

CASE NO.:
Appeal (civil) 8448 of 2002

PETITIONER:
DIPAK CHANDRA RUHIDAS

RESPONDENT:
CHANDAN KUMAR SARKAR

DATE OF JUDGMENT: 31/07/2003

BENCH:
V.N. KHARE CJ & K.G. BALAKRISHNAN & S.B. SINHA

JUDGMENT:
JUDGMENT

2003 Supp(2) SCR 72

The following Order of the Court was delivered:

The question as to interpretation of Section 116A of the Representation of the People Act, (hereinafter referred to as "the Act") falls for consideration in this appeal which arises out of a judgment and order dated 31.07.2002 passed in Misc. Case No. 28/01 in Election Petition No. 17/2001 whereby and where under the Election Petition filed by the appellant herein was dismissed.

The last general election for Assam Assembly was held in May 2001. Abhayapuri South Legislative Assembly Constituency is a reserved constituency. The respondent herein filed his nomination for contesting election from the said constituency. On the date of scrutiny of nominations, an objection was made that the respondent was not a member of the Scheduled Caste and, therefore, his nomination was liable to be rejected. However, the Returning Officer overruled this objection. The respondent having received majority of valid votes in the election was declared a member of the Legislative Assembly from Abhayapuri South (35) Legislative assembly Constituency. The appellant herein who was an elector of the aforesaid Assembly filed Election Petition No. 17 of 2001 before the Gauhati High Court challenging the election of the respondent on the ground that his nomination was improperly accepted. After the notices were served upon the respondents in the Election Petition, the returned candidate filed an application for dismissal of the Election Petition, inter alia, on the ground that the allegations contained in the Election Petition are vague and lacked material particulars and the Election Petition need not to go on trial. The Tribunal (High Court) after considering the matter found that the allegations contained in the Election Petition were vague and general and lacked material particulars. In that view of the matter, the Tribunal (High Court) on 31st July, 2002 dismissed the Election Petition. Aggrieved, the appellant challenged the aforesaid order and judgment of the High Court by means of a special leave petition on 30th October, 2002. Subsequently, leave has also been granted.

When this matter was taken up for hearing a preliminary objection was raised on behalf of the respondent that this appeal by way of special leave petition is not maintainable, inter alia on the ground that as a regular appeal as contemplated under Section 116A of the Act, could have been filed, this special leave petition under Article 136 of the Constitution was not maintainable. In any event as no application along with affidavit has been filed for condonation of delay; the same became barred by time having not been filed within 30 days of the order of the High Court.

Learned counsel appearing on behalf of the appellant, on the other hand, would urge that having regard to the fact that no trial had taken place, the provisions of Section 116A of the Act were not attracted. According to

the learned counsel, an appeal would lie to this Court under the said provision only when an order is passed by the High Court at the conclusion of the trial as is provided for in Section 98 of the Act.

Chapter III occurring in part VI of the Act deals with trial of Election Petitions. Sections 86, 98, and 116A of the Act which are material for our purposes read as under :

"86. Trial of election petitions. - (1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.

Explanation. - An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of Section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation. - For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) 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 on which the election petition is presented to the High Court for trial."

"98. Decision of the High Court. - At the conclusion of the trial of an election petition the High Court shall make an order -

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected."

"116A. Appeals to Supreme Court. - (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under Section 98 or Section 99

(2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the High Court under Section 98 or Section 99.

Provided that the Supreme Court may entertain appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period."

The question which requires consideration, as noticed herein is as to whether what would be the true meaning and purport of the expression 'trial'. Heading of Chapter III is 'Trial of Election Petitions'. Sub-section (1) of Section 86 empowers the High Court to dismiss an Election Petition if the same does not conform to the requirements of Sections 81, 82 and 117. It may be true that other sub-sections of Section 86 provide as to the different stages of trial. Would it mean that an order passed under sub-section (1) of Section 86 would not be one passed at the trial.

The Explanation appended to sub-section (1) of Section 86 makes the position absolutely clear and implicit.

Explanation as is well-known has various functions. This Court in *S. Sundaram v. V.R. Pattabhiraman*, AIR (1985) SC 582 stated:

"We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of willful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning to explain or clarify certain ambiguities which may have crept in the statutory provision."

Referring to various case laws and treatises on Interpretation of Statutes, it was held:

"Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve.
- (c) To provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

Explanation to Section 86(1) of the Act has been inserted for clarifying vagueness which might have otherwise occurred in sub-section (1) of Section

86 of the Act. By reason of the said provision, thus, a legal fiction has been created in terms whereof an order passed under sub-section (1) of Section 86 would be an order under clause (a) of Section 98.

The legal fiction created by reason of the said Explanation must be given its full effect.

In Bhavnagar University v. Palitana Sugar Mill (P) Ltd and Ors., [2003] 2 SCC 111, this Court stated:

"The purpose and object of creating a legal fiction in the statute is well-known. When a legal fiction is created, it must be given its full effect. In East End Dwellings Co. Ltd. v. Finsbury Borough Council, [1951] 2 All.E.R. 587, Lord Asquith, J. stated the law in the following terms:-

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 leave of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The said principle has been reiterated by this Court in M. Venugopal v. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and Anr., [1994] 2 SCC 323. See also Indian Oil Corporation Limited v. Chief Inspector of Factories and Ors. etc., [1998] 5 SCC 738, Voltas Limited, Bombay v. Union of India and Ors., [1995] Supp. 2 SCC 498, Harish Tandon v. Addl. District Magistrate, Allahabad, U.P. and Ors., [1995] 1 SCC 537, G. Viswanathan etc. v. Hon'ble Speaker and Tamil Nadu Legislative Assembly, Madras and Anr., [1996] 2 SCC 353."

Furthermore, Section 86 deals with trial of Election Petitions, sub-section (1) whereof is a part of it. Trial has not been defined. In Black's Law Dictionary at page 1348 it is stated:

"A judicial examination and determination of issue between parties to action Gulf, C. & S.F. Ry. Co. v. Smit, Okl., 270 F.2d 629, 633; whether they be issues of law or of fact, Pulaski v. State, 23 Wis. 2d 138, 126 N.W. 2d 625, 628. A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties whether of law or fact, before a court that has proper jurisdiction."

It is, therefore, not necessary that the trial must be a full dressed or a jury trial or a trial which concludes only after taking evidence of the parties in support of their respective cases.

Section 116A provides for an appeal. The said provision must be given a liberal and purposive construction. The scope of an appeal should be held to be wider than an application for judicial review or a petition under Article 136 of the Constitution of India. Furthermore, the Representation of the People Act provides for a complete machinery. The right of appeal conferred upon a suitor must be considered from that angle. When an order is passed under Section 98 of the Act, the same may be in terms of either sub-section (1) of Section 86 or otherwise. An appeal lies against a final order. An order passed under sub-section (1) of Section 86 is also final. It may be that in the event an appeal there from is allowed, the matter may be required to be sent back but that would not render an order passed there under as an interlocutory one. It does not take away the concept of the finality attached therewith.

Although, there is no direct decision on the point but it appears that this

Court in Hari Shankar Jain v. Sonia Gandhi, [2001] 8 SCC 233 entertained an appeal under Section 116A from an order rejecting the Election Petition.

Learned counsel then urged that this special leave petition may be treated as an appeal under Section 116-A of the Act. An appeal is required to be filed within 30 days of the order and judgment of the Tribunal (High Court) and the power has been given to the Supreme Court to condone the delay in case of the appeal having been filed after 30 days. In the present case no application for condonation of delay has been filed in terms of the proviso appended to sub-section (2) of Section 116A of the Act. As the appeal would have otherwise been barred by limitation, we are not in a position to treat this appeal as an appeal under Section 116A of the Act. We are, therefore, of the opinion that the said special leave petition was not maintainable and leave under Article 136 of the Constitution of India was wrongly granted. It is, accordingly, revoked. The special leave petition is dismissed.

There shall be no order as to costs.