

Mohan Raj vs Surendra Kumar Taparia & Ors on 12 August, 1968

Equivalent citations: 1969 AIR 677, 1969 SCR (1) 630, AIR 1969 SUPREME COURT 677

Author: M. Hidayatullah

Bench: M. Hidayatullah, G.K. Mitter

PETITIONER:

MOHAN RAJ

Vs.

RESPONDENT:

SURENDRA KUMAR TAPARIA & ORS.

DATE OF JUDGMENT:

12/08/1968

BENCH:

HIDAYATULLAH, M. (CJ)

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HIDAYATULLAH, M. (CJ)

MITTER, G.K.

CITATION:

1969 AIR 677

1969 SCR (1) 630

CITATOR INFO :

E 1978 SC1583 (7)

R 1982 SC 983 (10)

ACT:

Representation of the People Act (43 of 1951), ss. 79, 82(b) and 86(1)-'Candidate', if includes a candidate who has withdrawn-Code of Civil Procedure (Act V. of 1908), O.I. r. 10 and O.VI. r. 17-Non-joinder of necessary party to election petition-Whether petition can be saved by amendment or striking out parties.

HEADNOTE:

Seven candidates were duly nominated for election from a Parliamentary constituency, but two of the candidates withdrew. The first respondent, who was one of the remaining five contesting candidates, was declared

elected. His election was challenged on various grounds by the appellant who was an elector. To the petition, only the returned candidate (first respondent) and the other four contesting candidates were made parties. On the first respondent's objection that the allegations were vague, the appellant amended his petition. In his amended petition, with respect to one of the grounds, namely, offering bribes to voters, the appellant gave instances of bribes having been offered or paid by the first respondent, his election agents, and others. Two persons were referred to as the election agents of the first respondent. One of them was one of the candidates who had withdrawn and who was not made a party to the election petition. The first respondent in his written statement contended that the petition should be dismissed under s. 86(1) of the Representation of the People Act, 1951, as the candidate against whom corrupt practices were alleged and who was a necessary party under s. 82(b) was not made a party to the election petition. The appellant then filed an application for amendment of his petition wherein he stated that by 'election agent' he never meant the candidate who had withdrawn, that there was never any intention to make any allegations against that candidate and that his name may be deleted from the petition, as he was not the first respondent's election agent and reference to him was made by inadvertence. The High Court dismissed the election petition under s. 86(1).

In appeal to this Court,

HELD: (1) A candidate who is duly nominated continues to be a candidate for purposes of s. 82(b) in spite of withdrawal, and if he is not joined as a party when allegations of corrupt practice are made against him, the election petition shall be dismissed under s. 86(1). [634 D, F; 635 F]

Aminlal V. Hunna Mal, [1965] 1 S.C.R. 393 and Har Swarup V. Brij Bhushan Saran, [1967] 1 S.C.R. 342, followed.

Chaturbhuj V. Election Tribunal, Kanpur, (1958) 15 E.L.R. 301, approved.

(2) The record showed that allegations of corrupt practice were made against the candidate who had withdrawn. It could not be contended by the appellant that the allegations were made against him not as a candidate but in the character of an election agent, because, the appellant had himself stated in his application for amendment that the candidate who had withdrawn was not the election agent of the first respondent. Therefore, the

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allegations were made against an individual who was a candidate within the meaning of s. 82(b) and who had to be joined as a necessary party to the election petition. [634 B-C; 636 F-G]

(3) The Court cannot use O. VI, r. 17 or O. I, r. 10 of the Civil procedure Code to avoid the consequences of non-

joinder for which a special provision, namely s. 86, is found in the Act. The Civil procedure Code applies to the trial of election petitions only subject to the provision of the Representation of the People Act and the rules, made thereunder. When the Act makes a person a necessary party and provides that the petition shall be dismissed if he is not joined, the power in the Code, of amendment or to strike out parties. cannot be used at all. If the deletion prayed for by the appellant was granted, every election petition can be by amendment and the provisions of s. 86(1) and the policy of frae law will be defeated. [636 A-C, D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1801 of 1967. Appeal under s. 116-A of the Representation of the People Act, 1951 from the judgment and order dated October 10, 1967 of the Rajasthan High Court in Election Petition No. 13 of 1967.

R.M. Hazarnavis and B.R. Agarwala, for the appellant. S.V. Gupte, Sardar Bahadur Saharya, Vishnu Bahadur Saharya and Yogindra Khusalani, for respondent No. 1. H.K. Puri, for respondent No. 2.

The Judgment of the Court was delivered by Hidayatullah, C.J. This is an appeal by the unsuccessful election petitioner against the judgment of the High Court of Rajasthan dated October 10, 1967. The election petition was filed to challenge the election of the first respondent at the Pali Parliamentary Constituency in the Fourth General Elections. At that election seven nomination papers were filed. Two of the candidates withdrew. Amongst them was one R.D. Periwal. There were thus only five contesting candidates. of these, the first respondent obtained 1,47,509 votes. His closest rival respondent No. 2 (now deceased) obtained 1,21,438 votes. The remaining candidates got a little over thirty thousand votes between them. The election petitioner (appellant here) is an elector of Pali. In his petition he joined the returned candidate and the other four contesting candidates. Many grounds were urged in the petition. The first ground was that the returned candidate or his election agent prompted hatred against the Congress, appealed to religion and sent persons dressed as Sadhus preaching that if Congress was returned to power there would be go-hatya and took pledges or oaths from the voters. The second was that the returned candidate and his election agent were guilty of suppression of true expenses and filed false returns. The third ground was that the candidate or his election agent obtained the services of Government servants in furthering the election of the returned candidate.

6 3 2 The last ground was that the returned candidate and his election agent and other persons with the consent of the returned candidate paid and offered bribes between January 13, 1967 to February 14, 1967 to induce the electors directly or indirectly to vote for the returned candidate. The petition was scrutinised and was found to be in order. The returned candidate entered appearance on May 15, 1967 and filed a written statement a month later. He took the objection that the allegations were vague and lacking in necessary particulars. The High Court thereupon ordered better and fuller particulars on July 2, 1967. The election petitioner was asked to file an application for amendment

and a draft of the amended petition. This was done but there were objections.

The objections were decided on August 1, 1967. Some of the allegations of corrupt practices were deleted for want of sufficient particulars. The other amendments were allowed. Para. 16 of the petition in the amended form read as follows:

"That the respondent No. 1 and his election agents Messrs. R.D. Penwal and Shri Lunia and other persons with the consent of the respondent No. 1 paid and offered bribes between 13-1-67 to 20-2-67 with the object of inducing directly or indirectly electors to vote for respondent No. 1.

The following amongst other are some of the instances"

(Instances were mentioned) On August 24, 1967 written statement was filed in which an objection was taken that as R.D. Periwal, against whom corrupt practices had been alleged, was not joined as a party, the petition was liable to be dismissed under s. 86(

1) of the Representation of the People Act. This preliminary objection was heard by the Judge on August 29, 1967. Same day an application for amendment of the election petition was filed. It was stated in the election petition that the election petitioner had gathered the impression that Inder Kumar Lucia was the election agent, from a telegram sent by Lunia; that the name of R.D. Periwal in paragraph 16 crept in because of 'uncertainty and inadvertence' and the reference to election agent 'came to be made in an omnibus manner'. What this statement means is not very clear. However, it was pointed out that there was no intention to make any allegation against R.D. Periwal but two or three allegations of corrupt practice were imputed to Lunia. A request was, therefore, made that the reference to 'election agent' in all the paragraphs charging, corrupt practices should be deleted and it was specifically prayed that the name of R.D. Periwal in paragraph 16 should also be deleted. In short, it was intended to withdraw allegations against Periwal. This application was not separately considered by the High Court but the election petition itself was dismissed under s. 86(1) since Periwal, who was a duly nominated candidate (who withdrew later), had to be compulsorily joined under s. 82(b) if allegations of corrupt practice against him were made.

It will be noticed, therefore, that in the original election petition allegations were made against the returned candidate or his election agent. Two of the allegations of corrupt practice were against the returned candidate and his election agent. They were charges of taking assistance of Government servants and bribing voters. In connection with the bribery charge, no names were mentioned. In his reply to the petition the returned candidate denied the charges in respect of himself and his election agents (using the plural). In the amended petition, in one place, the returned candidate and his, election agent were mentioned with Lunia as the election agent and in another, which we have quoted earlier, two election agents, Lunia and Periwal were mentioned by name. The returned candidate in reply denied that Lunia was the election agent. In the second application for amendment filed on August 29, 1967 attempt was made to withdraw allegations against the election agent and to delete all references to Periwal. This was resisted and it was stated that Periwal was the only election agent appointed by the returned. candidate.. The question is whether the election

petition was liable to be dismissed for not joining Periwal who was a duly nominated candidate and against whom charges of corrupt practice were made ?

Mr. Hazarnavis contends that the amendments were made in answer to the order for better and fuller particulars. He submits that the original petition did not name Periwal although the amended petition did and the High Court need not have mixed up the two petitions to find out whether Periwal had to be joined or not. According to him, the original petition could not be dismissed since it did not name Periwal and the amended petition only supplied particulars as required by the Judge. He submits that even in giving instances of bribery in paragraph 16, although the name of Periwal was mentioned in the opening part, no instance was cited with Periwal's name although other names were mentioned. Therefore, he submits that Periwal was not in the mind of the election petitioner at all and the mention of Periwal was merely an error. In reply it is pointed out that all allegations were supported by affidavits and that all references to the election agent and allegations against him were affirmed on personal knowledge by the election petitioner. In the Original' petition no names were given but when better particulars were ordered a categorical reference to the election agents was made by referring to Lunia and Periwal and this was again affirmed on personal knowledge by the petitioner. It is pointed out that in the list of workers of time returned candidate Periwal was shown as 'the election agent and the returned candidate affirms that Periwal was the only election agent. It is shown by way of illustration that the return of election expenses was filed by Periwal as the election agent and the allegations of corrupt practice in respect of the election expenses related to Periwal.

On examining the entire record with the assistance of counsel we are satisfied that Periwal was always meant when the reference was to an election agent and this was more clearly specified when the amended petition was filed. Therefore, the attempt was first to name him and now to withdraw his name to save the petition. This, in our opinion, could not be done and the High Court lost sight in dismissing the election petition and disallowing the amendment by implication. We give our reasons briefly:

It is necessary to read the Act backwards from s. 86(1). That section reads:

"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. This is a peremptory provision and admits of no exception. The Court must enforce it strictly if there is a non-compliance with the requirements of s. 82 among others. In this connection we have to read s. 82(b) which reads as follows:

"82. Parties to the petition.-- A petition shall join as respondents to his petition:--

(a)

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

This makes it incumbent that any candidate against whom a charge of corrupt practice is made must be joined as a party. Who is a candidate is laid down in s. 79(b). That provision reads as follows:

"79. Definitions.--In this Part and in Part VII unless the context otherwise requires.

(a)

(b) 'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election. and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate."

Since Periwal was a candidate who was duly nominated at an election he would be a candidate within the meaning assigned to that word by this definition. The question raised is that Periwal was a candidate at the election since he had withdrawn and, in any case, this definition need not be read in s. 82(b) which should be limited to contesting candidates. Under s. 37 a candidate may withdraw and once the notice of withdrawal is given it is final. After the date of withdrawal passes a list of contesting candidates is drawn up under s. 38. It is submitted that s. 82(b) should be limited to the contesting candidates. It is also submitted that when ss. 100 and 123 speak of a candidate they refer to a candidate whose candidature subsists to the time of the election, that is to say, after the time for withdrawal passes. The petition under s. 83(1)(b), it is said, can set out particulars of corrupt practices "against parties" and that would include contesting candidates, election and other agents and persons other than candidates and their agents. It is submitted that a candidate who has withdrawn is no longer a candidate and hence cannot be a party.

The argument cannot be entertained. These questions have already been considered by 'this Court on more than one occasion. They were first considered in *K. Kamaraja Nadar V. Kunju Thevar and Others*(1) but that ruling may not strictly be appropriate since it was based on s. 55A(2) which is now repealed. However, other cases (*Amin Lal V. Hunna Mal*(2) and *Har Swarup & Anr. V. Brij Bhushan Saran & Ors.*) (3) consider this point. It is there laid down that a candidate who is duly nominated continues to be a candidate for purposes of s. 82(b) in spite of withdrawal. This really decides the question which has been mooted before us. A very detailed examination of the same question is to be found in *Chaturbhuj V. Election Tribunal, Kanpur & Ant.*(4). In that case our brother Bhargava (M. L. Chaturvedi, J. concurring) has examined in the Allahabad High Court these provisions from every angle which is presented to us and has adequately answered all the arguments.

It is argued that the Civil Procedure Code applies and O. VI, r. 17 and O. 1, r. 10 enable the High Court respectively to order amendment of a petition and to strike out parties. It is submitted, therefore, that both these powers could be exercised in this case by ordering deletion of reference to Periwal. This argument cannot be accepted. No doubt the power of amendment is preserved (1) [1959] S.C.R. 583. (2) [1965] 1 S.C.R. 393. (3) [1967] 1 S.C.R. 342. (4) (1958) 15 E.L.R. 301.

to the court and O. 1, r. 10 enables the court to strike out parties but the court cannot use O. VI, r. 17 or O. 1, r. 10 to avoid the consequences of non-joinder for which a special provision is to be found in the Act. The court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder (see s. 87). When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as curative means to save the petition.

An attempt is made to distinguish the cases cited by us on the ground that now the provisions of ss. 4 to 25 of the Indian Limitation Act are applicable to election petitions and the amendment of the petition and joining of parties can take place at any time. It is subtitled that now the cases must be decided under the amended law. We need not go into this matter. It is doubtful whether these provisions of the Limitation Act apply at all. The petitioner has not asked to join Periwai. He only wants an amendment to delete allegations of corrupt practice against him. This cannot be permitted since it will defeat the provisions of s. 86(1). Every election petition can be saved by amendment in this way but that is not the policy of the law. The dismissal is peremptory and the law does not admit of any other approach. It is significant that in *Amin Lal V. Hunna Mal*(1), although the matter was not gone into from this angle it was said that the amendment for better particulars was not intended to enable the election petitioner to remove the defect in presentation or in the joinder of parties. *Sheopat Singh V. Ram Pratap*(2), since the facts were assumed, cannot be said to record any decision.

Lastly, it is submitted that Periwai was being charged in character as an election agent and not as a candidate. This submission runs counter to the amendment petition which says that he was not an election agent and therefore he was really charged in his capacity as an individual and as he was a duly nominated candidate he had to be joined. The argument really contradicts the last amendment petition and cannot be entertained.

For the reasons above stated it must be held that the decision of the High Court under appeal was correct. The appeal fails and will be dismissed with costs.

V.P.S.

Appeal dismissed.

(1) [1965] 1 S.C.R. 393.

(2) [1965] 1 S.C.R., 175.