

GAHC010019022022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/241/2022

KARIM UDDIN BARBHUIYA
S/O- LATE RAHIM UDDIN BARBHUIYA, R/O- DHONEHARI PART-II, P.O.
SILDUBI, P.S. SONAI, DIST. CACHAR, ASSAM, PIN- 788112.

VERSUS

ANAMUL HAQUE
S/O-LT. ALA UDDIN LASKAR, R/O-BERENGA PART II, P.O.--BERENGA, P.S.-
SILCHAR, DIST-CACHAR , ASSAM.

Advocate for the Petitioner : MR. K P PATHAK

Advocate for the Respondent : MR. D K MISHRA

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 14-06-2024

For the applicant (respondent in El.P. 5/2021)	Mr. K.P. Pathak, Sr. Advocate, Mr. H.I. Ahmed, Mr. I. Kalita, Mr. A. Barooah, Advocates.
For the opposite party (petitioner in El.P. 5/2021)	None.

Date of hearing	05.06.2024.
Date of order	14.06.2024.

Sl.	Particulars	Para no.
1.	Parties to this I.A.	2 and 3
2.	Prayer in this I.A.	4 and 5
3.	Contention on behalf of the respondent.	6 to 10
4.	Stand of the petitioner	11 to 13
5.	Issues	14
6.	In issue no.(a)	15 to 18
7.	On issue no.(b)	19 to 25
8.	On issue no.(c)	26 to 28
9.	On issue no.(d)	29 to 30
10.	On issue no.(e)	31 to 51
11.	Order	52 to 55

ORDER

(CAV)

Heard Mr. K.P. Pathak, learned senior counsel, assisted by Mr. I. Kalita, learned counsel for the applicant. None appears on call for the opposite party.

Parties to this application:

2) The applicant herein, namely, Karim Uddin Borbhuiya, is the returned candidate, whose election has been challenged by the opposite party herein, namely, Anamul Haque.

3) Hence, for the sake of convenience, in this order, the term "petitioner" will denote the "election petitioner" and the word "respondent" will denote the returned candidate. In the connected election petition, there is only one respondent.

Prayer in this interlocutory application:

4) The respondent, by filing this interlocutory application, has prayed for rejection of the election petition under the provision of Order VII, Rule 11 of the Civil Procedure Code (hereinafter referred to as 'CPC' for brevity) read with section 86 of the Representation of the People Act, 1951 (hereinafter referred to as 'RP Act, 1951' for brevity).

5) In this interlocutory application, the respondent has contended that in the connected election petition, the petitioner has prayed (A) for declaration that the election of the respondent from 10 Sonai LAC is void, and (B) for any other order(s) as may be deemed fit and proper under sections 98, 99, 100 and 101 of the RP Act, 1951.

Contention on behalf of the respondent:

6) The learned senior counsel for the respondent has submitted that although the respondent has urged, *inter alia*, four major points for questioning the maintainability of the connection election petition. However, at this stage he is pressing this application on the following two points:-

- a. The connected election petition is barred by limitation.
- b. The election petition is bad for non-joinder of necessary parties.

7) In connection with the issue of limitation, it has been submitted that the election results was declared on 02.05.2021 and therefore, 45 days time within which election petition ought to have been filed by the petitioner had expired on 16.06.2021. It was further submitted that the petitioner was impleaded as respondent no. 7 in Election Petition No. 1/2021, filed by one Aminul Haque Laskar. In the said proceeding, the right of the petitioner to file his written statement was closed by this Court by an order dated 24.08.2021.

Thereafter, on 31.08.2021, the petitioner had filed the connected election petition, which was registered as Election Petition No. 5/2021. It has been submitted that to explain the delay, although the petitioner is taking the help of order dated 10.01.2022, passed by the Supreme Court of India in *Re: Cognizance for Extension of Limitation, (2022) 3 SCC 117*.

8) It was submitted that the said order was never intended to have the effect of extending the period of limitation prescribed by section 81(1) of the RP Act, 1951. It was submitted that by the said order, the period from 15.03.2020 till 28.02.2022 would stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

9) In connection with the second point, the learned senior counsel for the respondent has submitted that in prayer (A) of the election petition, the petitioner has prayed for declaring the election of the respondent to be void, which is covered by the provisions of section 98(b) of the RP Act. However, under prayer (B), the respondent has further prayed for any other order(s) as may be deemed fit and proper under sections 98, 99, 100 and 101 of the RP Act, 1951.

10) In the context of prayer (B) of the election petition it was submitted that the provision of section 101 of the RP Act, 1951 refers to grounds for which a candidate other than the returned candidate may be declared to have been elected on the basis of which Court can pass an order

under section 98(c) of the RP Act, 1951. It is submitted that the petitioner has neither pleaded any grounds in support of the prayer made in the election petition, nor the petitioner has impleaded proper and necessary parties in the election petition. Hence, it was submitted that the petitioner has failed to comply with the requirement of section 82 of the RP Act, 1951 and therefore, the consequences of section 86 of the RP Act, 1951 must follow.

Stand of the petitioner:

11) The petitioner (i.e. the opposite party herein) has not filed any objection to this interlocutory application.

12) A learned counsel from amongst the earlier set of counsel for the petitioner, by filing I.A.(C) 1168/2024, had prayed for allowing him and other engaged counsel to withdraw their vakalatnama by projecting that he had given notice to the petitioner of withdrawal of vakalatnama. By an order passed on 05.06.2024, the said I.A.(C) 1168/2024 was allowed.

13) However, even after been given notice of the date fixed for the matter, the petitioner has not appeared on call. Therefore, the matter was heard *ex parte* against the petitioner.

Issues that arise for determination in this interlocutory application:

14) In light of the prayer made by the respondent, the following 5 (five) issues arise for determination in this case:

- a. Whether the connected election petition is liable to be dismissed for non-joinder of necessary parties?
- b. Whether the petitioner can be given an opportunity to make a prayer for amendment of the election petition so as to cure the defect of non-

joinder of necessary parties?

- c. Whether the petitioner can be granted an opportunity to invoke the provisions of Order 23, Rule 1 CPC so as to withdraw and/or abandon that part of the claim which is inclusive of the deemed prayer that any other candidate has been duly elected?
- d. Whether for non-compliance of the provisions of section 81 and 82 of the RP Act, 1951, the election petition is liable to be rejected?
- e. Whether the election petition filed by the petitioner on 31.08.2021 is barred by limitation?

On issue no. (a) of non-joinder of necessary parties:

15) As per the provisions of section 84 of the RP Act, the petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

16) The provisions of sections 98, 101 and 86 of the of the RP Act, 1951 are quoted below:-

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.

* * *

101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.- If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

- (a) *that in fact the petitioner or such other candidate received a majority of the valid votes; or*
- (b) *that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,*

the High Court shall, after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.

* * *

82. *Parties to the petition.- A petitioner shall join as respondents to his petition—*
- (a) *where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and*
 - (b) *any other candidate against whom allegations of any corrupt practice are made in the petition.*

17) The petitioner has made a prayer for claiming relief in terms of section 98 and 101 of the RP Act. Accordingly, it cannot be denied that the said prayers would be inclusive of the prayer for relief as provided under section 98(c) and section 101(b) of the RP Act. Thus, in addition to claiming declaration that the election of the respondent is void, the petitioner has also prayed that any other candidate has been duly elected. Hence, as per the mandate of section 82 of the RP Act, 1951, the petitioner ought to have impleaded all the contesting candidates other than the petitioner as respondents in the connected election petition.

18) Therefore, the issue no. (a) is answered in favour of the respondent and against the petitioner by holding that the election petition is bad for non- joinder of necessary parties.

On issue no. (b):

19) Having answered the point of determination no. (a) against the

petitioner by holding that the election petition is bad for non- joinder of necessary parties, the corollary issue which arises for determination is whether the petitioner can be given an opportunity to make a prayer for amendment of the election petition so as to cure the defect.

20) In that regard, it is seen that the issue has been settled by the decision of a 3-Judge Bench of the Supreme Court of India in the case of *K. Kamaraja Nadar v. Kunju Thevar & Ors.*, AIR 1958 SC 687, which has been cited by the learned senior counsel for the respondent. The relevant para-33 thereof is quoted below:-

33. *As regards the amendment of a petition by deleting the averments and the prayer regarding the declaration that either the petitioner or any other candidate has been duly elected, so as to cure the defect of non-joinder of the necessary parties as respondents, we may only refer to our judgment about to be delivered in Mallappa Basappa v. Basavaraj Ayyappa, Civil Appeal No. 76 of 1958: (AIR 1958 SC 698), where the question is discussed at considerable length. Suffice it to say here that the Election Tribunal has no power to grant such an amendment be it by way of withdrawal or abandonment of a part of the claim or otherwise, once an Election Petition has been presented to the Election Commission claiming such further declaration.*

21) It may also be mentioned that in the case of *Bijayananda Patnaik v. Satrughna Sabu & Ors.*, AIR 1966 SC 1566, a 3-Judge Bench of the Supreme Court of India, after taking note of the judgment in the case of *K. Kamaraja Nadar (supra)*, had observed in para 5 as follows:-

5. *It will be seen from these provisions in Chap. IV that the petitioner in an election petition has not an absolute right to withdraw it; nor has the respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provision as to withdrawal of election petitioner is to be found in the well established principle that 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 of the constituency also is substantially interested in it, as an election is an essential part of the democratic process. That is why provision is*

made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in order to preserve the purity of elections: (see Kamaraja Nadar v. Kunju Thevar, 1959 SCR 583: AIR 1958 SC 687). At the same time, though these principles are the basis of the provisions to be found in Chap. IV of the Act, it is equally clear that but for these provisions it may have been possible for a petitioner to withdraw the election petition absolutely. Section 90 (1) provides that

"Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the tribunal as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits."

In view of this provision, O. 23, R.1(1) would have applied even to an election petition before the tribunal but for the provisions contained in Chap. IV. It is because the provisions of the Code of Civil Procedure apply to election petitions subject to the provisions of the Act and the Rules framed thereunder that O.23 R. 1(1) cannot be applied to the withdrawal of election petitions in view of Ss. 108 to 111 thereof; but for these special provisions, O. 23, R. 1(1) would have been applicable, and it is well established that that provision gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim.

22) It may be mentioned that from the contents of para-33 of the judgment rendered in the case of *K. Kamaraja Nadar (supra)*, a reference has been made to the case of *Mallappa Basappa (supra)*, where the said issue was discussed. In the said context, the Court also takes note of the fact that the Supreme Court of India, in the subsequent decision in the case of *Bijayananda Patnaik (supra)*, did not make any observation that the opinion of the co-ordinate 3- Judge Bench in the case of *K. Kamaraja Nadar (supra)*, was overruled or that it was not a good law.

23) The Court would also like to refer to the observations made by the Constitution Bench of the Supreme Court of India in para-29 of the case of

National Insurance Co. Ltd. v. Pranay Sethi, 2017 STPL 13374 SC: (2017) 0 Supreme(SC) 1050, which is quoted below:-

29. We are compelled to state here that in Munna Lal Jain v. Bipin Kumar Sharma, (2015) 6 SCC 347, the three-Judge Bench should have been guided by the principle stated in Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422, which has concurred with the view expressed in Sarla Verma v. Delhi Transport Corporation, (2009) 6 SCC 121 or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari (supra), being earlier in point of time would be a binding precedent and not the decision in Rajesh v. Rajbir Singh, (2013) 9 SCC 65.

24) Thus, the Court is of the considered opinion that as per the ratio laid down in the case of *K. Kamaraja Nadar (supra)*, the petitioner, having made a prayer (B) in the election petition for any other order(s) as may be deemed fit and proper under sections 98, 99, 100 and 101 of the RP Act, 1951, the petitioner cannot be permitted to amend the election petition so as to cure the defect.

25) Accordingly, the point of determination no. (b) is answered in favour of the respondent and against the election petitioner by holding that the petitioner cannot be given an opportunity to make a prayer for amendment of the election petition so as to cure the defect.

On issue no. (c):

26) In respect of the point of determination no. (c), as to whether the petitioner can be granted an opportunity to invoke the provisions of Order XXIII, Rule 1 CPC so as to withdraw and/or abandon that part of the claim which is inclusive of the deemed prayer that any other candidate has been duly elected, it is seen that the issue has been settled by the Supreme Court of India in the case of *Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa & Ors., AIR 1958*

SC 698, which has been cited by the learned senior counsel for the respondent. The relevant para-18 thereof is quoted below:-

18. *The provisions of Order XXIII, R. 1 of the Code of Civil Procedure also contain inherent evidence which militates against this contention. Order XXIII, 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 Order XXIII, 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 Order XXIII, R. 1 would apply and the petitioner would be at liberty to withdraw or abandon a part of his claim?*

19. *On a due consideration of all these provisions, we are of opinion that the provisions of Order XXIII, 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 Section 97 of the Act.*

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

"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."

See also the passage at Ibid, 300, para 541:

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

21. *The case of Aldridge v. Hurst, (1876) 1 CP 410 at pp. 413, 414, 415, 417 (E), 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 in part."

* * *

"These sections show that not merely 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 of 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 seat, 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 the seat for one who may be the duly elected representative; or, on the other hand, from showing by means of the recriminate 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 part material 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 show that he is unfit to serve in a future parliament, he himself, having raised this issue by claiming the seat."

22. *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 Order XXIII, R.1 Civil P. C., 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 Section 97 of the Act cannot be taken away, and the returned candidate or any other party to the petition would in 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 Section 123 were proved against the petitioner or any other candidate sponsored by him it would entail upon him the disqualification for standing as candidate or even for voting for a period of 6 years under Sections 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 Kalaghartgi constituency on October 16, 1957 would have been void and he 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.*

23. *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 Section 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.*

27) In this context, the observations made herein before, in the context of the decision of the Supreme Court of India in the case of *K. Kamaraja Nadar (supra)*, *Bijayananda Patnaik (supra)*, and *Pranay Sethi (supra)*, are required to be referred to without burdening this order with repetition.

28) Thus, the provision of Rule (1) of Order XXIII of the CPC has no application in an election petition, and therefore, an election petitioner cannot be permitted to withdraw and/or abandon a part of the claim. Accordingly, the point of determination no. (c) is answered in favour of the respondent and against the election petitioner.

On issue no. (d):

29) In respect of point of determination no. (d) as to whether for non-compliance of the provisions of section 81 and 82 of the RP Act, 1951, the election petition is liable to be rejected, it is seen that in the said issue has been settled by the Supreme Court of India in the case of *K. Vankateswara Rao & Anr. v. Bekkam Narasimha Reddi & Ors.*, AIR 1969 SC 872: (1968) 0 Supreme(SC) 204, cited by the learned senior counsel for the respondent. The relevant para-13 thereof is quoted below:-

13. *Even though Section 87(1) of the Act lays down that the procedure applicable to the trial of an election petition shall be like that of the trial of a suit, the Act itself makes important provisions of the Code inapplicable to the trial of an election petition. Under Order VI, R.17 C.P.C. a Court of law trying the suit has very wide powers in the matter of allowing amendments of pleadings and all amendments*

which will aid the Court in disposing of the matters in dispute between the parties are as a rule allowed subject to the law of Limitation. But Section 86(5) of the Act provides for restrictions on the power of the High Court to allow amendments. The High Court is not to allow the amendment of a petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. With regard to the addition of parties which is possible in the case of a suit under the provisions of Order I, R.10 subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of Section 86. Section 82 shows who are necessary parties to an election petition which must be filed within 45 days from the date of election as laid down in Section 81. Under Section 86(1) it is incumbent on the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82. Again the High Court must dismiss an election petition if security for costs be not given in terms of Section 117 of the Act.

30) Thus, it is seen that the Supreme Court of India has held to the effect that it is incumbent on the High Court to dismiss the election petition for non-compliance of section 81 or section 82 of the RP Act, 1951. Hence, the point of determination no. (d) is answered in favour of the respondent and against the election petitioner.

On issue no. (e):

31) In respect of the point of determination no. (e), as to whether the election petition filed by the petitioner on 31.08.2021 is barred by limitation, it is seen that in this case, the election result was declared on 01.05.2021. The period of 45 days, within which election petition is required to be filed as per the mandate of section 81(1) of the RP Act, 1951 is 45 days, which has expired on 16.06.2021.

32) The provision of section 81 of the RP Act, 1951 is quoted below:-

81. Presentation of petitions.- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section

(1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[section 2 omitted.]

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

33) The first and foremost question that arises for decision in this interlocutory application is whether the issue that the connected election petition is barred by limitation can be adjudicated as a preliminary issue or whether the issue of limitation is a mixed question of fact and law, and that such an issue should be decided on conclusion of the trial. This question has been answered in the later part of this order in the affirmative, after discussion on the issue as under.

34) In this case, the election result was declared on 02.05.2021. Therefore, as per the provisions of section 81 of the Representation of the People Act, 1951 (hereinafter referred to as "RP Act, 1951"), the election petition was required to be presented within 45 days from the declaration of result of the returned candidate, i.e. within 16.06.2021.

35) By referring to the filing slip accompanying the election petition, it was pointed out by the learned senior counsel for the applicant that the petitioner had filed the election petition on 31.08.2022, i.e. after 76 days from the declaration of result.

36) The Court also take note of the fact that the connected Election

Petition No. 5/2021 was filed by the petitioner on 31.08.2021, after passing of the order dated 24.08.2021, by which his opportunity to file written statement was closed in connection with Election Petition No. 1/2021, filed by Aminul Haque Laskar, wherein the petitioner was arrayed as respondent no.7.

37) The connected election petition (El. P. No. 5/2021) was filed on 31.08.2021. However, in para-35 of the said election petition, the petitioner has stated that the limitation period for filing various litigations by the litigants before the various forums had been extended by the Apex Court and the same is still governing the field.

38) The Supreme Court of India had given a clear direction in the order dated 10.01.2022, passed in Misc. Application No. 21/2022 in SMWP(C) No. 3/2020 that the period from 15.03.2020 till 28.02.2022 shall stand excluded in computing the periods prescribed in respect of laws which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay). In this regard, it is seen that under proviso to section 116(a) of the Representation of the People Act, 1951, the Supreme Court had the power to entertain an appeal after the expiry of the period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period. However, such *pari materia* provision is not provided under section 81 thereof for the High Court to condone the delay. Therefore, the extension of the period of limitation to present an election petition is not available in the RP Act, 1951. Hence, the delay in the presentation and/or filing of an election petition cannot be held to be condonable.

39) It would be appropriate to quote the relevant operative para-5 of the herein before referred order dated 10.01.2022, passed by the Supreme

Court of India in Misc. Application No. 21/2022 in SMWP(C) No. 3/2020, which is extracted below:-

5. *Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:*

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

40) In light of the observations made by the Supreme Court of India, which has been extracted herein before, it is seen that the Supreme Court of India did not deem it fit to give a blanket extension of time and therefore, under para-5(IV) of its order, it was clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe

period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

41) It would be appropriate now to refer to paragraphs 2 to 6 of the case of *Charan Lal Sahu v. Nandkishore Bhatt*, (1973) 0 Supreme(SC) 228, which has been cited by the learned senior counsel for the respondent, are quoted below:-

2. It was contended before us that the petition can only be dismissed after the trial commenced and the trial commences only after notices are issued to the respondents. In support of this proposition, provisions of the repealed Section 85 of the Act are referred to. We are unable to appreciate how the repealed Section 85 of the Act furthers the submission of the petitioner or has any relevance. It is apparent that prior to repeal by Act 47 of 1966, Section 81 provided for the presentation of the election petition by any candidate aggrieved by the result of the election to the Election Commission; Section 83 prescribed what the contents of the petition should be; and Section 85 provided:

"If the provisions of Section 81, Section 83 or Section 117 are not complied with, the Election Commission shall dismiss the petition:

Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may in its discretion condone such failure."

Presentation of the petition under the repealed S.81, beyond the period prescribed for its presentation could be condoned by the Election Commission in its discretion under the proviso to the repealed S.85 of the Act, but there is nothing in Section 85 which permits the Election Commission to condone the non-compliance with the provisions of Section 117. Before the amendment of the Act in 1966, once the Election Commission finds the election petition to be in order and does not dismiss it under S. 85 for non-compliance with the requirements of Ss. 81, 83 and 117, it has to appoint an Election Tribunal for the trial of the petition. The trial by the Tribunal therefore is only after compliance with the mandatory provisions prescribed in Sections 81, 83 and 117 so that the trial is unrelated to the non-compliance by the petitioner with the requirements of Section 117. After the amendment, the jurisdiction of both the Election Commission and the Tribunal in respect of election disputes has been abolished and the High Courts of respective States have been vested with the jurisdiction in this regard. But the conferment of

jurisdiction to entertain try and determine an election petition has not in any way materially affected the position stated by us, as will be presently indicated.

3. *The right to challenge an election is a right provided by Article 329 (b) of the Constitution of India, which provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The right conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matters, none can be exercised under any general law or on any principle of equity. This Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. In *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218 it was pointed out that strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.*

4. *On behalf of the appellant the case of *K. Kamaraja Nadar v. Kunju Thevar*, 1959 SCR 583 has been relied upon in support of the submission that the provisions of Section 117 of the Act are directory and not mandatory in their character. An examination of this decision does not support this contention of the appellant. That was a case under the unamended S. 117 of the Act under which the petitioner was required to enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees had been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition. The petitioner therein had deposited Rs. 1000/- but had not mentioned the complete head of account in the Government Treasury receipt nor was the deposit made in favour of the Secretary to the Election Commission as laid down in the aforesaid section. The Election Commission discussed this defect and left the question to the Tribunal to decide after hearing the parties whether the defect could be treated as fatal or one that could be cured by fresh deposit or otherwise so as to secure the costs of the candidate if eventually awarded to him. The Tribunal held that there was no defect in the matter of the head of account and was further of opinion that*

non-mention of the fact that the deposit was made in favour of the Secretary to the Election Commission was immaterial in that it was taken to have been made in favour of the Election Commission at whose disposal the fund was placed, and accordingly there was sufficient compliance with the requirements of S. 117 of the Act. In that case this Court after examining in detail the procedure relating to the filing of the election petition observed at p. 606:

"It would be absurd to imagine that a deposit made either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of Section 117 and would involve a dismissal of the petition under Section 85 or Section 90 (3). The above illustration is sufficient to demonstrate that the words in favour of the Secretary to the Election Commission" used in Section 117 are directory and not mandatory in their character. What is of the essence of the provision contained in Section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or anyone else."

This decision, therefore, cannot come to the rescue of a petitioner who has failed to deposit the security as required under Section 117 of the Act or has paid less than the amount specified therein. The decision in Lalaram v. The SC of India, AIR 1967 SC 847 has no relevance to the matter in issue because as pointed out by the High Court that case relates to security being furnished for filing a review petition under the SC Rules, which, stands on a different footing.

5. *The argument of the appellant's advocate that in view of the marginal note to Section 86 election petition can only be dismissed after the trial has commenced by the issue of a notice to the respondent is equally without substance. Amended S. 86 apart from sub-sec (1) provides for several matters in sub-sections (2) to (7) such as for reference of the election petition or election petitions, where there is more than one in respect of the same election, to a Judge, the ordering of security for costs in case of the application by a candidate who is not already a respondent being made a respondent, the permission to amend or amplify particulars of an corrupt practice alleged in the petition, the continuance of the trial of the election petition from day to day and its expeditious trial to be concluded as far as possible within six months from the presentation of the petition to the High Court. The*

reference to Trial is in a larger sense and deals with the steps in a trial rather than in a narrower sense of a trial commencing after the notice of the petition is directed to be served on the respondent. The marginal note of Section 36, namely, "Trial of election petitions cannot indicate that under sub-sec. (1) of Section 86 an election petition cannot be dismissed for non-compliance with the provisions set out therein, unless notice is issued to the respondent. Where the language is clear and can admit of no other meaning such as is evident from sub-s. (1) of Section 86, the marginal note cannot be read to control that power.

6. *We are clearly of the view that the non-deposit of the security along with the election petition as required under S. 117 of the Act leaves no option to the Court but to reject it. The appeal is accordingly dismissed with costs.*

42) In the case of *Hukumdev Narain Yadav v. Lalit Narayan Mishra*, (1974) 2 SCC 133, cited by the learned senior counsel for the respondent, amongst others, it was held that the provision of Section 5 of the Limitation Act, 1963 had no application in an election petition. The relevant paragraph 25 is quoted below:-

25. *For all these reasons we have come to the conclusion that the provisions of Section 5 of Limitation Act do not govern the filing of election petitions or their trial and, in this view, it is unnecessary to consider whether there are any merits in the application for condonation of delay."*

43) In the present case in hand, the election result was declared on 02.05.2021 and 45 days time available to file election petition had expired on 16.06.2021. However, the connected election petition was filed on 31.08.2021, i.e. after 76 days from the date of declaration of result.

44) Thus, as per the ratio laid down by the Supreme Court of India in the case of *Hukumdev Narain Yadav (supra)*, the Limitation Act, 1963 has no application in an election petition.

45) The dates relevant in the connected election petition have been narrated herein before. Hence, the Court is of the considered opinion that the

presentation of the Election Petition No. 5/2021 on 31.08.2021, was barred by limitation.

46) In the case of *Nusli Neville Wadia v. Ivory Properties*, (2020) 6 SCC 557, which has been cited by the learned senior counsel for the respondent, the Supreme Court of India had held in para-51 thereof that in a case question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b).

47) Thereafter, in the case of *Mongia Realty & Buildwell Pvt. Ltd. v. Manik Sethi*, 2022 SCC OnLine 156, cited by the learned senior counsel for the respondent, the Supreme Court of India had held as follows:-

14. *Order XIV Rule 2 of the CPC stipulates that when issues of both law and facts arise in the same suit, the Court may dispose the suit by trying the issue of law first. For this purpose, the provision specifies two questions of law, which are (i) jurisdiction of the Court; and (ii) a bar to the suit created by any law for the time being in force. The provision is extracted below:*

2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to-

- (a) the jurisdiction of the Court, or*
- (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.*

15. *Before this Court in Nusli Neville Wadia v. Ivory Properties*, (2020) 6 SCC 557, the issue was whether the issue of limitation can be determined as a preliminary issue under Order XIV Rule 2. The three-judge bench of this court observed that if the issue of limitation is based on an admitted fact, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b). However, if the facts surrounding the issue of limitation are disputed, it cannot be decided as a preliminary issue.

This Court observed as follows:

51. ... As per Order 14 Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14 Rule 2. In Order 14 Rule 2(1), the court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order 14 Rule 2(2) makes a departure and the court may decide the question of law as to jurisdiction of the court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

52. In a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2) (b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.

16. *Since the determination of the issue of limitation in this case is not a pure question of law, it cannot be decided as preliminary issue under Order XIV Rule 2 of the CPC. Hence, we allow the appeal and set aside the judgment of the trial Judge dated 16 August 2018 and of the Single Judge of the High Court dated 4 September 2019. The issue of limitation which has been framed by the learned trial Judge may be decided, along with other issues at trial. The appeal shall stand allowed in the above terms.*

48) In the case of *Sukhbiri Devi & Ors. v. Union of India*, 2022 SCC OnLine 1322, cited by the learned senior counsel for the respondent, the Supreme Court of India had referred to the decision rendered in the case of

Nusli Neville Wadia (supra), and it was again held that it is clear that the issue of limitation can be framed and determined as a preliminary issue under Order XIV, Rule 2(2)(b) CPC in a case where it can be decided on admitted facts.

49) The relevant dates referred above, are available in the record, which is undisputed. Therefore, it is held that the preliminary issue regarding whether or not the connected Election Petition No. 5/2021 was barred by limitation is an issue which can be framed and taken up under Order XIV, Rule 2(2)(b) CPC. Resultantly, in light of the discussions above, the said preliminary issue is answered in the affirmative and against the opposite party, i.e. the election petitioner by holding that as the election result was declared on 02.05.2021, the election petition presented on 31.08.2021, is barred by limitation.

50) The relevant dates are available on record. Therefore, to find out the relevant dates of when the election result was declared and when the connected election petition was filed, the Court would not require any evidence, but only a perusal of the record would suffice.

51) Thus, the Court is inclined to hold that the preliminary issue on the question as to whether the election petition is barred by limitation, as raised by the respondent, is capable of being answered without any evidence. Therefore, it is held that the Election Petition No. 5/2021 is barred by limitation and thus, the same is dismissed on being barred by limitation. Therefore, the point of determination no. (e) is answered in favour of the respondent and against the election petitioner.

Order:

52) In light of the discussions above, all the five issues are answered

against the election petitioner and in favour of the respondent in the election petition. Accordingly, this interlocutory application is allowed.

53) Resultantly, the election petition is liable to be and is accordingly, rejected under Order VII, Rules 11(a) and 11(d) of the Civil Procedure Code.

54) As the election petitioner is unrepresented, there shall be no order as to cost.

55) A separate consequential order is being passed in the connected Election Petition No. 5/2021.

JUDGE

Comparing Assistant