

Surekha Dash Vs. Civil Judge (Junior Division) and ors.

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Court : Orissa

Decided On : May-14-1998

Reported in : 1998(II)OLR43

Judge : A. Pasayat ;and P.C. Naik, JJ.

Acts : Orissa Grama Panchayat Act, 1965 - Sections 35 and 37; Provisions of Representation of People's Act, 1951

Appeal No. : O.J.C. No. 12 and 377 of 1997

Appellant : Surekha Dash

Respondent : Civil Judge (Junior Division) and ors.

Advocate for Def. : Pratap Mohanty, S.P. Dhal, G.P. Samal and B.D. Mishra (for opp. party No. 3)

Advocate for Pet/Ap. : Mira Ghose, P. Mishra, S. Acharya, P.K. Tripathy and N.S. Ghose

Disposition : Application dismissed

Judgement :

A. Pasayat, J.

1. Present writ application involves an interesting question of law, and in fact this application has been entertained only to adjudicate the question whether under the Orissa Grama Panchayat Act/ 1965 (in short, the 'Act') the learned Civil Judge (Junior Division) has power to allow amendment to the pleadings.

2. In view of the limited nature of legal controversy factual details are to be indicated in brief.

Petitioner has been elected as Sarpanch of Badasuara Grama Panchayat. Opposite party Nos. 3, 4, 5 and 6 were contestants in the said election on 16.1.1997. An election dispute has been raised under the Act by opposite party No. 3 which has been numbered as Election Dispute Misc. Case No. 7 of 1997, and the same is pending before learned Civil Judge (Junior Division), Jajpur. During pendency of the election dispute, an application styled as one under Order 6, Rule 17, Code of Civil Procedure, 1908 (in short, the 'Code') was filed by opposite party No.3. Amendment sought for was to the effect that the election petitioner's agents protested against the error and illegality in counting of votes before the Presiding Officers and the Election Officers in respect of Ward Nos. 1 to 12. But they did not pay any heed to the same. The present petitioner filed an objection stating that there is no scope for any amendment of the election petition. It was pointed out that in the objection filed by her to the election petition it was clearly stated that all the formalities were observed, and there were no error and/or illegality, and in any event no objection was raised by the election petitioner's agents before the Presiding Officers and the Election Officers. It is her stand that to get over this stand the amendment has been sought for.

3. Learned Civil Judge (Junior Division) held that the amendment sought for is formal in nature and does not change the nature and character of the dispute. The stand that the amendment is impermissible was held not acceptable in view of applicability of the Code to election disputes. Revision filed by the present petitioner was rejected by learned Additional District Judge, Jajpur on the ground that it was not entertainable.

4. Miss Mira Ghose, learned counsel for the petitioner submitted that the Act lays down the procedure for trial of election petitions. There being no specific provision

for amendment, view taken by the Courts below cannot be maintained. It is submitted that under Section 35 of the Act procedure before the Election Tribunal is indicated and its powers are enumerated in Section 37, and a combined reading of Section 35 and Section 37 makes it clear that the prayer for amendment is not to be entertained.

Learned counsel appearing for opposite party No. 3, however, submitted that in view of the provisions of Sub-section (1) of Section 35 of the Act, prayer for amendment can be entertained and therefore, the plea taken by the present petitioner is thoroughly misconceived.

5. Sub-section (1) of Section 35, and Section 37 are relevant for the purpose of adjudication of this case. They read as follows :

'35. Procedure before the Munsif - (1) Subject to the provisions of this Act and the Rules made thereunder every election petition shall be tried by the Munsif 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.

xx xx xx xx"37. Powers of Munsif - The Munsif shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely:

- (a) discovery and inspection;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
- (c) compelling the production of documents;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence taken on affidavit;

(g) issuing commissions for the examination of witness and may summon and examine suo motu any person whose evidence appears to him to be material; and shall be deemed to him to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898)'.

At this juncture, it is to be noted that in the Act the expression 'Munsif still continues to be used, though presently the officer is designated as Civil Judge (Junior Division). Therefore, steps for amendment of the Act to change the designation is necessary.

6. Certain provisions of the Representation of the People's Act, 1951 (in short, 'R.P. Act') throw considerable light on the controversy, because question was raised before the apex Court in several cases as to whether there is any scope for seeking amendment of the election petition in respect of the particulars of corrupt practice or in respect of other matters.

7. Subject to the provisions of the R.P. Act of 1951 and of any Rules made thereunder, every election petition shall be tried by the High Court, as may be, in accordance with the procedure applicable under the Code to the trial of suits. The High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds with a view to delay the proceedings. Prior to amendment by the Amending Act of 1966, Section 92 gave specific powers under the Code to the Tribunal when trying the election. These were -

(a) discovery and inspection;

(b) enforcing the attendance of witnesses and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

- (e) granting adjournments;
- (f) reception of evidence takes on affidavits; and
- (g) issuing commissions for the examination of witnesses.

By the Amending Act, 1966, Sections 86 to 92 of the R.P. Act of 1951 were replaced by new Sections 86 and 87. Sections 88 to 92 have been merged in Sections 86 and 87 by the Act No. 47 of 1966 with effect from 14th December, 1966. Section 87 deals with procedure before the High Court and makes the Code applicable to the trial of election petitions. The amendment thus made shows that apart from the powers which Election Tribunal possessed under Section 92, the High Court will have all the powers under the Code as in the trial of suits.

Chapter III of Part VI of the R.P. Act deals with trial of Election petitions. Section 87 which forms part of the Chapter reads as follows :

'87. Procedure before the High Court. - (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 (5 of 1908) to the trial of suits :

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings. (2) The provisions of the Indian Evidence Act, 1972 (1 of 1872), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.'

The question regarding applicability of the Code to trial of election disputes was examined in great detail by the Apex Court in *Dr. P. Nalla Thampy Thera v. B. L. Shankar and Ors.* : AIR 1984 SC 135. Observations by a Full Bench of Punjab High Court in *Jugal Kishore v. Dr. Baldev Prakash*: AIR 1968 Punjab 152 to the following effect were approved.

'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.'

8. The power of amendment granted by Section 86(5) of the R.P. Act is relatable to Clause (b) of Section 83(1) and is coupled with a prohibition, namely, the amendment will not relate to a corrupt practice not already pleaded in the election petition. The power is not relatable to Clause (a) of Section 83(1) as the plain language of Section 86(5) confines itself to the amendments of 'particulars' of any corrupt practice alleged in the petition and does not extend to 'material facts'. It is clear from the trinity of Clauses (a) and (b) of Section 93 and Sub-section (5) of Section 85 that there is a distinction between 'material facts' referred to in Clause (a) and 'particulars' referred to in Clause (b).

9. Once the amendment sought falls within the purview of Section 86(5), the High Court should be liberal in allowing the same unless, in the facts and circumstances of the case, the Court finds it unjust and prejudicial to the opposite party to allow the same. Such prejudice must, however, be distinguished from mere inconvenience. See *F.A. Sapa v. Singora* : AIR 1991 SC 1557.

Amendment is permitted only in respect of particulars of a corrupt practice which has already been alleged in the petition and not of a new corrupt practice. The amendment may take one of the two forms, namely:

- (i) greater details of facts and instances already given may be furnished regarding a corrupt practice;
- (ii) the amendment may seek to give fresh facts and instances in respect of a corrupt practice already alleged.

There can be no difficulty regarding the first category of amendments giving greater details of facts and instances already given. Such an amendment is always permissible.

10. In number of cases it was held that power to amend the election petition is not restricted to the provision contained in the R.P.Act, but is regulated by Order 6, Rule 17 of the Code also and it is extensive as that of a Civil Court. In *Harish Chandra Bajpai v. Triloki Singh* 'AIR 1957 SC 454, the Supreme Court held :

'Although the term 'matter' in Section 83(3) was of wider import than 'particulars' to be stated under Section 93(2) and would comprehend the grounds on which the election was sought to be set aside Section 83(3) was not an exhaustive provision on the power of amendment. Its application being limited to allegations of corrupt and illegal practices, and therefore, in respect of other matters, the power of amendment under Order VI, Rule 17, read with Section 90(2) of the Act was not excluded, and the maxim *expressio unius exclusio alterius*, would not apply. While the Election Tribunal had undoubtedly the power under Section 83(3) of the Act to allow an amendment in respect of any particulars of illegal and corrupt practices, or to permit new instances to be included provided the grounds of charges were specifically stated in the petition, its powers to amend a petition under Order VI, Rule 17 of the Code of Civil Procedure could not be exercised so as to permit new grounds of charges to be raised or the character of the petition to be so altered as to make it in substance and a new petition, when a fresh petition on those allegations would be time barred.'

In *Aminlal v. Hunna Mal*: AIR 1965 SC 1143, the Supreme Court again dealt with the powers of amendment and its effect to cure the defects against Sections 81 and 82. At page 1246 it was observed :

'Sub-rule (1) of Section 90 provides that subject to the provisions of the Act and 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 at the trial of suits. Under Order 6, Rule 17 of the Code of Civil Procedure a Civil Court has power to permit amendment of pleadings and therefore, it is obvious that the Tribunal can exercise the same power with respect to a petition referred to it for trial as the Civil Court. Sub-section (3) provides that the Tribunal shall dismiss the petition if it does not comply with the provisions of Section 81 or Section 82 notwithstanding that it has not been dismissed by the

Election commission under Section 85. It would follow from this that the power of the Tribunal to dismiss an election petition is not, in any way, affected by the fact that it was not dismissed by the Election Commission under Section 85..... As soon as an election petition can be permitted by the Tribunal to be amended, petition which has been amended would, from the date of amendment, be the only petition before it. Therefore, that would be the petition with respect to which it could exercise the powers conferred upon it by Sub-section (3) of Section 90.'

In view of the aforesaid provision, the learned Civil Judge (Junior Division) has jurisdiction to allow the amendment of pleadings.

11. The question whether amendment is to be allowed would depend upon the parameters indicated in Order 6, Rule 17 of the Code. Essentially the principles governing the amendment of complaints are as follows :

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit.

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original complaint or change of the subject-matter of or controversy in the suit is not permissible.

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment.

(iv) In general the amendments should not cause prejudice to the other side which cannot be compensated in costs.

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the special circumstances of the case.

Keeping in view the aforesaid principles, the amendment sought to be inserted cannot be said to be of such nature as to warrant rejection.

The writ application is without any merit, and is accordingly dismissed. No costs.

P.C. Naik, J.

12. I agree.

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