tribunal however, while disposing of this contention urged before it, referred to Sub-section (6) of Section 90 of the Representation of the People Act, 1951, which lays down that:

"Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of publication of the copy of the petition in the Official Gazette under Sub-section (1) of Section 86."

He has also referred to Sub-section (1) of Section 90 of the Act which provides that:

"Subject to the provisions of this Act and of any rules made thereunder, every 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 (5 of 1908), to the trial of suits."

Learned counsel, however, has relied upon a Full Bench decision of the Jammu and Kashmir High Court reported in *Dina Nath Kaul v. Election Tribunal*, J. and K. AIR 1960 J & K 25. That too was a case where on the date fixed for hearing of the petition, the petitioner could not appear and accordingly the Tribunal dismissed the petition saying that "the petitioner (second respondent) does not appear to be serious about prosecuting the petition". This was on the 3rd of December, 1957. On the 10th of December 1957, an application was filed on behalf of the petitioner for restoration of the election case setting out the circumstances why he failed to appear on the date fixed for hearing of the petition. That application was allowed and the case was restored to file. The respondent in that election case filed an application for quashing the order of the

Tribunal restoring the election case. In that connection, Gopalakrishnan Nair, J, who delivered the leading judgment made the following observation:

"These authorities establish that once an election petition is before the Election Tribunal, it has to proceed to completion according to the provisions of the Representation of the People Act, and it is not open to the petitioner to exercise his option to prosecute the petition or not or to abandon or withdraw it wholly or in part."

In the subsequent paragraph, his Lordship has again observed as follows:

"It follows that the dismissal of an election petition on the ground of non-appearance of the petitioner is contrary to law and causes injustice and denies the rights of the entire electorate who are unquestionably interested in the proceedings, The order of the Election Tribunal dated 3-12-57 dismissing the election petition preferred by the second respondent under the provisions of Order 9 Rule 8 is, therefore, plainly erroneous, unjust and untenable in law."

Taking that view of the matter, their Lordships refused to issue a writ of certiorari for quashing the order passed by the Election Tribunal on the 15th July 1958. It is true, no doubt, that if the view of law as laid down by the Full Bench of the Jammu and Kashmir High Court is taken to be us laying down the correct law with regard to the power of the Tribunal to dismiss an election petition for default, this appeal will have to be allowed. Accordingly, I consider it necessary to scrutinise some of the decisions to which reference has been made in the judgment of the Full Bench. Reliance was placed also on the case and the observations in the judgment of the Supreme Court reported in *Inamati Mallappa Basappa Vs. Desai Basavaraj Ayyappa and Others*, as also in *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, . In *Inamati Mallappa Basappa Vs. Desai Basavaraj Ayyappa and Others*, the point for consideration was, whether the Election Commission could allow the petitioner to withdraw or abandon a part of his claim either by having resort to the: provisions of Order 23, Rule 1, Code of Civil Procedure, or otherwise, and it was ruled that it was not open to the petitioner to do so. To abandon a part of the claim or to withdraw it would run counter to the provisions of the Representation of the People Act itself, and the Tribunal or the Election Commission had no power to allow such abandonment or withdrawal of a part of the claim.

In that connection their Lordships referred to Sections 108 to 110 of the Representation of the People Act, 1951. Section 108 relates to withdrawal of petitions before appointment of Tribunal, Section 109 relates to withdrawal of petitions after appointment of Tribunal and Section 110, which is relevant, refers to procedure for withdrawal of petitions before the Election Commission or the Tribunal. Sub-section (2) of Section 110 was duly considered in the aforesaid decision and the inference drawn was that the legislature laid down restrictions on the. power of the petitioner to withdraw an election petition. This provision was obviously based on the theory that an election petition is not a suit between

two parties, but it is a matter in which the entire constituency is interested, and where the prayer for withdrawal is induced by any bargain or consideration which ought not to be allowed, the prayer should be refused. If such an application is granted, notice of the withdrawal is to be published so that the voters of the constituency or any one would be competent to bring himself on the record in place of the petitioner withdrawing it, within fourteen days of such publication in the official gazette by the Election Commission or by the Tribunal, as the case may be, the intention of the legislature to the same effect is implicit in the provisions of Sections 112 to 116 of the Representation of the People Act, 1951, regarding the procedures to be adopted in case of abatement of election petitions.

It is clear, therefore, that the underlying principles of the decision of the Supreme Court in the above case is that Section 90(1) cannot be invoked in a case where there is a distinct provision under the Representation of the People Act itself, debarring the petitioner from the withdrawal of the election petition. If, therefore, it appears that there is a distinct provision in the Representation of the People Act itself laying down certain procedures, the general provisions of the Code of Civil Procedure, according to the ordinary rule of interpretation, would be substituted by the specific provisions of the Representation of the People Act, and the Code of Civil Procedure, which is a general provision, cannot be invoked in aid by any party interested in the dispute. In *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, the position was entirely different, and although there is an observation therein as to the general character of an election dispute, pointing out that it is not a private affair merely of a particular person, but that it is a matter in which the entire constituency is interested, but beyond it, no assistance can be derived by the learned counsel for the appellant, so far as the present controversy is concerned, from that decision.

7. The Election Tribunal, however, placed reliance in support of its conclusion upon a decision of the Madhya Pradesh High Court reported in *Sunderlal Mannalal v. Nandramdas*, AIR 1958 Madh Pra 260 in which the following observation occurs at page 261:

Now the Act does not give any power of dismissal. But it is axiomatic that no Court or tribunal is supposed to continue a proceeding before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which even tribunal possesses. Reference was made in the Bill in which Section 111-A had been proposed and was not accepted by the Select Committee. We do not think that the citation of the Bill or of the Select Committee Report is proper; but we mention this fact because the citation instead of supporting the present petitioner in fact goes against him.

The intention, if any, in deleting the proposed Section 111-A must have been to leave the powers exercisable under the CPC intact. Now, the CPC also provides for dismissal of suits under the 9th Order. There is also an additional power of the Court to say that a particular proceeding before it is not being prosecuted

and therefore is being struck off. The order which was made on the 10th September, was of this nature. In our opinion, no express provision in the Act was necessary to empower the Court to make the order of dismissal in default."

8. The Division Bench of the M. P. High Court, therefore, has clearly ruled that if the petitioner does not take steps when the case is fixed for hearing, it is the inherent jurisdiction of the Court to dismiss the election petition. I am in respectful agreement with the decision of the Division Bench of the Madhya Pradesh High Court in the above cast. The position, indeed, would be a baffling one if it were to be laid down that even if the petitioner chose not to prosecute a petition or lead evidence, the Tribunal must go on with the" case. I may only add to the reason assigned in the judgment that Section 90(1) is sufficiently wide to make Order 9 of the CPC applicable to all election disputes under the Representation of the People Act. It is, no doubt, true that there is an observation in the judgment of their Lordships of the Supreme Court that the powers of the Tribunal u/s 92 of the Act are different from the powers of a Court under the Code of Civil Procedure. That, however, cannot be taken to have the effect of nullifying the clear provision of Section 90(1) of the Act that the procedure to be followed by the Tribunal in disposing of the election petition would be that of the Code of Civil Procedure. Order 9 is a part of the Code of Civil Procedure, and there is no reason to hold that it would not apply to the present case, because there is no such restriction provided in the Representation of the People Act itself making this Order 9 inapplicable to the election cases. It is true, no doubt, that in the case of Bhuvanesh Bhushan Sharma Vs. Election Tribunal, Farrukhabad and Another, , this point was raised, but it was not answered as it was not necessary for the decision of the point involved in that case.

In my opinion, however, I see no reason why Order 9 of the CPC should not be held to be applicable to election cases as well, as an integral part of the Code of Civil procedure. The Tribunal took the correct view in overruling the contention urged before it that it was not competent to dismiss the election petition if the petitioner did not take proper steps to go on with the trial. It may be stated that the application for restoration of the election case was filed by the petitioner before the Tribunal under Order 9, Rule 9 of the Code of Civil Procedure. It seems to me that unless there is any provision in the Representation of the People Act itself, as is provided for in Sections 110 to 116 of the Representation of the People Act the entire body of the CPC would be held to be applicable to the trial of election disputes, in the same manner as it is applicable in the case of trial of a suit.

9. For the reasons aforesaid, I am satisfied that the decision of the Tribunal is correct. There is no merit in the appeal, which must be dismissed. In the circumstances of the case, however, the parties shall bear their own costs.

Tarkeshwar Nath, J.

10. I agree.