

PETITIONER:
INAMATI MALLAPPA BASAPPA

Vs.

RESPONDENT:
DESAI BASAVARAJ AYYAPPA & OTHERS

DATE OF JUDGMENT:
22/04/1958

BENCH:
BHAGWATI, NATWARLAL H.
BENCH:
BHAGWATI, NATWARLAL H.
KAPUR, J.L.
SARKAR, A.K.

CITATION:
1958 AIR 698 1959 SCR 611

ACT:

Election Petition-Claim for seat-Recrimination, when right accrues-Abandonment of claim for seat, if permissible-Whether abandonment affects right of recrimination-Code of Civil Procedure (Act V of 1908), O. 23, r. 1.-Representation of the People Act, 1951 (27 Of 1951), ss. 90 and 97.

HEADNOTE:

A, the unsuccessful candidate at an election, filed an election petition against B, the successful candidate, claiming a declaration that the election of B was void and that he had been duly elected as he had secured the next highest number of valid votes. On the first date of the hearing before the Election Tribunal A submitted an application under O. 23, r. 1, of the Code of Civil Procedure abandoning the relief claiming the seat. B objected to the abandonment and filed a notice of recrimination under s. 97 of the Representation of the People Act, 1951, accompanied by the statement and necessary particulars. A contended that B was not entitled to give evidence in recrimination as the claim for the seat had been abandoned. The Tribunal held that s. 90(1) of the Act had made the procedure prescribed by the Code of Civil Procedure applicable to proceedings in election petitions and as such A had a right under O. 23, r. 1, of the Code to abandon a part of his claim and that A having abandoned his claim for the seat B was no longer entitled to recriminate.

Held, that the provisions of the Act constitute a self-contained code governing the trial of an election petition and in spite of s. 90(1) of the Act, the provisions O. 23, r. 1, of the Code of Civil Procedure were not applicable to the trial of an election petition by the Tribunal; and it was not open to A to withdraw or abandon a part of his claim once an election petition had been presented to the Election Commission, particularly when such a withdrawal or abandonment of a part of the claim would have had the effect of depriving B of the right of recrimination which had accrued to him under s. 97 of the Act. The right of recrimination accrued to B the moment the election petition was presented to the Election Commission containing the

claim for 'the seat, and it was not open to A to defeat this right by withdrawing or abandoning the claim for the seat. An election petition once filed does not mean a contest only between the parties thereto but continues for the benefit of the whole constituency and cannot come to an end merely by the withdrawal thereof by the petitioner or even by his death or

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by the death or withdrawal of opposition by the respondent but is liable to be continued by any person who might have been a petitioner.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 76 of 1958.

Appeal by special leave from the judgment and order dated September 26, 1957, of the Election Tribunal, Dharwar, in Election Petition No. 52 of 1957.

G. S. Pathak, H. J. Umrigar and G. C. Mathur, for the appellant.

P. Ram Reddy, for respondent No. 1.

G. S. Pathak and S., S. Shukla, for the interveners.

1958. April 22. The Judgment of the Court was delivered by BHAGWATI J.-This is the 4th of the series of Civil Appeals before us arising out of election petitions and involving the interpretation of the relevant sections of the Representation of the People Act, 1951 (hereinafter referred to as "the Act"). The decision of this appeal turns on the construction of s. 97 of the Act and also on the jurisdiction of the Election Tribunals to allow withdrawal or abandonment of part of the claims before them.

The appellant and respondents 1 to 3 were the contesting candidates for election to the Mysore Legislative Assembly from the Dharwar Constituency in the last General Elections. The appellant was the Congress candidate and the first respondent was the candidate of the Lok Sevak Sangh party. The result of the election was declared on March 3, 1957, and the appellant was declared elected by a majority of 1,727 votes. On April 14, 1957, the first respondent presented to the Election Commission a Petition, being Election Petition No. 52 of 1957 under s. 80 of the Act wherein besides claiming a declaration that the election of the appellant was void he claimed a further declaration that he, the first respondent, had been duly elected as he had secured the next highest number of valid votes. The Election Petition was published in

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the official gazette and was then referred to the Election Tribunal for trial. 'The appellant and the respondents Nos. 2 and 3 received a notice from the Election Commission requiring them to appear before the Tribunal on or before July 20, 1957. On the said date, the first respondent submitted before the Election Tribunal what purported to be an application under O. 23, r. 1, of the Code of Civil Procedure to the following effect :

" The petitioner hereby abandons part of his claim namely " that it be further declared that the petitioner has been duly elected as the petitioner has secured the next highest number of valid votes. " The petitioner confines his claim, therefore, to have the election of respondent No. 1 declared void and to have costs of the proceedings awarded to him. " On July 25, 1957, the appellant filed his objections to the said application contending inter alia, that by reason of

the fact that the first respondent had claimed in his Election Petition a declaration that he was duly elected, the appellant and the other respondents to the Election Petition had acquired a right under s. 97 of the Act, to file recrimination against the first respondent subject of course to compliance with the necessary statutory provisions in that behalf, and that such right to file recrimination could not be affected by the purported abandonment of the relief by the first respondent. On July 29, 1957, the appellant gave notice of his recrimination under s. 97. The said notice was accompanied by the statement and necessary particulars as required by s. 97 read with s. 83 of the Act and was given within 14 days from the date of the commencement of the trial, viz., July 20, 1957. The particulars of corrupt practices under s. 123(1) (a) and (b) and s. 123(6) of the Act thus given by the appellant comprised corrupt practices of bribery and using of motor vehicles for the conveyance of voters to the poll which if proved would have led to his disqualification for standing as a candidate and from being a member of the Legislature for a period of six years counting from the date on which the finding of the Election Tribunal as to such practice took effect under the Act (Vide s. 140).

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On August 1, 1957, the first respondent filed an objection to the above-mentioned notice under s. 97 wherein he contended inter alia that the appellant was not entitled to give evidence in recrimination as the claim for further declaration had been abandoned by him. There had been a vacancy for a Legislative Assembly seat from a neighbouring constituency on account of the death of Shri B. R. Tambakad on June 26, 1957, and the first respondent decided to contest the election in the vacancy, filed his nomination paper for the said vacancy on September 17, 1957, and was duly elected on October 16, 1957, as a member of the Mysore Legislative Assembly from the Kalaghatgi Constituency. The application of the first respondent under O. 23, r. 1, of the Code of Civil Procedure, the notice of recrimination given by the appellant under s. 97 and the objection filed by the first respondent to the same came up for hearing before the Election Tribunal, Dharwar, and the Tribunal framed the following issues:-

- " (1) Whether the 1st respondent is entitled to abandon a part of his claim in the manner he has done ?
(2) If so, whether the appellant will be entitled to give notice to the Tribunal of his intention to give evidence to prove that the election of the first respondent would have been void if he had been the returned candidate ?
(3) Whether the notice of recrimination given by the appellant is barred by limitation ? "

The Tribunal held that by virtue of the provisions of s. 90(1) of the Act the procedure prescribed by the Code of Civil Procedure had been made applicable to proceedings in election petitions and as such under the provisions of O. 23, r. 1, of the Code of Civil Procedure the first respondent had a right to abandon a part of his claim. It further held that in view of the abandonment of part of the claim by the first respondent, viz., that he be declared as the duly elected candidate, neither the appellant nor respondents Nos. 2 and 3 would be entitled to give notice of recrimination under

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s. 97 and consequently the appellant would not be entitled to give evidence to prove that the election of the first respondent would have been void if he had been the returned

candidate. It also held that the notice of recrimination given by the appellant was not barred by limitation, inasmuch as -under explanation to s. 90(4) the trial of the petition was deemed to commence on the date fixed for the appellant and the respondents Nos. 2 and 3 to appear before the Tribunal, viz., July 20, 1957, and the notice of recrimination had been given by the appellant within 14 days thereof. The Tribunal accordingly ordered that the abandonment of a part of his claims aforesaid should be noted on the petition and further ordered that the appellant could not give evidence to prove that the election of the first respondent would have been void if he had been the returned candidate inasmuch as on the abandonment of that part of the claim by the first respondent the recrimination put in by the appellant did not survive.

The appellant applied for and obtained on January 13, 1958, from this Court special leave to appeal under Art. 136 of the Constitution to appeal against the decision of the Election Tribunal and that is how this Civil Appeal No. 76 of 1958 has come before us.

Section 97 of the Act reads as under :-

" Recrimination when, seat claimed: (1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of the commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall

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be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.

Under the terms of this section a right of recrimination accrues to the returned candidate or any other party to the Election Petition where the petitioner besides claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that any candidate other than the returned candidate has been duly elected. Would it then be open to the petitioner to abandon that part of 'the relief which claimed such further declaration so as to deprive the returned candidate or any other party to the petition of the right of recrimination which has thus accrued to him; or in other words, has the Election Tribunal the power to allow the petitioner to withdraw or abandon a part of his claim as aforesaid thus rendering the exercise of the said right of recrimination nugatory ?

It is necessary at the outset, therefore, to understand the nature and scope of an Election Petition. As has been observed by us in the judgment just delivered in Civil Appeals Nos. 763 & 764 of 1957 and Civil Appeal No. 48 of 1958:-

" An election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power.

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An election petition is not a matter in which the only

persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process.".....

An election petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested.

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(Vide Jagan Nath v. Jaswant Singh (1), A. Sreenivasan v. Election Tribunal, Madras (2), The Tipperary case (3)).

An Election Petition presented to the Election Commission is scrutinised by it and if the Election Commission does not dismiss it for want of compliance with the provisions of s. 81, s. 82 or s. 117 of the Act, it accepts the same and causes a copy thereof to be published in the official gazette and a copy thereof to be served by post on each respondent. The respondents to the petition not only get notice of the same but the constituency as a whole receives such notice by publication thereof in the official gazette so that each and every voter of the constituency and all parties interested become duly aware of the fact of such Election Petition having been presented. A copy of the Election Petition published in the official gazette would also show to all of them that the petitioner in a particular Election Petition, in addition to claiming a declaration that the election of all or any of the returned candidates is void, has also claimed a further declaration that he himself or any other candidate has been duly elected. The whole constituency is thus alive to the fact that the result of the election duly declared is questioned on various grounds permitted by law with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate may be declared duly elected, in place and stead of the returned candidate. The constituency may have an interest in either maintaining the status quo or if perchance the election of the returned candidate is set aside, in seeing that some other deserving candidate is declared elected in his place and stead and not necessarily the petitioner or any other candidate sponsored by him whose election could be challenged on any of the grounds mentioned in s. 100(1). It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from

(1) [1954] S.C.R. 892, 895. (2) (1955) II E.L.R. 278, 293.

(3) (1875) 3 O'M. & H. 19, 23.

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ordinary civil proceedings. Once this process has been set in motion by the petitioner he has released certain forces which even he himself would not be able to recall and he would be bound to pursue the petition to its logical end. It may be that he may not be able to substantiate his claim for a declaration that the election of all or any of the returned candidates is void. In that event he would of course fail and no question would arise of his obtaining a further declaration that lie himself or any other candidate has been duly elected. All the grounds urged in the Election Petition against the returned candidates under s. 100(1) of the Act would fail and the election would stand. The voters would thus be vindicated. If the petitioner, however, succeeds in establishing his first claim and the election of the returned candidate is declared void, the question would necessarily arise when such a further declaration has been claimed by him whether he himself or any other candidate

should be declared duly elected. In that event, the occasion would arise for considering whether the petitioner himself or any other candidate sponsored by him should be declared duly elected. If the election of the petitioner or such other candidate could have been challenged on any of the grounds mentioned in s. 100(1) such election would certainly have been void if he had been a returned candidate and the petition had been presented calling in question his election. A recrimination could there. fore be filed by the returned candidate or any other party to the petition under s. 97. The requisite notice under s. 97 would be accompanied by the statement and particulars required by s. 83 in the case of an election petition and signed and verified in like manner. , This notice would be, in effect, a counter' petition presented by the returned candidate or any other party to the petition accompanied by the statement and particulars required by s. 83 in the case of ,in election petition and would also be supported by the deposit of security and further security referred to in ss. 117 and 118 of the Act. The election contest would then not only be between the petitioner on the one hand and the returned candidate on the other but

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also between the returned candidate or any other party to the petition and the candidate who has been sponsored by the petitioner for such election. An election contest as aforesaid would result in the declaration of the properly qualified candidate as duly elected and the maintenance of the purity of the elections in which the constituency as a whole is vitally interested and no person would get elected by flagrant breaches of the election law or by corrupt practices.

This is the purpose of a recrimination and the right to file a recrimination accrues to the returned candidate or any other party to the petition the moment an election petition is presented containing a claim for a further declaration that the petitioner himself or any other candidate has been duly elected. The proviso to s. 97(1) merely enacts conditions for the exercise of such right of recrimination and states that the returned candidate or such other party is not to be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in ss. 117 and 118 respectively. If these conditions are fulfilled in the manner therein specified the returned candidate or such other party will be entitled to give such evidence which right of course would not be capable of being exercised if either of these two conditions has not been fulfilled. The accrual of this right, however, is not postponed till the fulfilment of these conditions. It accrues the moment an election petition containing a claim for such further declaration is presented to the Election Commission.

If once such a right has accrued to the returned candidate or any other party to the petition, can that right be affected by the petitioner seeking to withdraw or abandon that part of his claim, viz., a claim for a further declaration that he himself or any other candidate has been duly elected ? If it were permissible for him to withdraw or abandon a part of his claim on the analogy of O. 23, r. 1, of the Code of Civil Procedure,

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he would make a virtue of necessity and withdraw or abandon

that part of his claim so as to avoid any investigation in the Election Petition itself in regard to himself or any other candidate sponsored by him on any of the grounds mentioned in s. 100(1) including corrupt practices within the meaning of s. 123 which if proved would entail a disqualification for standing as a candidate or even for voting for a period of 6 years under ss. 140 and 141(b).

So far as withdrawal of petitions is concerned there are specific provisions enacted in the Act beginning with s. 108. Section 108 deals with the withdrawal of petitions before the appointment of Tribunals and provides that an election petition may be withdrawn only by leave of the Election Commission if an application for its withdrawal is made before any Tribunal has been appointed for the trial of such petition. Section 109 deals with the withdrawal of petitions after the appointment of Tribunals and enacts that where an application for withdrawal of an election petition is made after a Tribunal has been appointed for the trial of such petition, the election petition may be withdrawn only by leave of the Tribunal and a notice of such an application fixing a date for the hearing of the application is to be given to all other parties to the petition and is to be published in the official gazette. Section 110 prescribes the procedure for withdrawal of petitions before the Election Commission or the Tribunal and s. 110(2) provides that no application for withdrawal is to be granted if in the opinion of the Election Commission or of the Tribunal, as the case may be, such application has been induced by any bargain or consideration which ought not to be allowed. If such an application is granted, notice of the withdrawal is to be published in the official gazette by the Election Commission or by the Tribunal as the case may be; and a person who might himself have been a petitioner may, within fourteen days of such publication apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions of s. 117 as to security, is to be entitled to be so substituted and to continue the proceedings

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upon such terms as the Tribunal may think fit. When an application for withdrawal is granted by the Tribunal and no person has been substituted as, petitioner in place of the party withdrawing as above, the Tribunal is to report the fact to the Election Commission and thereupon the Election Commission shall publish the report in the official gazette. This will ring the curtain on the election contest and the result of the election which has been duly declared will no more be liable to be disturbed.

There are also provisions enacted in the Act which provide for the consequences of the death of a sole petitioner or of the survivor of several petitioners or the death or withdrawal of opposition by the sole respondent therein. Section 112 provides that an election petition shall abate on the death of a sole petitioner or of the survivor of several petitioners. If an election petition thus abates before a Tribunal has been appointed for the trial of the petition, notice of the abatement shall be published in the official gazette by the Election Commission (Vide s. 113). If on the other hand an election petition abates after a Tribunal has been appointed for the trial of the petition, notice of the abatement has to be published in the official gazette by the Tribunal (Vide s. 114). The death of a sole petitioner or of the survivor of several petitioners, however, does not spell the termination of the proceedings and s. 115 provides that after a notice of the abatement of

an election petition is published under s. 113 or s. 114 any person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions of s. 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit. The position as it obtains on the death or withdrawal of opposition by a respondent is worked out in s. 116 which provides that if before the conclusion of the trial of an election petition the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and

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there is no other respondent who is opposing the petition the Tribunal shall cause notice of such event to be published in the official gazette, and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the Tribunal may think fit.

The above provisions go to show that an election petition once filed does not mean a contest only between the parties thereto but creates a situation which the whole constituency is entitled to avail itself of. Any person who might himself have been a petitioner is entitled to be substituted, on the fulfilment of the requisite conditions and upon such terms as the Tribunal may think fit, in place of the party withdrawing and even the death of the sole petitioner or of the survivor of several petitioners does not put an end to the proceedings, but they can be continued by any person who might himself have been a petitioner. Even if the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, a similar situation arises and the opposition to the petition can be continued by any person who might have been a petitioner, of course on the fulfilment of the conditions prescribed in s. 116. These provisions therefore show that the election petition once presented continues for the benefit of the whole constituency and cannot come to an end merely by the withdrawal thereof by the petitioner or even by his death or by the death or withdrawal of opposition by the respondent but is liable to be continued by any person who might have been a petitioner.

If, therefore, an election petition duly presented cannot be thus withdrawn by the petitioner, is there any warrant for the contention that even though he may not be able to withdraw his petition in the manner aforesaid he can at least abandon a part of his claim on the analogy of O. 23, r. 1, of the Code of Civil

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Procedure? The whole petition cannot be withdrawn; but would it not be possible for the petitioner to withdraw or abandon a part of his claim as above? The provisions of s. 90 of the Act are sought to be relied upon in support of this contention. Section 90(1) provides that subject to the provisions of the 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 to the trial of suits, provided however that the Tribunal shall have the discretion to refuse for reasons to be recorded in writing to examine any witness or witnesses if it is of the opinion

that their evidence is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings. Under s. 90(2) the provisions of the Indian Evidence Act, 1872, shall subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition. Section 90(4) provides that any candidate not already a respondent shall, upon application made by him to the Tribunal within fourteen days from the date of commencement of the trial and subject to the provisions of s. 119, be entitled to be joined as a respondent. Section 90(5) provides that the Tribunal 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. It is clear from the above that the section only provides for the procedure for the trial of election petitions by the Tribunals. It provides for the examination of witnesses, the rules of evidence to be followed, the joinder of candidates not already respondents as respondents and the amendment or amplification of particulars of a corrupt practice already alleged in the petition. The powers of a Tribunal are, however, separately dealt with in s. 92

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which enacts that the Tribunal shall have the powers which are vested in a court under the Code of Civil Procedure, when trying a suit in respect of the following matters:-(a) discovery and inspection; (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses; (c) compelling the production of documents; (d) examining witnesses on oath; (e) granting adjournments; (f) reception of evidence taken on affidavit; and (g) issuing commissions for the examination of witnesses, and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a civil court within the meaning of ss. 480 and 482 of the Code of Criminal Procedure, 1898. It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it. There are also other provisions to be found in the Act which relate to place of trial (s. 88); Power of Election Commission to withdraw and transfer Petitions (s. 89); appearance before Tribunal (s. 91); documentary evidence (s. 93); answering of criminating questions and certificate of indemnity (s. 95) and expenses of witnesses (s. 96). The effect of all these provisions really is to constitute a self-contained Code governing the trial of election petitions and it would appear that in spite of s. 90(1) of the Act, the provisions of O. 23, r. 1, of the Code of Civil Procedure, would not be applicable to the trial of election petitions by the Tribunals. If the withdrawal of a petition cannot be permitted and any person who might have been a petitioner is entitled to continue the proceedings, on a parity of reasoning, the withdrawal of a part of the claim also could not be permitted without allowing another person who might have been a petitioner an opportunity of proceeding with that part of the claim by substituting himself in place and stead of the petitioner who withdraws or abandons -the same. If the constituency as

a whole is interested in the petition presented before the Election Tribunal no such withdrawal or abandonment of a part of the claim could ever be permitted without giving an opportunity to any person who might have been a petitioner to continue the proceedings and pursue the petition to its logical conclusion.

The provisions of O. 23, r. 1, of the Code of Civil Procedure also contain inherent evidence which militates against this contention. Order 23, r. 1, sub-rule (2), provides for liberty being given by the Court to a party withdrawing or abandoning a part of his claim to file a fresh suit on the same cause of action, if so advised. In the very nature of things such liberty could not be reserved to a petitioner in an election petition. The provisions above referred to in regard to withdrawal of petitions do not provide for the same and if they do not do so, can it be urged that the provisions of O. 23, r. 1, sub-rule (2), though they may not apply to the cases of withdrawal of petitions may nevertheless apply where the petitioner withdraws or abandons a part of his claim ? If these provisions do not apply to the withdrawal or abandonment of a part of the claim in the case of an election petition, could it then be urged that nevertheless the other provisions of O. 23, r. 1, would apply and the petitioner would be at liberty to withdraw or abandon a part of his claim ?

On a due consideration of all these provisions, we are of opinion that the provisions of O. 23, r. 1, do not apply to the election petitions and it would not be open to a petitioner to withdraw or abandon a part of his claim once an election petition was presented to the Election Commission, more so when such a withdrawal or abandonment of a part of the claim would have the effect of depriving the returned candidate or any other party to the petition of the right of recrimination which had accrued to him under s. 97 of the Act.

This is also the position in England. Halsbury's Laws of England, 3rd Ed., Vol. 14, para. 451, p. 258, contains the following passage under the caption Amendment of petition "

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" The withdrawal of that portion of a petition which claims the seat cannot, however, be effected by way of amendment because the rights of the electors would be affected by their not having the opportunity of substituting another petitioner.

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See also the passage at *ibid* p. 300, para. 541 :-

" It seems that where the petition prays the seat, recriminatory evidence may be offered, notwithstanding, that the prayer for the seat is abandoned at the trial.

The case of *Aldridge v. Hurst* (1) elucidates this position. Grove J. in that case observed as follows:-

" Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public, in purity of election and in having the member seated who is duly returned by a majority of proper votes. It appears to us also that the scope of the Act is, that petitions should not be mere pleadings, nor framed for the purpose of intimidating or in any way inducing, the respondent to abandon his seat; still less, of course, should they be collusive; but that they should be real, well considered, and not lightly withdrawn either in whole or part

These section show that not mearely may the candidate who is not returned claim the seat, or in other words claim to have been duly elected, but that any other voter might claim the seat for a candidate who has not been returned."

This right petitioning shows that the Act contemplates, in regard to petitions, not merely the rights of candidates not returned, but the rights of the constituency to insure that the person really elected should be their member; and this without the cost and disturbance of a new election, as the judge's decision in favour of such claim is final."

" It appears to us that it would be an infringement of this right, if, a petition having been presented by one person (in this case a candidate) claiming the Beat, the claim to the seat could be withdrawn by the mere motion of the person presenting it, after the twenty-one days, when no other petition could be presented, and thus the voters be prevented from claiming

(1) (1876) L.R. C.P. 410, 413, 414. 415, 417-627

the seat for one who may be the duly elected representative; or, on the other hand, from shewing by means of the recriminative charges which put in issue the claim, that the claimant is not a person entitled to the seat by that election or that he is disqualified for future elections; such withdrawal not being accompanied by the power to substitute another person as petitioner, by means of which the inquiry might be gone into at the trial. "

" It appears to us that the withdrawal of this portion of the prayer- of the petition is in pari materia with, even if it is not within, the provisions of the Act relative to the withdrawal of a whole petition."

" It is also to be observed that, although petitions may be presented at the last moment, it is commonly known in the county or borough that such petitions are likely to be presented ; and if any suspicion exists that they are sham petitions, means are taken by those who are in earnest to lodge petitions; and the entire withdrawal of collusive petitions is guarded against by the provisions of the Act to which we have alluded."

" In one point of view it is an argument against our allowing this prayer to be withdrawn, that, if there be no power under the withdrawal clauses to substitute a person for the petitioner as to this prayer, the constituency will be without means of proving either that the petitioner is the duly-elected member, or to answer his allegation that he is elected, or to shew that he is unfit to serve in a future parliament, he himself having raised this issue by claiming the seat."

It is, therefore, clear that there is no power in the Election Commission to allow a petitioner to withdraw or abandon a part of his claim either by having resort to the provisions of 0. 23, r. 1, of the Code of Civil Procedure or otherwise. If that is so, the right of recrimination which has once accrued to the returned candidate or any other party to the petition under s. 97 of the Act cannot be taken away, and the returned candidate or any other party to the petition would in 80

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such circumstances be entitled to give evidence to prove that the election of the petitioner or any other candidate sponsored by him would have been void if he had been the returned candidate and a petition had been presented calling in question his election. The counter petition which has in effect been thus filed by the returned candidate or any other party to the petition must be allowed to proceed and

the right of recrimination should continue to be exercised notwithstanding the attempted abandonment of a part of his claim by the petitioner with the inevitable result that if any corrupt practice within the meaning of s. 123 were proved against the petitioner or any other candidate sponsored by him it would entail upon him the disqualification for standing as a candidate or even for voting for a period of 6 years under ss. 140 and 141(b). In the present case, such proof on the part of the appellant would have not only entailed upon the 1st respondent a disqualification for voting but even for standing as a candidate for a period of six years, with the inevitable consequence that his election to the Mysore Legislative Assembly from the Kalaghatgi constituency on October 16, 1957, would have been void and lie would have been unseated. We have, therefore, come to the conclusion that the order passed by the Election Tribunal allowing abandonment of a part of the claim by the first respondent and precluding the appellant from giving evidence to prove that the election of the first respondent would have been void if he had been the returned candidate was clearly erroneous and liable to be set aside.

We accordingly allow the appeal and reverse the order passed by the Election Tribunal dated September 26, 1957. The Election Tribunal shall proceed with the trial of the election petition on the claims as they were originally included in the petition and will also allow the appellant to exercise his right of recrimination under s. 97 of the Act. The first respondent will pay the appellant's costs of this appeal and the costs thrown away before the Election Tribunal.

Appeal allowed.

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