

Ram Lakhan Vs. Ram Charitra and Others

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Court : Allahabad

Decided On : Nov-26-1992

Reported in : AIR1993All199

Judge : D.P.S. Chauhan, J.

Acts : [Representation of the People Act, 1951](#) - Sections 80-A, 86 and 87; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 144, 151 and 152 - Order 3, Rule 4(2) - Order 9, Rules 6 and 7 - Order XIV, Rule 1(5) - Order 17, Rule 1; [Constitution of India](#) - Articles 71 and 215

Appeal No. : Election Petn. No. 11 of 1991

Appellant : Ram Lakhan

Respondent : Ram Charitra and Others

Advocate for Def. : P.P. Srivastava,; S.N. Singh, ;R.N. Singh, ;S.S. Singh and ;A.K. Rai, Advs.

Advocate for Pet/Ap. : R.C. Srivastava, ;S.K. Srivastava and ;Pradeep Chandra, Advs.

Judgement :

ORDER

1. By means of the present election petition, the election of the respondent No. 1, Sri Ram Charitra, for the Legislative Assembly from 177, Khalilabad (Reserved) (I) constituency is questioned.

2. On 15-9-1992 the case was fixed for settlement of issues on which date the counsel appearing for the respondent no. 1, Sarvsri S. N. Singh and R.N. Singh, made a statement to the effect that their instructions have been withdrawn and they no longer represent the respondent No. 1. No other person was before the Court representing the respondent No. 1. Even the respondent No. 1 himself was not present. These circumstances led the Court for passing the following order:

'Sarvsri S.N. Singh and R.N. Singh, learned counsel for respondent No. 1, state that their instructions have been withdrawn by the client and they are not representing him. The respondent No. 1 himself is not present, In this view of the matter, let the election petition be proceeded ex parte.

Learned counsel for petitioner filed the documents, but they are not admitted or denied as the learned counsel for respondent No. 1 have withdrawn. The document may be brought on record. List for ex parte evidence on 23-9-1992'

3. On the next date fixed, the respondent No. 1 moved an application, which is posted for consideration today, for recall of the order dated 15-9-1992 by engaging Sarvsri S. S. Singh and Amber Nath Rai, as his counsel.

4. The application was supported by an affidavit of one Sri Kamlesh Kumar Singh in the capacity as pairokar of the respondent No. 1, wherein it was stated that the applicant is a heart patient and in connection with his treatment he was hospitalised from 31-8-1992 to 12-9-1992 in Balrampur Hospital at Lucknow. During this period, he received a message from his counsel that owing to unavoidable personal difficulties as also because the application could not be available to them at Allahabad to discuss the case with them, they were not in a position to conduct the case, and advised the respondent No. 1 to instruct and engage some other lawyer as his counsel, who could discuss the case with him at Lucknow and conduct the same, to which suggestion the applicant had to agree. It

has also been stated that the applicant had to undergo various tests in connection with his ailment and was advised rest on account of which he was not in a position to go to Allahabad and, in these circumstances, he sent a message to Sri S. S. Singh, Advocate, in the evening of 13-9-1992 to take up his case and seek time from the Court and after seeking time from the Court to come to meet him at Lucknow for preparing and conducting the case forthwith. It has also been stated that the applicant communicated him that on 15-9-1992 he will try to reach Allahabad but he could not do so on account of pain in the chest wherefor he was advised to take expert's opinion from a Cardiologist, whereat the applicant took the appointment for check up in Sanjay Gandhi Post Graduate Institute, Lucknow, which was given for 17-9-1992, on which date he was advised rest and was required for being available there for thorough investigation. These circumstances did not allow the applicant to be present at Allahabad on 15-9-1992 or earlier for filing affidavit seeking adjournment. His newly engaged counsel could not move the adjournment application for want of affidavit. The Court accordingly passed the aforesaid order for proceeding ex parte.

5. Counter and rejoinder affidavits were exchanged. On 25-9-1992 the learned counsel for the applicant was allowed time to file a supplementary affidavit explaining how and why he disengaged the counsel already appearing for him, as the affidavit filed by the pairokar was not found to be sufficient. A personal affidavit of the respondent No. 1 was filed but no counter affidavit, in spite of time having been allowed, was filed. Learned counsel for the contesting respondent was asked for explaining the position regarding the continuance or discontinuance of Sri P. P. Srivastava, Advocate, as counsel for the contesting respondent, as he appeared consequent upon the service of the notice of the election petition on him. He was also required to explain that, on the date fixed i.e. 15-9-1992, for framing of the issues, how the presence of respondent No. 1 was necessary. A supplementary affidavit has been filed wherein it has been stated that, before engaging Sarvsri S. S. Singh and Ambar Nath Rai, Sri P. P. Srivastava was disengaged and was no more the counsel for the respondent No. 1 on the date the order for proceeding ex parte was passed.

6. Under sub-rule (2) of Rule 4 of Order III of the Code of Civil Procedure, a procedure is provided for disengaging a pleader and the same could be done with the leave of the Court by writing signed by the client or the pleader. The said provision is as extracted below:--

'(2) Every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

Explanation-- For the purposes of this sub-rule, the following shall be deemed to be proceedings in the suit,

(a) an application for the review of decree or order in the suit,

(b) an application under Section 144 or under S. 152 of this Code, in relation to any decree or order made in the suit,

(c) an appeal from any decree or order in the suit, and

(d) any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of moneys paid into the Court in connection with the suit.'

In the present case no such leave of the Court was obtained from the Court and no writing signed either by the respondent No. 1 himself or by his counsel, Sri P. P. Srivastava, was ever filed. The lapse is procedural and is condoned and the disengagement of Sri P. P. Srivastava is accepted. However, the respondent No. 1 is required to place on record of the election petition a proper application in this regard.

7. Regarding the query as to for what purpose the lawyer was required to be present at Lucknow by the respondent No. 1 and as to how the presence of the respondent No. 1 was necessary on the date which was for settlement of issues. The explanation offered is that the counsel was required for giving the instructions

equipping him for the eventuality if the Court proceeded to record his statement under sub-rule (5) of Rule 1 of Order XIV of the Code of Civil Procedure. It was done by way of abundant caution though the respondent No. 1 was expecting himself to be here on the date fixed but his ill health did not allow him. The applicant, in the circumstances, as stated above, has made out a sufficient case for recall of the order dated 15-9-1992.

8. Learned counsel for the petitioner thereafter raised three fold objections. Firstly, that Order XVII Rule 1 of the Code of Civil Procedure has nothing to do in the present case, though the relief is sought under this provision in the application. It is correct that the provision related to the adjournment of hearing of the suit and the prayer in the present application is not for adjournment of hearing. The provision is not attracted. However, learned counsel for the respondent No. 1 accepted the position that the provision is misquoted and is not attracted for the purpose of the prayer in the present application.

9. Learned counsel for the petitioner has submitted that the application would not be covered under Order IX Rule 7 of the Code of Civil Procedure, whereunder the prayer in the application is made, Order IX, Rule 7 of the Code of Civil Procedure is as extracted below:--

'7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance--Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.'

The submission as advanced by the learned counsel for the respondent is that this provision has to be read conjointly with Order IX, Rule 6, as the words 'be heard in answer to the suit as if he had appeared on the day fixed for his appearance', go to indicate. These words signify that the stage, as mentioned in Order IX, Rule 6, is covered by Rule 7. Thus, the submission as advanced by the learned counsel for the petitioner has got substance. This provision would not be attracted, in the circumstances, in the present application. Learned counsel for the respondent No.

1 could not satisfy the Court for taking the different view and could not point out any provision under the Code of Civil Procedure under which such application could be treated.

10. Learned counsel for the contesting respondent submitted that relief in the application could be granted under S. 151, Code of Civil Procedure. Learned counsel for the petitioner submitted that this Court has held in Election Petn. No.9 of 1991, *Ram Nakshtra v. Ramapati*, as under :--

'The position of the High Court under the Act ([Representation of the People Act, 1951](#)) is akin to that mentioned in the case (supra) (AIR 1978 SC 499, *Charan Lal Sahu v. Shri Neelam Sanjeeva Reddy*) that it functions as a Tribunal set up under the Act....' (Bracketed portion is supplied, for clear expression, by me).

In view of the above, the respondent No. 1 cannot take the aid of S. 151 of the Code of Civil Procedure. It is true that in the case (supra) it has been held that the High Court while trying the election petition functions as a Tribunal, the controversy hinges around as to whether the inherent power is available to the High Court while functioning as a Tribunal under the [Representation of the People Act, 1951](#). The High Court is, no doubt, a Court and it inheres, in its very constitution, all such powers, as may be necessary, to do the right and to undo the wrong in the course of administration of justice. High Court while functioning under the [Representation of the People Act, 1951](#), though functions as a Tribunal but its functioning is as a High Court within the circumscribed framework under Representation of the People Act and it cannot be divested from its very constitutional status as a Court. Section 151 of the Code of Civil Procedure does not confer inherent power on a Court. The inherent powers are the powers which inhere in the Court by its very constitution. It only offers clarification to the effect that the Code of Civil Procedure not to affect the inherent powers of the Court.

11. There can always be circumstances which do not get coverage under the express provision of the statute and justice has to be done by doing right and undoing the wrong in the course of administration of justice. Inherent power has its root in necessity and its breath is co-extensive with necessity. The High Court is the repository of judicial functions and Court for settlement of the election dispute

relating to the Assembly and the Parliament under Article 71 of the Constitution. The language of sub-s. (1) of S. 80A of the [Representation of the People Act, 1951](#), which is relevant, is as extracted below:--

'(1) The Court having jurisdiction to try the election petition shall be the High Court.'

The provision by itself says that the election petition itself to be tried by trial by the Court and that Court to be the High Court and thus the High Court while trying the election petition retains its status and its functioning is regulated by the representation of the People Act, 1951, qua the trial of the election petition. The High Court, thus, retains the status of a Court and the inherent powers are available to it. There is a distinction between the Court functioning as a Tribunal and an authority acting as a Tribunal. Where Court functions as a tribunal it retains with it all its inherent powers.

12. Apart from the above, the High Court, under Art. 215 of the Constitution is a Court of Record and is repository of all the powers which are of multi-dimensions, and as such every power is inherent in the High Court.

13. In view of what has been stated above, the objection of the learned counsel for the petitioner is overruled, and the order dated 15-9-1992 deserves to be recalled.

14. It may not go unnoticed that the conduct of the respondent No. 1 right from very inception was not that of a vigilant litigant, respondent No. 1, consequent upon a notice of election petition being served on him, appeared before the Court through an Advocate, but did not file any written statement and also did not move the Court for seeking further time for the purpose and the Court had to pass the orders for proceeding ex defence. However, this order was subsequently set aside on an application made by him by fresh engagement of lawyers, Sarvsri S. N. Singh and R. N. Singh. The case again proceeded ex parte on 15-9-1992 on which date it was ordered to proceed ex parte and for setting aside the order for proceeding ex parte, the respondent No. 1 engaged a fresh set of lawyers. Such an approach is not fair.

15. The application is accordingly allowed with costs, which is assessed at Rs. 1,000.00, to be paid by the respondent No. 1 within three weeks from today. The order dated 15-9-1992 is set aside.

16. Let the case be listed on 7-12-1992 for settlement of issues.

17. Order accordingly.

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