

PETITIONER:
RAJENDRA KUMARI BAJPAI

Vs.

RESPONDENT:
RAM ADHAR YADAV & OTHERS

DATE OF JUDGMENT 06/08/1975

BENCH:

ACT:
Representation of the People Act, (43 of 1951), S. 87-
Applicability of o. XI C.P.C. to trial of election
petitions.

HEADNOTE:

An application for delivery of interrogatories is one of the logical steps in aid of the prosecution of an election petition and is fully covered by s. 87 of the Representation of the People Act, 1951. C(1)

(1) Order XI, C.P.C., forms part of the trial of suits and is not a special procedure. Order X relates to the procedure for examination of parties by the Court and o. XI, is a part of it, because, it provides for examination through interrogatories, when personal appearance is not possible. [262A-B]

(2) Before Act 47 of 1966 amended the Representation of the People Act, 1951, the power to try election petitions was conferred on the Election Tribunal. That Tribunal was not a Civil Court but was deemed to be a Civil Court. Though s. 90, as it then stood, provided that every election petition shall be tried, as nearly as may be, in accordance with the procedure under the C.P.C., in order to avoid doubts, the special powers under O. XI, C.P.C., were conferred on the Tribunal by s. 92. When Parliament has expressly conferred the powers contained in O. XI on the Tribunal, it could not be contended that the principles contained therein are excluded from the trial of election petitions, on the basis of English Law. [257F-H]

(3) After the amendment of 1966, as election petitions are to be tried by the High Court, a Court of Record, s. 87, which is based on the repealed s. 90, is sufficient to contain the entire procedure to be adopted by the High Court in trying election petitions. Section 87 is of widest amplitude so as to cover the entire procedure mentioned in the Code of Civil Procedure with only two exceptions, (a) when the Act contains express provision for certain matters which are inconsistent with the procedure prescribed by the Code; and (b) when a particular provision of the Code is either expressly or by necessary intendment excluded by the Act. That is why a provision like the repealed s. 92 is unnecessary; and it cannot be contended that since Parliament repealed that section, Parliament intended that the provisions of O. XI, C.P.C., should not apply to election petitions tried by the High Court. [258A-E; 269C-D]

Sitaram Hirachand Birla vs. Yograisingh Shankarsingh Parihar and others, AIR 1953 Bom. 293, Durvadhan v. Sitaram and others AIR 1970 All. 1; Jugal Kishore v. Dr. Baldev Prakash AIR 1968 Punj. 152 (F.B.) and Keshari Lal Kavi and another v. Narain Prakash and others, AIR 1969 Raj. 75,

referred to.

Dr. Jagjit Singh v. Giani Kartar Singh and others A.I.R. 1966 S.C. 773, and V. K. Sakleha v. Jagjiwan [1972] 1 S.C.C. 826, followed.

(4) Merely because in Inamati Mallappa Basappa v. Desai Basavaraj Ayyappu and others [1959] S.C.R. 611 it was held that the procedure contained in O. 23, r. 1 C.P.C. does not apply to election petitions it could not be contended that O. XI: C.P.C., would not also be applicable to election petitions. Order 23, r. 1 cannot be equated with the provisions of O. XI. Having regard to the nature of an election petition which is a matter of moment and concern to the entire constituency the notion of abandonment of the claim or withdrawal is absolutely foreign to the scope of such proceedings and must, therefore, be held to be excluded by the necessary intendment of s. 87 itself. [260H-261 B, D-E]

256

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 104 of 1975

Appeal by special leave from the judgment and order dated the 12th December, 1974 of the Allahabad High Court in Application Paper No. A-53 in Election Petition No. 30 of 1974.

Yogeshwar Prasad and Rani Arora, for the appellant

K C. Agarwala and K. M. L. Srivastava, for respondent no. 1.

The Judgment of the Court was delivered by

FAZAL ALI, J.-This appeal by special leave involves an interpretation of the scope and ambit of s. 87 of the Representation of the People Act, 1951, as amended by Act 47 of 1966. The short point that falls for determination in this appeal is as to whether or not the provision of O. XI of the Code of Civil Procedure can be applied to the trial of election petitions in the High Court by force s. 87 of the said Act. For the purpose of brevity, the Representation of the People Act, 1951 shall be referred to as the Act of 1951 shall the Representation of the People Act as amended by Act 47 of 1966 as 'the Act'. The circumstances under which this appeal arises may be succinctly stated as follows.

An election for the U.P. Legislative Assembly for 275 Allahabad North Assembly Constituency was held on February 6, 1974 In this election the appellant was a candidate put up by the Congress Ruling party and his election was contested by the first respondent Ram Adhar Yadav who was set up by the Samukta Socialist party. The appellant was declared duly elected in the said election and the respondent No. 1 was defeated.

The respondent No. 1 filed an election petition being Election Petition No. 30 of 1974 in the High Court of Allahabad some time in April 1974 challenging the election of the appellant on various grounds. The appellant filed a detailed written statement denying all the allegations made by the first respondent in his petition. The election petition was assigned to J. M. L. Sinha, J. who framed a number of issues on October 4, 1974. In October 1974 respondent No. 1 filed an application being Paper No. A/53 under O. XI, r. 1 of the Code of Civil Procedure for grant of leave to respondent No. 1 to deliver interrogatories in

writing for the examination of the appellant and filed certain interrogatories along with his application. The appellant filed her objections being Paper No. A/54 to the said application contending, inter alia, that the procedure prescribed under O.XI relating to interrogatories was not applicable to the trial of election petitions in the High Court and was not covered by s. 87 of the Act. The application filed by the first respondent and the objections of the appellant came up for consideration before the learned Single Judge who by his order dated December 12, 1974, held that the provisions of O.XI fully applied to the election petitions and accordingly rejected the objections filed by the appellant. Hence this appeal by special leave.

257

It appears that under the Act of 1951 the power to try election petitions was conferred on the Tribunal and s. 92 of that Act expressly conferred powers under O.XI of the Code of Civil Procedure on the Tribunal. The relevant portions of s. 92 of the Act of 1951 may be extracted thus:

The Tribunal shall have the powers which are vested in a court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters:

(a) discovery and inspection;

x x x x

(g) issuing commissions for the examination or 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 sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898)."

By the Amendment Act 47 of 1966 this section was, however, deleted and s. 90 of the Act of 1951 was replaced by s. 87 of the Act which was the same as s. 90 of the Act of 1951.

Mr. Yogeshwar Prasad counsel appearing for the appellant has submitted two points before us. In the first place he contended that the provisions regarding inspection and discovery and interrogatories as contained in O.XI of the Code of Civil Procedure are not an integral part of the procedure in a civil suit but are special powers contained in the Code and cannot, therefore, be made applicable to election petitions which are proceedings of a special nature. In simplification of this argument it was argued that the history of the English Law as also the Election Law of our country before independence would show that the procedure contained in O.XI of the Code of Civil Procedure was not made applicable to the trial of election petitions. It is, however, not necessary for us to examine the history of this matter because the Act of 1951 settles the issue. When the Parliament expressly conferred powers contained in O.XI on the Tribunal under the statutory provision of s. 92 of the Act of 1951, it must be presumed to have made a drastic departure from the old law on the subject and particularly the English Law. In view of this enactment, therefore, it cannot be said that the provisions of our Election Law, particularly in regard to s. 92 of the Act of 1951 were in pari materia with the provisions of the English Law on the subject. In fact s. 92 incorporating the entire provisions of O.XI of the Code of Civil Procedure was expressly enacted so that the elected representatives also may be subjected to the same law of the land such as the Code of Civil Procedure as any other citizen. In these circumstances, we are unable to apply the English Law to the Act in order to hold that the principles contained in O. XI

of the Code of Civil Procedure are excluded from the trial of election petitions. The first contention put forward by counsel for the appellant must, therefore, fail.

258

It was then contended that even though express powers for inspection and discovery were conferred on the Tribunal under s. 92 of the Act of 1951, yet by virtue of the amendment under Act 47 of 1956 this express provision was deliberately deleted, which shows that the Parliament intended to give special protection to the elected representatives so as not to compel them to answer interrogatories. This is no doubt an attractive argument, but on closer scrutiny it does not appear to be tenable. The argument completely overlooks the object of the Amendment Act 47 of 1956. By virtue of this enactment a basic change in the trial of election petitions was sought to be introduced. Before 1956 the power to try election petitions was conferred on the Tribunal which was not a civil court and, therefore, special powers had to be conferred on it. In fact clause (g) of s. 92 of the Act of 1951 extracted above clearly shows that the Tribunal was deemed to be a civil court hence there was the necessity of conferring special powers contained in O.XI of the Code of Civil Procedure on the Tribunal to avoid further doubts. After the amendment of 1956 as the election petitions were to be tried by the High Court, s. 87 of the Act which is based on s. 90 of the Act of 1951 was considered sufficient to contain the entire procedure to be adopted by the High Court in trying the election petitions which were to be in accordance with the Code of Civil Procedure as far as applicable. Since the High Court is a court of record and a civil court is not, it was not at all necessary for the Parliament to have enacted a separate section like s. 92 of the Act of 1951 and that is why s. 92 was considered to be unnecessary in view of the change of forum and was deleted under the amended Act. From this it cannot be contended that the Parliament intended that the provisions of O. XI of the Code of Civil Procedure 1 should not apply to the election petitions tried by the High Court under the Act. Counsel for the appellant was unable to cite any authority directly in point. On the other hand, the view which we have taken in this case, is amply supported by number of authorities of this Court as well as other High Courts.

To begin with, this Court as far back as 1951, while considering ss. 90 and 92 of the Act of 1951 observed in *Harish Chandra Bajpai v. Triloki Singh*(1) thus:

"The second contention urged on behalf of the appellants is that if the provisions of the Civil Procedure Code are held to be applicable in their entirety to the trial of election petitions, then there was no need to provide under s. 92 that the Tribunal was to have the powers of courts under the Code of Civil Procedure in respect of the matters mentioned therein, as those powers would pass to it under s. 90(2). But this argument overlooks that the scope of s. 90(2) is in a material particular different from that of s. 92. While under s. 90(2) the provisions of the Civil Procedure Code are applicable only subject to the provisions of the Act and the rules made thereunder, there is no such limitation as regards the powers conferred by s. 92. It was obviously the intention of the legislature to put the powers of the Tribunal in respect of

259

the matters mentioned in s. 92 as distinguished from

the other provisions of the Code on a higher pedestal, and as observed in *Sitaram v. Yograjsingh* (A.I.R. (1953) Bom. 293), they are the irreducible minimum which the Tribunal is to possess.

(3) It is then argued that s. 92 confers powers on the Tribunal in respect of certain matters, while s. 90(2) applies the Civil Procedure Code in respect of matters relating to procedure, that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under s. 92 and not under s. 90(2). We do not see any antithesis between 'procedure' in s. 90(2) and 'powers' under S. 92. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that, he was clearly entitled to do under s. 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in this contention either."

The Court pointed out that the object of s. 92 was merely to secure powers of the Court in respect of the matters mentioned therein and that there was no antithesis between ss. 90(2) and s. 92 of the Act of 1951.

Similarly in *Sitaram Hirachand Birla v. Yograjsingh Shankarsingh Parihar and others*, (1) Chagla, C.J., clearly pointed out that the distinction between the power and procedure was completely artificial and a distinction without any difference. The learned Chief Justice speaking for the Court observed as follows:

"In our opinion, Mr. Kotwal is right, because on principle it is difficult to make a distinction between procedure and the powers of a Court as suggested by Mr. Patwardhan. The whole of the Civil Procedure Code, as its very name implies, deals with procedure. In the course of procedure the Court always exercises powers and when the Court is exercising its powers, it is exercising them in order to carry out the procedure laid down in the Code. Therefore procedure and powers in this sense are really interchangeable terms and it is difficult to draw a line between procedure and powers. The powers conferred under s. 92 is not any substantive power, it is procedural power, a power intended for the purposes of carrying out the procedure before the Tribunal."

In a recent decision of the Full Bench of the Allahabad High Court in *Duryodhan v. Sitaram and others* (2) the Court held that the matters mentioned in s. 92 appertain to the procedure for trial, and are also attracted by virtue of s. 90(1). The Court observed as follows:

260

"In my opinion, the matters mentioned in Section 92 appertain to the procedure for trial, and are also attracted by virtue of Section 90(1). They were separately stated in Section 92 to make them operate in spite of any provision to the contrary in the Act or the Rules, and not with a view to curtail the amplitude of Sec. 90(1). The provisions of O.9, Rr. 8 and 9, Civil P.C. even if they deal with powers, would be procedural powers and be attracted by virtue of Section 90(1)."

While dealing with the scope and ambit of s.90 of the Act 1951 this Court in *Dr. Jagjit Singh v. Giani Kartar Singh and others* (1) observed as follows .

"The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by Cl. (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, inter alia, in respect of discovery and inspection."

A Full in Bench of the Punjab High Court in Jugal Kishore v. Dr. Baldev Prakash, (2) while construing the provisions of s. 87 of the Act clearly pointed out that the High Court was a Court of record and possessed all inherent powers of a Court while trying election petitions. In this connection, Grover, J., observed as follows:

"It is quite clear that there is no distinct provision in the Act laying down any particular or special procedure which is to be followed when the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the petition. The provisions of the Code of Civil Procedure would, therefore, be applicable under Section 87 of the Act. I am further of the opinion that any argument which could be pressed and adopted for saying that the inherent powers of the Court could not be exercised in such circumstances would be of no avail now as the High Court is a Court of record and possesses all inherent powers of a Court while trying election petitions."

We fully approve of the line of reasoning adopted by the High Court in that case. The Rajasthan High Court in Keshari Lal Kavi and another v. Narain Prakash and others (3) followed the Punjab case and has taken the same view.

Some reliance was placed by the learned counsel for the appellant on the decision in Inamati Mallappa Basappa v. Desai Basavarai Ayyappa and others, (4) where this Court held that the procedure contained in O. 23, r. 1 of the Code of Civil Procedure did not apply to election petitions and, therefore, on a parity of reasoning O. C.P.C. also could not be applicable to the trial of election petitions.

261

We are, however, unable to agree with this argument. The provision contained in O. 23 r. 1 cannot be equated with the provisions of o. XI because the election petition being a matter of moment and concerning the entire constituency there could be no question of the election petition being withdrawn by the petitioner who had filed the same. This was highlighted by this Court in that case when the Court observed as follows:

"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.

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On a due consideration of all these provisions, we are 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."

Having regard to the nature of the election Petition, the notion of abandonment of the claim or withdrawal is absolutely foreign to the scope of such proceedings and must, therefore, be held to be excluded by necessary intendment of s. 87 of the Act itself. This authority therefor, does not appear to be of any assistance to counsel

for the appellant.

The matter, however, seems to be concluded by a recent decision of this Court in Virendra Kumar Saklecha v. Jagjivan and others(1) where the Chief Justice speaking for the Court interpreted s. 87 of the Act and observed as follows:

"Under Section 87 of the Act every election petition should be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Under Section 102 of the Code the High Court may make rules regulating their own procedure and the procedure of the Civil Courts subject to their supervision and may by such rules vary, alter or add to any of the rules in the First Schedule to the Code."

The relevant part of s. 87 runs thus :

"(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits :"

A bare perusal of this section leads to the irresistible conclusion that election petitions shall have to be tried in accordance with the proce-

262

cedure applicable under the code of Civil Procedure to the trial of suits. In other words, election petitions would be tried like ordinary civil suits.

We are unable to agree with counsel for the appellant that O. XI does not form part of the trial of suits but is a special procedure. This is repelled by a reference to O. XI of the Code of Civil Procedure itself. It will appear that O. X relates to the procedure for examination of parties by the Court and O. XI is a part of that procedure, because it provides that where witnesses are not able to appear before the Court personally they are examined through interrogatories. In these circumstances, therefore, O. XI is as much a part of the procedure as O. X relating to trial of suits in matters regarding summoning of witnesses, documents etc. In these circumstances it cannot be said that s. 87 of the Act either expressly or impliedly excludes the application of O. XI of the Code of Civil Procedure. In fact we are clearly of opinion that s. 87 of the Act is of the widest amplitude so as to cover the entire procedure mentioned in the Code of Civil Procedure with only two exceptions-(i) where the Act contains express provision for certain matters which are inconsistent with the procedure prescribed by the Code; and (ii) where a particular provision of the Code of Civil Procedure is either expressly or any necessary intendment excluded by the Act. Subject to these two exceptions, s. 87 is very wide in its connotation

We, therefore, agree with the learned Single Judge who was trying the election petition that the application for interrogatories was one of the logical steps in aid of the prosecution of the petition and was fully covered by s. 87 of the Act. The second contention raised by counsel for the appellant thus fails.

For the reasons given above, there is no merit in this appeal which fails and is accordingly dismissed with costs.

V.P.S.

Appeal Dismissed.

263