

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 3rd March, 2011

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Election Petition No.14/2009

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SH. NAND RAM BAGRI

... Petitioner

Through: Mr. Jayant K. Sood & Mr. R.K. Burman, Advocates

Versus

SH. JAI KISHAN & ORS.

... Respondents

Through: Mr. K.C. Mittal, Advocate for R-1.
Ch. Shamsuddin Khan & Ms. Anna
Bashir, Advocates for R-8.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The question which has fallen for adjudication is, whether in the trial of an election petition, the witnesses are necessarily required to be examined and cross examined before the Judge of the High Court and

whether recording of evidence before the Joint Registrar is impermissible. Though the said question has been raised by the respondent No.1 belatedly, after all the witnesses of the petitioner have already been examined and cross examined before the Joint Registrar and only at the stage of examination of the witnesses of the respondents but the question being a pure question of law and there being no estoppel against the law, the counsels have been heard.

2. The contentions of the counsel for the respondent No.1 are:-

- (i) that the trial of an election petition is different from the trial of a suit and the trial of an election petition is governed by the Representation of the People Act, 1951 and the Rules made by the Delhi High Court for trial of election petitions;
- (ii) attention is invited to the Office Order dated 18th October, 1995 of the Registrar of this Court to the effect that the practice prior thereto being followed of returning election petitions for the purposes of rectifying the defects / objections,

as being followed with respect to complaints, was contrary to the provisions of the Act and the Rules and issuing directions for rectifying the said practice;

- (iii) attention is invited to *Kailash Vs. Nanhku* AIR 2005 SC 2441 holding that commencement of trial in the context of an election petition is different from that in the context of a civil suit - that while in a civil suit the trial begins when issues are framed and case is set down for recording of evidence, in the case of election petition, all the proceedings commencing with the presentation of the election petition and up to the date of decision are included within the meaning of trial;
- (iv) that under Section 80-A of the Representation of the People Act, 1951, the Court having jurisdiction to try election petition is the High Court and such jurisdiction is to be exercised by a Single Judge of the High Court to whom such election petition is assigned by the Chief Justice. It is contended that for this

reason only, notwithstanding the change in roster, the election petition continues to be listed before the same Judge to whom it is assigned;

- (v) the rules framed by this Court in relation to election petitions are also different from the rules applicable to the original side (trying suits) of this Court;

It is thus contended that when the jurisdiction to try an election petition is in a Judge of the High Court, the question of examination and cross examination of witnesses, which is an important part of the trial of the election petition, before the Joint Registrar does not arise.

3. I have drawn the attention of the counsel for the respondent no.1 to Section 87 of the Act providing for the trial of the Election Petition by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits, subject of course to the provisions of the Act and any Rules made

thereunder. Section 87(2) also provides that the provisions of the Indian Evidence Act, 1872 shall be deemed to apply in all respects to the trial of an Election Petition, again subject to the provisions of the Act.

4. Attention of the counsel for the respondent no.1 is also invited to Order XVIII of the CPC providing for examination-in-chief of witnesses by way of affidavit and recording of cross examination on Commission.

5. It was enquired from the counsel for the respondent no.1 as to which provision of the Act or the Rules prevented the High Court from having the examination in chief of the witnesses in an Election Petition on affidavit and having their cross examination recorded before the Joint Registrars, who under the Rules framed by this Court are authorized to so record the cross examinations and who otherwise are Addl. District Judges well versed and experienced in the recording of examination and cross-examination of witnesses.

6. The counsel for the respondent no.1 relies only on Section 80-A of the Act. He contends that since the same provides for exercise of jurisdiction by a Judge, and since the applicability of CPC and the Evidence Act has been made subject to the provisions of the Act, the examination and cross examination of witnesses has to be before the Judge only and cannot be before the Joint Registrar. He has otherwise not been able to show any other provision in the Act or the Rules preventing such recording of evidence by the Joint Registrar.

7. Attention of the counsel for the respondent no.1 has next been invited to the word “ordinarily” in Section 80-A(2) which is as under:-

“Such jurisdiction shall be exercised ordinarily by a Single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose.”

It has been enquired whether the use of the word “ordinarily” would not mean that the jurisdiction can also be exercised by the Joint Registrar who is very much a part of the High Court and empowered under the Rules

framed by the High Court to record examination and cross examination of witnesses.

8. The counsel has contended that the word “ordinarily” has been used only to indicate that the jurisdiction has to be exercised by a Single Judge and not by a Division Bench.

9. The counsel for the petitioner has invited attention to para 22 of *Jamal Uddin Ahmad v. Abu Saleh Najmuddin* AIR 2003 SC 1917 observing that even in the absence of rules under the provisions of the Act or framed by the High Court, if there is any practice, unless there be something inherently objectionable or impermissible about it, the same should be allowed to prevail if satisfies the test of being incidental and essential to the performance of the main judicial functions of the High Court. It was further held that the said practice unless runs counter to any rule of law, is binding and must be upheld. The counsel for the petitioner has further argued that the practice of this High Court is of recording of witnesses even in an Election Petition by the Joint Registrar only. He has

in this regard handed over copies of orders in certain other Election Petitions directing recording of evidence before the Joint Registrar. The counsel for the respondent no.1 also has not been able to controvert the prevalence of the said practice.

10. The Act has vested the jurisdiction to try an election petition in the High Court. The Supreme Court in *Jamal Uddin Ahmad* (supra) has held that the term “High Court” in the said Act has been used to denote an Institution and not literally the High Court as constituted within the meaning of Article 216 of the Constitution. It was held that the administrative and ministerial staff are as much a part of the High Court as an Institution in which the jurisdiction to try an Election Petition was vested. The High Court is a Constitutional Court which was existing since prior to the enactment of the Representation of the People Act. It is a Court of record and exercises plenary powers. The High Court being a pre-existing judicial Institution has rules, directions and practices governing its functioning. The practice of the Court is also the law of the Court and the same would apply to Election Petitions also. The Supreme Court further

held that in the High Court there can be delegation as also there can be authorization in favour of the Registry and the officials therein by empowering or entrusting them with authority or by permitting a few things to be done by them for and on behalf of the Court so as to aid the Judges in discharge of their judicial function. Such delegation or authorization was held to be a necessity. Ofcourse all these observations were made in respect of administrative and ministerial functions in relation to the trial of an Election Petition.

11. The Supreme Court in *T. Deen Dayal v. High Court of A.P.* (1997) 7 SCC 535 also held that jurisdiction to try an Election Petition is given to the High Court and negatived the contention that the Judge trying the Election Petition should be deemed to be an “authority” and not a “Court” and held the said contention to be contrary to express language in the enactment. It was held that the Court empowered by the Parliamentary enactment could not be treated as an “authority”.

12. In view of the aforesaid position, it cannot be said that the jurisdiction to try an Election Petition is in the Judge alone and not in the Court. Once the jurisdiction is held to be in the High Court, it would include in its gamut the entire Court ofcourse with the jurisdiction being exercised under the control and supervision of the Single Judge to whom the trial of the Election Petition has been assigned.

13. This Court has provided for the examination and cross examination of witnesses in suits filed before this Court before the Joint Registrars who as aforesaid are Addl. District Judges well versed and experienced in the same, in an attempt to expedite the trial and disposal of the suits. The power of the Court in relation to securing the attendance of witnesses and to record evidence, under Rule 3(29) of Chapter II of the Delhi High Court (Original Side) Rules, 1967 framed in exercise of powers under Sections 122 & 129 of CPC and Section 7 of the Delhi High Court Act, 1966, is exercisable by the Registrar and which power has been delegated to the Joint Registrar. Experience showed that the Judges were not able to devote sufficient time for recording examination and cross examination of

witnesses and which led to considerable delays. The said attempt of this Court has been successful with the trials being expedited. What is now being suggested by the counsel for the respondent no.1 in relation to Election Petitions is bound to delay the disposal of the Election Petitions and trial which as per Section 86 (6) of the Act is required to be continued on day to day basis until its conclusion. The argument of the counsel for the respondent no.1 is thus found to be retrograde and not in the interest of justice. Such an interpretation is found to be pedantic and impracticable and this Court would shun any such interpretation which makes the procedure or the trial inconvenient and cumbersome or delays the same. The counsel for the respondent no.1 has not been able to show anything as to why the procedure applicable under CPC to the trial of suits cannot be applied to the trial of Election Petition.

14. Though the counsel for the respondent no.1 has not cited but I would be failing in my duty if do not refer to ***Krishan Gopal v. Prakashchandra*** (1974) 1 SCC 128. The Supreme Court held that the provisions of Section 80-A(2) are mandatory and a person who is not a Judge of the High Court

and who has not been assigned for the purpose by the Chief Justice cannot exercise the jurisdiction which is vested in the High Court by Sub-Section (1) of Section 80-A of the Act. It was further held that the word “ordinarily” does not indicate that the provisions of Sub-Section (2) of Section 80-A are not mandatory and that relaxation in compliance with those provisions is permissible. The word “ordinarily” was held to be only qualifying the number of Judges who can exercise the jurisdiction which is vested in the High Court to try an Election Petition.

15. I have considered whether in view of this judgment, the power to record examination and cross-examination of witnesses can be said to be vesting only in the Judge.

16. The principle aforesaid laid down in *Krishan Gopal* (supra) in 1973 is contrary to the recent judgment in *Jamal Uddin Ahmad*. Unfortunately, the earlier judgment of the larger Bench in *Krishan Gopal* was not noticed in *Jamal Uddin Ahmad*. If *Krishan Gopal* were to prevail then it could not have been held in *Jamal Uddin Ahmad* that the term “High Court” denotes

an Institution and includes delegation and authorization and not the Judge alone.

17. There is a long time gap of 30 years between the two judgments. Law cannot be a fossil and has to be alive to the demands of time. The Supreme Court in *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay* (1974) 2 SCC 402 held that necessity may sometimes be felt of ridding *stare decisis* of its petrifying rigidity....some new aspects may come to light and it may become essential to cover fresh grounds to meet the new situations or to overcome difficulties which did not manifest themselves or were not taken into account when the earlier view was propounded...as in life, so in law things are not static...law if it has to satisfy human needs and to meet the problems of life, must, adapt itself to cope with new situations...there is a continuing process of the growth of law and one can retard it only at the risk of alienating law from life itself...the rule of law which grew up in remote generations may in the fullness of experience be found to serve another generation badly. The Court cannot allow itself to be tied down by

and become captive of a view which in the light of the subsequent experience has been found to cause hardship.

18. The Supreme Court again in ***Union of India v. Raghubir Singh*** (1989) 2 SCC 754 emphasized the need for adapting the law to new urges in society and quoted with approval the Holmesian aphorism that the “life of the law has not been logic, it has been experience”. It was further held that in a developing society such as India, law does not assume its true function when it follows a groove chased amidst a context which has long since crumbled.

19. The Supreme Court in ***State of Punjab v. Devans Modern Breweries Ltd.*** (2004) 11 SCC 26 held that a decision although neither reversed nor overruled may cease to be law owing to changed conditions and changed law, as reflected by the principle “*cessante ratione legis cessat ipsa lex*”

20. Recently in ***Bhuwalka Steel Industries Ltd. v Bombay Iron and Steel Labour Board*** (2010) 2 SCC 273 it was reiterated that the trend of judicial opinion is that *stare decisis* is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience.

21. The view taken in ***Jamal Uddin Ahmad*** is guided by the necessity of the times and it being virtually impossible and impractical for the Judge to personally do each and everything required to be done in the course of the trial of an Election Petition. The same holds good qua the recording of evidence also. Once the High Court has taken care to appoint Judicial Officers as Joint Registrars for recording evidence, I am unable to find any prejudice which would be suffered by the parties to an Election Petition from recording of evidence by such Joint Registrars. The counsel for the respondent no.1 has also fairly stated that he has no grievance in that regard but has taken the objection as a pure question of law.

22. I therefore hold that in the matter of recording of evidence, in an Election Petition, the procedure as provided under the CPC for trial of suits shall apply and accordingly, the Joint Registrars who are empowered to record evidence in suits are held empowered to record evidence in an Election Petition also.

23. List before the Joint Registrar for the said purposes as already scheduled.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MARCH 3rd, 2011

gsr/pp

(corrected & released on 11th March, 2011).