

Loombaram Vs. Ramnarain

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Court : Rajasthan

Decided On : Feb-16-1979

Reported in : 1979WLN317

Judge : D.P. Gupta, J.

Appeal No. : S.B. Election Petition No. 8/77

Appellant : Loombaram

Respondent : Ramnarain

Advocate for Pet/Ap. : Mr. L.R. Mehta

Judgement :

D.P. Gupta, J.

1. The petitioner Loombaram, by his application dated Feb. 13, 1979 has submitted that tinder the provisions of Section 112 of the Representation of the People Act, 1951, (hereinafter referred to as 'the Act') Ramjiwan, who had also applied to be substituted as a petitioner in the above mentioned election-petition in place of the deceased petitioner Umed Ram, should also be substituted as a petitioner on such terms and conditions as to security or otherwise as this Court may deem proper. The allegation of the petitioner Loombaram is that Ramjiwan 'appears to be in hand and glove with the respondent Shri, Ramnarain' and

although he was not interested in being substituted as a petitioner in place of late Shri Omedram, yet he filed an application for substitution merely in order to delay the proceedings in this election petition. The aforesaid allegation may or may not be correct, yet the question which requires consideration is, as to whether all the persons, who apply for being substituted, as petitioners under Sub-section (3) of Section 112 of the Act, should necessarily be brought on the record, of course, subject to the imposition of conditions regarding payment of security or otherwise, or it is discretionary with the Court to substitute person such or some of the applicants for substitution as the Court may consider proper?

2. While deciding the application for substitution by my order dated January 12, 1979, I came to the conclusion that the application for substitution submitted by Loombaram on August 17, 1978 and by Ramjiwan on August 19, 1978 were within time and both of them were electors of the Bilara Assembly Constituency and as such were qualified to be substituted as petitioners in place of late Umedram. But I directed that Loombaram should be substituted as the petitioner considering the fact that he was real brother of the original petitioner; late Shri Umedram and had taken interest in the proceedings for substitution. The application of Ramjiwan was rejected on the ground that he had not taken any interest in the proceedings relating to the substitution of the petitioner and as such he did not appear to be a serious contender for being substituted as a petitioner in the election petition. In these circumstances, a further question will also emerge for consideration as to whether the part of the order dated January 12, 1979 rejecting the application of Ramjiwan for substitution as a petitioner in the election petition can be recalled by this Court?

3. Mr. L.R. Mehta learned Counsel for the petitioner Loombaram argued that this Court has no discretion in the matter of substitution of a person as a petitioner under Sub-section (3) of Section 112 of the Act, if it is found that such person was duly qualified to file an election petition in the matter himself and if he has applied for substitution within the period prescribed, after the publication of the notice of abatement of the election petition under Sub-section (2) of Section 112 of the Act, Mr. K.N. Joshi appearing for Ramjiwan strongly supported the submission of Mr. Mehta and argued that the provisions of Sub-section (3) of Section, 112 are

mandatory and that Ramjiwan was entitled to be substituted as a petitioner, as he might have himself been a petitioner in the election petition, as originally 'instituted and he had applied for substitution within the prescribed period of 14 days from the date of publication of the notice of abatement of the election petition. On the other hand, Mr. Singhvi learned Counsel tot the respondent, argued that if there were numerous applicants for being substituted as petitioners, in place of the deceased petitioner,' the Court has a judicial discretion to exercise and decide as to who amongst the various applicants should be allowed to be brought on record as petitioner in the election petition. Sub-section (3) of Section 112 of the Act, which is relevant for the present purpose, reads as; under,-

112(3) Any person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the High Court may deem fit.

It may be pointed out that similar provisions for substitution have bee a provided in Clause (c) of Sub-section (3) of Section 110 in case the petitioners are allowed to withdraw from the election petition and also under Section 116 of the Act, on the death of the respondent in the election petition. The purpose of making these provisions, for giving public notice of withdrawal or of abatement of the election petition on the death of the sole petitioner or the survivor of the several petitioners or on the death of the sole respondent or the contesting respondent is that they have been incorporated in the Act because an election petition, once filed, is a matter which concerns the entire Constituency and as such, a petitioner may not unilaterally be allowed to withdraw the petition without giving notice of withdrawal in the Constituency, to which the petition relates, nor can such an election petition be allowed to be dismissed by abatement on account of the several petitioners or the survivor of the several petitioners of the death of the sole or contesting respondent, nor can it be allowed to proceed expsrte on account of the death of the sole respondent or the sole contesting respondent, unless public notice of such abatement is issued and any person, who might have been a petitioner in respect of the election petition, can apply to be substituted as a petitioner on the

death of the sole petitioner or the survivor of several petitioners or as a respondent on the death of the sole respondent or the contesting respondent. The provisions for substitution have been considered by Bhagwati, J. Inamati Millappa Bassappa v. Desai Basavraj Ayyappa and Ors. XLI ELR 296 and the legal position has succinctly summarised by his lordship as under,-

The above provisions go to show that an election petition once filed does not mean a contest only between the parties thereto but creates a situation which the whole constituency is entitled to avail itself of. Any person who might himself have been a petitioner is entitled to be substituted, on the fulfilment of the requisite conditions and upon such terms as the Tribunal may think fit, in place of the party withdrawing and even the death of the sole petitioner or of the survivor of several petitioners does not put an end to the proceedings but they can be continued by any person who might himself have been a petitioner. Even if the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is another respondent who is opposing the petition a similar situation arises and the opposition to the petition can be continued by any person who might have been a petitioner, of course on the fulfilment of the conditions prescribed in Section 116. These provisions therefore show that the election petition once presented continues for the benefit of the whole constituency and cannot come to an end merely by the withdrawal thereof by the petitioner or even by his death or by the death or withdrawal of opposition by the respondent but is liable to be continued by any person who might have been a petitioner.

Thus, an election petition once filed cannot be dropped merely because of the intention of the existing petitioners to withdraw or on account of the death of the sole petitioner or the survivor of the several petitioners or even on the death of the sole respondent or the sole contesting respondent, if there is a person ready and willing to be substituted as petitioner or respondent who might have himself filed an election petition. Even the resignation of a returned candidate from his seat does not cause the petition to abate nor the subsequent death of the petitioner, whose nomination paper was alleged to be improperly rejected nor his subsequent election to the upper House could effect the maintainability of the petition.

4. So far, there is no controversy between the learned Counsel for the parties that the election contest cannot be allowed to become infructuous so long as there is a person available who might himself have been the petitioner in the original election petition, provided he applies within the period of fourteen days from the publication of the notice of withdrawal or abatement or upon the death of the sole respondent or contesting respondent. The election contest, therefore, widely differs from an ordinary civil litigation, as it cannot be withdrawn as a result of compromise or collusion between the parties or by abatement on the death of the sole petitioner or a sole surviving petitioner or the sole respondent or a sole contesting respondent, as the entire Constituency may have an interest in either maintaining the status quo or in case the election of the returned candidate is set aside, in setting up some other deserving candidate. It has been observed by their Lordships of the Supreme Court that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding, unknown to the common law and not only the candidate who took part in the election may be interested in the election petition, but the voters of the Constituency are substantially interested in it, because, an election petition is an essential part of the democratic process. Thus, the election petition is not a suit between two persons or parties but it is a proceeding in which the Constituency itself is the principal interested party and a petitioner cannot withdraw or abandon a part of his claim on analogy of Order XXIII VI, CPC nor it can abate on the death of the sole petitioner or the sole surviving petitioner or the sole respondent or the contesting respondent in case a person who [might himself have been a petitioner, is ready and willing to be substituted as a petitioner or respondent, as the case may be.

5. The further question which requires consideration is, if numerous persons, who are lawfully qualified to be substituted as petitioners; apply to be so substituted in accordance with the provisions of Sub-section (3) of Section 112 of the Act, whether it is obligatory upon the Court to substitute all of such applicants, or the Court has a discretion to exercise in the matter by deciding as to which of the applicants should be substituted as petitioners? The argument of Mr. K.N. Joshi, learned Counsel for Mr. Ramjiwan is that under Sub-section (3) of Section 112, of the Act, any person, who fulfills the requisite qualification and who applies within the specified time, must be so substituted as a petitioner, and the Court cannot

reject the application of such a person. Learned Counsel laid emphasis on the words 'shall be entitled to be so substituted' occurring in Sub-section (3) of Section 112 of the Act and argued that it is obligatory for the Court to order the substitution of such person who might himself have been a petitioner, if he applies within the specified time for being substituted as a petitioner. On a careful consideration of the language employed in the aforesaid provision, I am inclined to agree with the learned Counsel. The provisions of Section 112(3) of the Act are widely different from those of Order I Rule 10, CPC or for that matter, the provisions of Section 133 of the English Representation of the Peoples Act, 1949. Sub-section (3) of Section 133 of English Act is as under,-

133(1) An election petition shall be abated by the death of a sole petitioner or of the survivor of several petitioners.

(2) The abatement shall not affect the liability of the petitioner or any other person to the payment of costs previously incurred.

(3) On the abatement the prescribed notice thereof shall be given in the constituency or local Government area to which the petition relates; and within the prescribed time after the notice is given, any person who might have been a petitioner in respect of the election may apply to the election court or High Court in the prescribed manner and at the prescribed time and place to be substituted as a petitioner; and the court may, if it thinks fit, substitute him accordingly.

(4) Security shall be given on behalf of a petitioner so substituted, as in the case of a new petition.

(5) In the application of this section to an election of councillors in Scotland the reference in Sub-section (3) to the High Court shall be omitted, and the sheriff-substitute may act instead of the election court.

Thus, under the corresponding provisions in the English Act, there appears to be a discretion vested in the Court, as the words are 'the Court may, if it thinks fit', while in Sub-section (3) of Section 112 of the Act, the words are 'shall be entitled to be so substituted'. Frankly speaking, this question was never raised at the time when

the matter of substitution was heard by me earlier & the conduct of the applicant Ramjiwan, in not taking any part in the proceedings for substitution nor appearing when the evidence of the other applicant Loombaram was recorded in respect of the proceedings for substitution, and the absence of Ramjiwan or his counsel at the time when the arguments on the applications for substitution were heard by me on December 22, 1978 led me to think that Ramjiwan was not a serious contender for being substituted as a petitioner in the election petition and on that basis, his application for substitution was dismissed by the order dated January 12, 1979. But when the express language of Section 112(3) of the Act was brought to my notice, and the learned Counsel for Ramjiwan expressed his intention to move an application for review, I allowed him an opportunity to do so by my order dated February 12, 1979. But as Ramjiwan did not file any application for review, the petitioner Lumbaram filed an application on February 13, 1979 which has already been referred to above and he has expressed his consent to the addition of Ramjiwan as a petitioner in the election petition on such terms and conditions as to security as this Court may impose.

6. Considerable arguments were advanced before me on the question as to whether the use of the word 'shall' in Sub-section (3) of Section 112 should lead to the conclusion that the provision is of mandatory nature or that it is merely directory or discretionary. No uniform rule can be laid down, as has been observed by Lord Campwell in *Liverpool etc. v. Turner* 1861 (3) L.J. Ch. 379 as to whether mandatory enactments can be construed directory only or obligatory. The test which has been often emphasised is that it is the duty of the Court of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute. The following passage from *Statutory Construction* by Crawford has been quoted with approval by their Lordships of the Supreme Court in *State of U.P. v. Manbodhanlal etc.* AIR 1957 SC 921:

The question as to whether the statute is mandatory or directory depends upon the intent of the Legislature & not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from

construing it the one way or the other....

In *Raza Buland Sugar Co. Ltd. Rampur v. The Municipal Board Rampur* : [1965]1SCR970 , their Lordships of the Supreme Court observed as under,-

The question whether a particular provision of a statute which on the face of it appears mandatory in as much as it uses the word 'shall' as in the present case or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether & particular provision is mandatory or directory.

In *Hari Vishnu Kamath v. Ahmed Ishaque and Ors.* : [1955]1SCR1104 . it has been observed that the true intention of the legislature is the determining factor and whether statute should be construed as mandatory or directory must ultimately depend on the context There is no doubt that when a statute uses the word 'shall' prima facie it is mandatory but the Court may ascertain the real intention of the legislature by construing the whole scope of the Statute. As I have already observed above the purpose of enacting the provisions of Chapter IV relating to withdrawal or abatement of an election petition appears to be that the election contest, which concerns the whole constituency, should not be allowed to be determined by compromise or collusion or to suffer on account of default or death of the sole petitioner or the sole surviving petitioner or the sole respondent or the contesting respondent and that if a person, who himself might have filed the petition, comes forward to be substituted as a petitioner or respondent, as the case may be, he should be so substituted. The provisions of Sub-section (3) of Section 112, give an entitlement to the person, who is duly qualified for being substituted as a petitioner and who applies within the prescribed time and complies with the conditions as to security or otherwise that may be imposed by

the Court. I am, therefore, of the view that the Court has no discretion in the matter of substitution and so far as the provisions of Section 112(3) of the Act are concerned, they are mandatory in nature and must be given effect to if the attendant circumstances are duly complied with by the person concerned who seeks to be substituted as a petitioner in the election petition.

7. The other question which has been raised by the learned Counsel for the contesting respondent is that the petitioner Loombaram cannot be considered to be a person aggrieved and as such, an application under Order XLVII, Rule 1, CPC, is not maintainable on his behalf and the person aggrieved, namely Shri Ramjiwan, has not submitted any review application, even after time was allowed to him to do so. But this cannot deter me from correcting an obvious mistake which has crept in the order dated January 12, 1979. As I have already stated above that no arguments were advanced by counsel earlier about the interpretation of the provisions of Sub-section (3) of Section 112 of the Act and as such, no serious consideration was given to the question as to whether both the applicants should be substituted as petitioners and looking to the conduct of Ramjiwan, I thought that he was not a serious contender for being substituted, which led to the rejection of his application. As Mr. Joshi, appearing for Ramjiwan, has strongly supported the petitioner Loombaram in urging that Ramjiwan was entitled to be substituted as a petitioner, as he fulfilled the requisite qualification and had applied for substitution within the time prescribed, I am of the view that the claim of Ramjiwan for being substituted as a petitioner should not have been overlooked. This Court, as a Court of Record, has ample jurisdiction to correct an obvious mistake committed in the earlier order dated January 12, 1979 so far as the dismissal of the application of Ramjiwan is concerned. Once I have come to the conclusion that the provisions of Sub-section (3) of Section 112, are imperative and it was obligatory on the Court to substitute the applicant Ramjiwan as a petitioner and as it is not in dispute that he fulfilled the requisite qualification before an elector of the Bilara Assembly constituency and having applied within time for substitution, there is no alternative but to allow his application. In *Gammon India Ltd. v. The Bihar State Electricity Board* AIR 1976 Pat. 306 the learned Single Judge of the Patna High Court observed as under..It is well settled that a Court is authorised to Correct its own mistake. Although the learned Subordinate Judge

has made reference to the high valuation of the suit & the loss to which the plaintiff would be put to on account of limitation to bring a fresh suit, none the less, those circumstances were not made the basis of the inherent power. It may be that he might have been influenced by those considerations which were not irrelevant. The basis of the finding, however, is the mistake that he has committed in dismissing the entire suit. He has, therefore, not invoked any jurisdiction on those considerations but has exercised the said power when the matter had already been before him. And, here lies the basic distinction. Once this position is correctly appreciated the question of limitation becomes irrelevant. The provisions of Section 151 of the Code, which envisages inherent jurisdiction gives the Court abundant power to exercise it if it thinks necessary for the ends of justice or for preventing abuse of the process of the court, it can pass such order as it thinks fit. At the same time it is also open to a party to bring to the notice of the court by application that there has been such an abuse of the process of the court or it necessary for the ends of justice that a particular order should be passed Although this proposition is well settled and reference may be made to only one decision of the Supreme Court in *Keshardeo v. Radha Kissen* : [1953]4SCR136 . The court was, therefore, justified in exercising the inherent jurisdiction vested in it.

In *Subodh Chandra Mukherjee v. Sudhir Kumar Basu and Ors.* : AIR1950 Cal209 , it was observed that it was not only the right but the duty of the court to correct its mistake in exercise of its inherent powers under Section 151, C.P.C. It was also observed in the aforesaid case that the only way to correct the mistake is to set aside the order passed under a misapprehension and that it would be a proper use of the powers under Section 151, CPC Similarly, in *Devi Dayal Textile Co. and Ors. v. Nand Lal* : AIR1977 Delhi7 , a learned Judge of the Delhi High Court observed that it is not only the jurisdiction and the power of the court it is certainly its duty to review an order on discovering that it was passed by a mistake of the Court and would cause injustice to tin parties It was also observed in that case that correction of a mistake of the Court can be done by the court suo motu without any application by the parties concerned or even if the court is moved to do so by the parties. In *G.H. Usuf Sait v. S. Ramamurthy* : AIR1963 Mad367 it was held that if the court has become aware of the error, difficulty or the possible injustice resulting from its order, then it has inherent power under Section 151 CPC to

rectify the situation.

8. Having held that Ramjiwan applicant was as elector of the Bilara Assembly Constituency and he might himself have been the petitioner, and that he had also applied for substitution within the time prescribed under Sub-section (3) of Section 112, of the Act, I hold that his application for substitution should be allowed.

9. In the result, the order passed by this Court on January 12, 1979, in so far as it relates to the disposal of the application of Ramjiwan is here by recalled and it is held that Ram Jeewan is entitled to be substituted as a petitioner in this election petition, besides Loombaram Ramjiwan is directed to furnish a security in the sum of Rs. 2, 000/- (Rupees two thousand only), as required by Section 117 of the Representation of the People Act, 1951, within a period of seven days, as was allowed to the other applicant Lomba Ram. On Ramjiwan's depositing the requisite security amount for the costs of the election petition, he shall be substituted as a petitioner in the election petition in addition to Loombaram. This order also disposed of the application of Loombaram dated 13-2-1979.

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