

GAHC010035302022



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

Case No. : I.A.(Civil)/424/2022

PHANI BHUSAN CHOUDHURY
S/O. LATE RAMESH CH. CHOUDHURY, R/O. BAKHARAPARA, PART-II,
WARD NO.23, P.S. AND P.O. BONGAIGAON, DIST. BONGAIGAON, ASSAM,
PIN-783380.

VERSUS

SHANKAR PRASAD RAY
S/O. LATE AJIT NARAYAN RAY
R/O. A2
SANGRAM NILOY
BARPARA
BONGAOGAON
ASSAM
PIN-783380.

Advocate for the Petitioner : MR. P N GOSWAMI

Advocate for the Respondent : MR. N BORAH

Linked Case : El.Pet./3/2021

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Advocate for : MR. N BORAH

Advocate for : MR. P N GOSWAMI appearing for PHANI BHUSAN CHOUDHURY

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the applicant	: Mr. K.P. Pathak, Senior Advocate.
	: Dr. P.P. Medhi, Advocate.
For opposite party	: Mr. N. Borah, Advocate.
Date of hearing	: 04.08.2022, 18.01.2023.
Date of judgment	: 20.01.2023.

ORDER

(CAV)

Heard Mr. K.P. Pathak, learned senior counsel, assisted by Dr. P.P. Medhi with Mr. A. Baruah, learned counsel for the applicant (i.e. returned candidate). Also heard Mr. N. Borah, learned counsel for the opposite party (i.e. election petitioner).

2) The opposite party is the election petitioner in El. Pet. 3/2021. The applicant is a member of the Assam Legislative Assembly, who was duly returned from the No.32 Bongaigaon Legislative Assembly Constituency (LAC for short), in the election held in the year 2021 and he is the respondent in the said election petition. For the sake of clarity and convenience in this order, the parties are referred by their respective position in the cause title of the connected El. Pet. 3/2021.

3) By filing this interlocutory application under Section 151 CPC, the applicant has prayed for recalling of order dated 09.02.2022 passed in I.A. (C) 1484/2021 and consequently, the applicant has prayed for dismissal of the said El. Pet. 3/2021 under Section 86 of the Representation of the People Act, 1951 (RP Act, 1951 for short).

4) It may be mentioned that the election petitioner had filed an interlocutory application under the provisions of Order VI Rule 16 of the Code of Civil Procedure (CPC for short) read with Section 87 (1) of the RP Act, 1951 with a prayer for striking off/ deleting paragraph 25 as well as prayer no.1 of the election petition. The said paragraph 25, as well as prayer no. 1 sought to be struck off are reproduced below:-

"25. That it is further stated and submitted herein that if the Respondent would have disclosed about pendency of FIR dated 27.05.2020 against him then the election results would have swung in favour of the petitioner as he would have got the majority of the votes. However, by way of material concealment the Respondent has managed to get the majority of votes in his favour. As such, the Petitioner prays for a declaration from this Hon'ble Court under Section 101 of the Act of 1951 declaring the Petitioner to be the duly elected candidate from the No. 32 Bongaigaon Legislative Assembly Constituency for Assam Assembly Election, 2021."

"1. Declare that the Petitioner has in fact received a majority of the

valid votes cast at the election to the No. 32 Bongaigaon Legislative Assembly Constituency of the Assam Legislative Assembly, 2021, and further Declaring that the election of the Respondent to the said constituency is void, and that the Petitioner is duly elected to the said constituency."

5) This Court upon considering the materials available on record as well as the submission made by the learned counsel for the petitioner and the learned senior counsel for the respondents, had allowed the said interlocutory application. The operative part of the said order dated 09.02.2022, passed in I.A.(C) 1484/2021 is quoted below:

"12. In light of the discussions above, the Court is inclined to allow the present interlocutory application and permit the petitioner to strike-out (i) paragraph 25, as well as (ii) prayer (1) in the connected election petition, i.e. El. Petition No. 3/2021, without altering the seriatim of paragraphs and prayer of the said election petition. The Registry shall carry out the striking out.

13. The Court having allowed the prayer No. (1) to be struck-off by referring to the provisions of Order XXIII, Rule 1(1) CPC, the consequences would be that under Sub-Rule (4) of Rule 1 of Order XXIII of the CPC, the petitioner would be precluded from instituting any fresh election petition in respect of such subject-matter or such part of the claim."

6) The learned senior counsel for the respondent has submitted that in the connected election petition, the petitioner had not only prayed for declaring the election of the respondent as void, but also prayed for a declaration that the election petitioner be declared as duly elected. However, the petitioner had failed to implead all other contesting candidates as respondents in the connected election petition. In this regard, it has been submitted that on failure to implead other contesting candidates in the election petition, the election petition was not maintainable as the presentation of election petition would be in violation of the mandatory provision of Section 82 of the RP Act, 1951. Hence, the respondent had filed an interlocutory application under Order

VII Rule 11 CPC, which was registered as I.A.(C) 1272/2021, amongst others, on the ground that owing to non-joinder of necessary parties, the election petition was liable to be dismissed as contemplated under Section 82 of the RP Act, 1951.

7) It is further submitted that in order to overcome the incurable defect of non-joinder of necessary party, the petitioner had filed I.A.(C) 1484/2021. This Court heard the said I.A.(C) 1272/2021 along with I.A.(C) 1484/2021. By order dated 09.02.2022, passed in I.A.(C) 1484/2021, while holding that the prayer to strike out prayer no.1 of the election petition would not be maintainable. Nonetheless, by invoking the provision of Order XXIII, Rule 1(1) of the CPC, this Court had permitted the petitioner to abandon prayer no. (1) by providing that the consequences would be that under Sub-Rule (4) of Rule 1 of Order XXIII of the CPC, the petitioner would be precluded from instituting any fresh election petition in respect of such subject-matter or such part of the claim.

8) The learned senior counsel for the respondent had submitted that his endeavour would be to demonstrate that in an election petition, the defect of non-joinder of necessary party is not curable by permitting the petitioner to abandon his claim for a declaration that he is the elected candidate would have the effect of rendering the order dated 09.02.2022 passed by this Court in I.A.(C) 1484/2021 *per incuriam*, being contradictory to the law settled by the Supreme Court of India in this regard. Hence, it was submitted that as the order was passed in mistake of law, this Court would have an inherent power under Section 151 CPC to recall the said order dated 09.02.2022 passed by this Court in I.A.(C) 1484/2021.

9) In order to support the contention that order dated 09.02.2022 could be recalled by this Court, the learned senior counsel for the respondent has cited the following decisions, viz., (1) *Champa Devi Vs. Asha Devi*, AIR 1938 All 8, (2) *Subodh Ch. Mukherjee Vs. Sudhir Kumar Basu*, AIR 1950 Cal. 209, (3) *Keshardeo Chamaria Vs. Radha Kissan Chamaria*, AIR 1953 S.C. 23, (4) *Sita Ram Sahu Vs. Kedar Nath Sahu*, AIR 1957 All 825, (5) *L. Janakirama Iyer Vs. P.M. Nilakanta Iyer*, AIR 1962 SC 633, (6) *J. Jugraj Vs. Appellate Tribunal For Foreign Exchange*, 2014 SCC Online Mad 9050, and (7) *State of Uttar Pradesh & Ors. Vs. Roshan Singh*, (2008) 2 SCC 488.

10) By referring to the case of *Muniraju Gowda P.M. Vs. Munirathna & Ors.* (2020) 10 SCC 192, which was relied upon while passing the order dated 09.02.2022, it was submitted by the learned senior counsel for the respondent that the facts in the said case was that the returned candidate had made a prayer for quashing of prayer (c) of the election petition. However, in the present case in hand, the election petitioner had made a prayer to strike out prayer no.1.

11) In support of his submission that if declaration within the meaning of Section 101 of the RP Act, 1951 is prayed for by the election petitioner, all contesting candidates must be made parties as well as in support of this present interlocutory application, the learned senior counsel for the respondents has relied on the following cases, viz., (1) *Ajay Maken Vs. Adesh Kumar Gupta*, (2013) 3 SCC 489, (2) *Govt. of A.P. Vs. Satyanarayan Rao*, (2004) 4 SCC 262, (3) *Official Liquidator Vs. Dayanand & Ors.* (2008) 10 SCC 1, (4) *National Insurance Co. Ltd. Vs. Pranay Sethi and Ors.*, (2017) 16 SCC 680, (5) *Sandeep Kumar Bafna Vs. State of Maharashtra*, (2014) 16 SCC 623, (6) *Dr.*

Faesar & Ors. Vs. Union of India, (2020) 4 SCC 1, (7) K. Kamaraja Nadar Vs. Kunju Thevar & Ors., AIR 1658 SC 687, (8) Inamati Mallappa Basappa Vs. Desai Bansavaraj Ayyappa & Ors., AIR 1958 SC 698, (9) K. Venkateswara Rao & Anr. Vs. Bekkam Narasimha Reddi & Ors., AIR 1969 SC 872, and (10) Mohan Raj Vs. Surendra Kumar Taparua & Ors., AIR 1969 All 8.

12) Per contra, the learned counsel for the election petitioner has opposed the prayer made in this interlocutory application. It was submitted that the provisions of Section 151 CPC cannot be invoked and used to recall the order dated 09.02.2022 as the said order is not an appealable order. Hence, it is submitted that the only remedy that the respondent would have against the order dated 09.02.2022 is to assail the said order in the Supreme Court of India. It was also submitted that by way of this interlocutory application, the respondent is seeking to prefer an appeal in disguise and it is submitted that the provision of Section 151 CPC cannot be used to nullify any provisions of law. In support of his submissions, the learned counsel for the petitioner has cited the following cases, viz., (1) *K.K. Velusamy Vs. N. Palanisamy, (2011) 11 SCC 275*, and (2) *Jyotsna Rani Ghosh Vs. Garib Sah Nawas and Ors., 2017 (4) GLT 943*.

13) Thus, from the nature of submissions made at the Bar, the following two points of determination has arisen for decision in this case:-

1. Whether the order dated 09.02.2022 passed in I.A.(C) 1484/2021 can be said to be *per incuriam*, being contrary to the law laid down by the Supreme Court of India?
2. Whether it would be permissible for this Court to invoke power under Section 151 CPC to recall the order dated 09.02.2022 passed in I.A.(C) 1484/ 2021?

Point of determination no. 1:

14) From the submissions made by the learned senior counsel for the respondent, it has come to the notice of the Court that at the time when I.A.(C) 1484/2021 was heard and decided, the notice of the Court was not brought to the decision of the Supreme Court of India rendered in the case of (i) *K. Kamaraja Nadar (supra)*, (ii) *Inamati Mallappa Basappa (supra)*, (iii) *K. Venkateswara Rao (supra)*, and (iv) *Mohan Raj (supra)*.

15) In the case of *Inamati Mallappa Basappa (supra)*, the three Judge Bench of the Supreme Court of India had held that the provision of Rule 1 of Order XXIII of the CPC does not apply to the election petitions and that it would not be open to the petitioner to withdraw or abandon a part of his claim once an election petition was presented. Para 10 to 18 thereof, as extracted from SCC Online are quoted below:

10. *An election petition presented to the Election Commission is scrutinised by it and if the Election Commission does not dismiss it for want of compliance with the provisions of Section 81, Section 82 or Section 117 of the Act, it accepts the same and causes a copy thereof to be published in the official gazette and a copy thereof to be served by post on each respondent. The respondents to the petition not only get notice of the same but the constituency as a whole receives such notice by publication thereof in the official gazette so that each and every voter of the constituency and all parties interested become duly aware of the fact of such Election Petition having been presented. A copy of the Election Petition published in the official gazette would also show to all of them that the petitioner in a particular Election Petition, in addition to claiming a declaration that the election of all or any of the returned candidates is void, has also claimed a further declaration that he himself or any other candidate has been duly elected. The whole constituency is thus alive to the fact that the result of the election duly declared is questioned on various grounds permitted by law with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate may be declared duly elected, in place and stead of the returned candidate. The constituency may have an interest in either maintaining the status quo or if perchance the election of the returned candidate is set aside, in seeing that some other deserving candidate is declared elected in his place and stead and not necessarily the petitioner or any other candidate*

sponsored by him whose election could be challenged on any of the grounds mentioned in Section 100(1). It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from ordinary civil proceedings. Once this process has been set in motion by the petitioner he has released certain forces which even he himself would not be able to recall and he would be bound to pursue the petition to its logical end. It may be that he may not be able to substantiate his claim for a declaration that the election of all or any of the returned candidates is void. In that event he would of course fail and no question would arise of his obtaining a further declaration that he himself or any other candidate has been duly elected. All the grounds urged in the Election Petition against the returned candidates under S. 100 (1) of the Act would fail and the election would stand. The voters would thus be vindicated. If the petitioner, however, succeeds in establishing his first claim and the election of the returned candidate is declared void, the question would necessarily arise when such a further declaration has been claimed by him whether he himself or any other candidate should be declared duly elected. In that event, the occasion would arise for considering whether the petitioner himself or any other candidate sponsored by him should be declared duly elected. If the election of the petitioner or such other candidate could have been challenged on any of the grounds mentioned in Section 100(1) such election would certainly have been void if he had been a returned candidate and the petition had been presented calling in question his election. A recrimination could therefore be filed by the returned candidate or any other party to the petition under Section 97. The requisite notice under Section 97 would be accompanied by the statement and particulars required by Section 83 in the case of an election petition and signed and verified in like manner. This notice would be, in effect, a counter petition presented by the returned candidate or any other party to the petition accompanied by the statement and particulars required by Section 83 in the case of an election petition and would also be supported by the deposit of security and further security referred to in Sections. 117 and 118 of the Act. The election contest would then not only be between the petitioner on the one hand and the returned candidate on the other but also between the returned candidate or any other party to the petition and the candidate who has been sponsored by the petitioner for such election. An election contest as aforesaid would result in the declaration of the properly qualified candidate as duly elected and the maintenance of the purity of the elections in which the constituency as a whole is vitally interested and no person would get elected by flagrant breaches of the election law or by corrupt practices.

11. This is the purpose of a recrimination and the right to file a recrimination accrues to the returned candidate or any other party to the petition the moment

an election petition is presented containing a claim for a further declaration that the petitioner himself or any other candidate has been duly elected. The proviso to Section 97(1) merely enacts conditions for the exercise of such right of recrimination and states that the returned candidate or such other party is not to be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in Sections 117 and 118 respectively. If these conditions are fulfilled in the manner therein specified the returned candidate or such other party will be entitled to give such evidence which right of course would not be capable of being exercised if either of these two conditions has not been fulfilled. The accrual of this right, however, is not postponed till the fulfillment of these conditions. It accrues the moment an election petition containing a claim for such further declaration is presented to the Election Commission.

12. *If once such a right has accrued to the returned candidate or any other party to the petition, can that right be affected by the petitioner seeking to withdraw or abandon that part of his claim viz., a claim for a further declaration that he himself or any other candidate has been duly elected? If it were permissible for him to withdraw or abandon a part of his claim on the analogy of Order 23 Rule 1 of the Code of Civil Procedure, he would make a virtue of necessity and withdraw or abandon that part of his claim so as to avoid any investigation in the Election Petition itself in regard to himself or any other candidate sponsored by him on any of the grounds mentioned in Section 100(1) including corrupt practices within the meaning of S. 123 which if proved would entail a disqualification for standing as a candidate or even for voting for a period of 6 years under Sections 140 and 141(b).*

13. *So far as withdrawal of petitions is concerned there are specific provisions enacted in the Act beginning with Section 108. Section 108 deals with the withdrawal of petition before the appointment of Tribunals and provides that an election petition may be withdrawn only by leave of the Election Commission if an application for its withdrawal is made before any Tribunal has been appointed for the trial of such petition. Section 109 deals with the withdrawal of petitions after the appointment of Tribunals and enacts that where an application for withdrawal of an election petition is made after a Tribunal has been appointed for the trial of such petition, the election petition may be withdrawn only by leave of the Tribunal and a notice of such an application fixing a date for the hearing of the application is to be given to all other parties to the petition and is to be published in the official gazette. Section 110 prescribes the procedure for withdrawal of petitions before the Election Commission or the Tribunal and Section 110(2) provides that no application for withdrawal is to be granted if in the opinion of the Election*

Commission or of the Tribunal, as the case may be, such application has been induced by any bargain or consideration which ought not to be allowed: If such an application is granted, notice of the withdrawals to be published in the official gazette by the Election Commission or by the Tribunal as the case may be; and a person who might himself have been petitioner may, within fourteen days of such publication apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions of Section 117 as to security, is to be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit. When an application for withdrawal is granted by the Tribunal and no person has been substituted as petitioner in place of the party withdrawing as above, the Tribunal is to report the fact to the Election Commission and thereupon the Election Commission shall publish the report in the official gazette. This will ring the curtain on the election contest and the result of the election which has been duly declared will no more be liable to be disturbed.

14. *There are also provisions enacted in the Act which provide for the consequences of the death of a sole petitioner or of the survivor of several petitioners or the death or withdrawal of opposition by the sole respondent therein. Section 112 provides that an election petition shall abate on the death of a sole petitioner or of the survivor of several petitioners. If an election petition thus abates before a Tribunal has been appointed for the trial of the petition, notice of the abatement shall be published in the official gazette by the Election Commission, (Vide Section 113). If on the other hand an election petition abates after a Tribunal has been appointed for the trial of the petition, notice of the abatement has to be published in the official gazette by the Tribunal (Vide Section 114). The death of a sole petitioner or of the survivor of several petitioners, however, does not spell the termination of the proceedings and Section 115 provides that after a notice of the abatement of an election-petition is published under Section 113 or Section 114 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 of Section 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit. The position as it obtains on the death or withdrawal of opposition by a respondent is worked out in Section 16 which provides that if before the conclusion of the trial of an election petition 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 no other respondent who is opposing the petition the Tribunal shall cause notice of such event to be published in the official gazette, and there upon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to*

continue the proceedings upon such terms as Tribunal may think fit.

15. *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 fulfillment 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 no other 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 fulfillment of the conditions prescribed in Section 116. These provision 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.*

16. *If, therefore, an election petition duly presented cannot be thus withdrawn by the petitioner, is there any warrant for the contention that even though he may not be able to withdraw his petition in the manner aforesaid he can at least abandon a part of his claim on the analogy of Order 23 Rule 1 of the Code of Civil Procedure ? The whole petition cannot be withdrawn; but would it not be possible for the petitioner to withdraw or abandon a part of his claim as above? The provisions of Section 90 of the Act are sought to be relied upon in support of this contention. Section 90(1) provides that subject to the provisions of the 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 (Act 5 of 1908); to the trial of suits, provided however that the Tribunal 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 their evidence 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. Under Section 90(2) the provisions of the Indian Evidence Act, 1872 (I of 1872), shall subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition. Section 90(4) provides that any candidate not already a respondent shall, upon application made by him to the Tribunal within fourteen days from the date of commencement of the trial and subject to the provisions of S. 119, be entitled to be joined as a respondent.*

Section 90(5) provides that Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in petition. It is clear from the above that the section only provides for the procedure for the trial of election petitions by the Tribunals. It provides for the examination of witnesses, the rules of evidence to be followed, the joinder of candidates not already respondents as respondents and the amendment or amplification of particulars of a corrupt practice already alleged in the petition. The powers of a Tribunal are, however, separately dealt with in Section 92 which enacts that the Tribunal 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: (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 witness on oath; (e) granting adjournments; (f) reception of evidence taken on affidavit; and (g) issuing commissions for examination of witnesses, and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1998 (Act 5 of 1898). It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it. There are also other provisions to be found in the Act which relate to place of trial (Section 88); Power of Election Commission to withdraw and transfer petitions (Section 89); appearance before Tribunal (S. 91); documentary evidence (Section 93); answering of criminating questions and certificate of indemnity (Section 95) and expenses of witnesses (Section 96). The effect of all these provisions really is to constitute a self contained Code governing the trial of election petitions and it would appear that in spite of Section 90(1) of the Act, the provisions of Order 23 Rule 1 of the Code of Civil Procedure would not be applicable to the trial of election petitions by the tribunals. If the withdrawal of a petitions cannot be permitted and any person who might have been a petitioner is entitled to continue the proceedings, on a parity of reasoning, the withdrawal of a part of the claim also could not be permitted without allowing another person who might have been a petitioner an opportunity of proceeding with that part of the claim by substituting himself in place and stead of the petitioner who withdraws or abandons the same. If the constituency as a whole is interested in the petition presented before the Election Tribunal no such

withdrawal or abandonment of a part of the claim could ever be permitted without giving an opportunity to any person who might have been a petitioner to continue the proceedings and pursue the petition to its logical conclusion

17. The provisions of Order 23 Rule 1 of the Code of Civil Procedure also contain inherent evidence which militates against this contention. Order 23 Rule 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 23 Rule 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 23 Rule 1 would apply and the petitioner would be at liberty to withdraw or abandon a part of his claim?

18. *On a due consideration of all these provisions, we are of opinion that the provisions of Order 23, Rule 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.*

16) In the case of *K. Venkateswara Rao (supra)*, it was held that the trial of an election petition is not the same thing as the trial of suit and the provision of Rule 1 of Order XXIII of the CPC does not apply. Para 9, 10 and 14 thereof as extracted from SCC OnLine are quoted below:

9. *The above brief analysis is sufficient to show that the trial of an election petition is not the same thing as the trial of a suit. As was pointed out by this Court in the case of Kamaraja Nadar v. Kunju Thevar, 1959 SCR 583 at p. 596, the provisions of the Act*

"go to show 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..."

The Court also emphasised on the peculiar character of an election petition by quoting from the observations of A. Sreenivasan v. Election Tribunal, Madras,

(1955) 11 ELR 278 at p. 293. Reference was also made to the *Tipperary* case, (1875) 3 O'M & H 19, 25 where Morris, J., said:

"...a petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

10. This aspect of an election petition was emphasised again in the case of *Mallappa Basappa v. Basavaraj Ayyappa*, 1959 SCR 611 where it was held that the provisions of Order 23 Rule 1 of the Code of Civil Procedure do not apply to 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.

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14. The Act as amended in 1966 gives the jurisdiction to try on election petition to the High Court of a State. The provision for appeal in Section 116-A was introduced in the Act for the first time in 1956 providing for an appeal from every order of the Tribunal under Section 98 or Section 99 to the High Court of the State in which the Tribunal was situate. By sub-section (2) of Section 116-A of the Act as amended in 1956 the High Court was, subject to the provisions of the Act, to have the same powers, jurisdiction and authority and was to follow the same procedure with respect to an appeal under this Chapter (Chapter IV-A) as if the appeal were an appeal from an original decree passed by a Court situate within the local limits of its civil appellate jurisdiction. Sub-section (3) fixed the time limit for filing the appeal to a period of 30 days from the date of the order complained of. The proviso to this sub-section gave the High Court discretion to entertain an appeal after the expiry of the period of 30 days if it was satisfied that the appellant had sufficient cause for not preferring the appeal within such period. This Section was amended again in 1966 and Section 116-A (1) now provides for an appeal from an order of the High Court under Section 98 or Section 99 to the Supreme Court on any question, whether of law or fact. Sub-section (2) of the new Section is on the same lines as the old sub-section (3) excepting that the Supreme Court has been substituted for the High Court and the High Court for the Tribunal in the old section.

17) In the case of *Mohan Raj (supra)*, it was held by the Supreme Court of India that when the RP Act, 1951 makes a person a necessary party and provides that the election petition shall be dismissed if such party is not joined, the power of amendment of striking out cannot be used at all. It was also held that the CPC applies only subject to the provisions of the RP Act, 1951

and when the Act enjoins the penalty of dismissal of the election petition for non-joinder of a party, the provisions of the CPC cannot be used as curative means to save the election petition. Para 10 thereof, as extracted from SCC OnLine is quoted below:

10. It is argued that the Civil Procedure Code applies and Order 6, Rule 17 and Order 1 Rule 10 enable the High Court respectively to order amendment of a petition and to strike out parties. It is submitted, therefore, that both these powers could be exercised in this case by ordering deletion of references to Periwal. This argument cannot be accepted. No doubt the power of amendment is preserved to the Court and Order 1 Rule 10 enables the Court to strike out parties but the Court cannot use Order 6 Rule 17 or Order 1 Rule 10 to avoid the consequences of non-joinder for which a special provision is to be found in the Act. The Court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder (see Section 87). When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as curative means to save the petition.

18) Similarly, in the case of *K. Kamaraja Nadar (supra)*, a three Judge Bench of the Supreme Court of India had held that an election tribunal has no power to grant prayer for amendment of any election petition whether by way of withdrawal or abandonment of a part of the claim or otherwise, once an election petition has been presented for such further declaration. Para 33 thereof, as extracted from SCC OnLine 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 Civil Appeal No. 76 of 1958, 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.

19) It may be mentioned that Civil Appeal No. 76 of 1958 is the case of *Inamati Mallappa Basappa (supra)*, which was decided by a three- Judge Bench, as mentioned herein before.

20) However, we may also refer to another three- Judge Bench decision of the Supreme Court of India in the case of *Bijayananda Patnaik v. Shatrughna Sabu*, AIR 1963 SC 1566: 1963 STPL 653 SC. Para 5 of the said judgment (as extracted from STPL) is quoted below:-

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.

21) On a perusal of the said case of *Bijayananda Patnaik (supra)*, it is seen that although in para-5 quoted herein before, the case of *K. Kamaraja Nadar (supra)* had been referred to, but the decision of *Inamati Mallappa Basappa (supra)* had not been brought to the notice of the Hon'ble Supreme Court of India. Therefore, as the earlier judgment of the coordinate Bench had not been overruled by a larger Bench, in the considered opinion of the Court, the judgment earlier in point of time will prevail. If one needs any authority on the point, the case of *Pranay Sethi & Ors. (supra)*, decided by Constitution Bench of the Supreme Court of India may be referred to. Para 28 thereof is quoted below:-

28. *In this context, we may also refer to Sundeep Kumar Bafna v. State of Maharashtra and another, (2014) 16 SCC 623 which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a coequal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in Rajesh's case was delivered on a later date, it had not apprised itself of the law stated in Reshma Kumari (supra) but had been guided by Santosh Devi (supra). We have no hesitation that it is not a binding precedent on the co-equal Bench.*

22) Therefore, in the light of the previous decision of the three-Judge Bench decision rendered by the Supreme Court of India in the case of (i)

Inamati Mallappa Basappa (supra), and (ii) *K. Kamaraja Nadar (supra)*, as well as in the light of the Constitution Bench decision in the case of *Pranay Sethi (supra)*, we are unable to accept that the subsequent decision of the three-Judge Bench of the Supreme Court of India in the case of *Bijayananda Patnaik (supra)* would be a binding precedent. Accordingly, by following the ratio laid down in (i) *Inamati Mallappa Basappa (supra)*, and (ii) *K. Kamaraja Nadar (supra)*, we are inclined to hold that as the prayer number (1) in the election petition was for declaration that the election petitioner be declared as returned candidate, which is a prayer within the scope of Section 101 of the RP Act, 1951, it is required that all the contesting candidates, other than the petitioner, are to be arrayed as respondents as per the requirement of Clause (a) of Section 82 of the RP Act, 1951. Therefore, the provision of Order XXIII Rule 1(1) of the Civil Procedure Code cannot be used as curative means to save the petition from the defect of non-joinder of necessary party.

23) In light of the discussions above, the Court is inclined to answer the point of determination no. 1 in the affirmative and against the election petitioner by holding that the order dated 09.02.2022 passed in I.A.(C) 1484/2021 does not lay down the correct law and therefore, is *per incuriam*, being contrary to the law laid down by the Supreme Court of India, referred to above. Thus, the said verdict of the Court dated 09.02.2022 passed in I.A.(C) 1484/2021 does not lay down the correct position of law.

Point of determination no. 2:

24) In the case of *Ajay Maken (supra)*, the Supreme Court of India had observed that when a further declaration is prayed for by the election petitioner under Section 101 for having declaring him as elected, the election

petitioner is bound to make all the contesting candidates as parties to the election petition. Para 26 and 26.1 thereof are quoted below:

26. *However, as to who should be made parties/ respondents to an election petition is stipulated under section 82 and not left to the choice of an election petitioner. Section 82 reads thus:*

“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.”

It can be seen from section 82 as to who should be made parties to an election petition depends upon two factors.

26.1 *The first factor is the nature of the relief sought by the petitioner. Where a further declaration as contemplated under section 101 is sought, the petitioner is bound to make all the contesting candidates parties respondents to the election petition. Where no such declaration is sought, the section stipulates that it is enough to make all the returned candidates at the election, parties to the election petition. The employment of the expression “all the returned candidates” is obviously meant to cover disputes relating to elections to Rajya Sabha or Legislative Councils where more than one candidate is declared elected at the same election.*

25) Therefore, while referring to the case of *Ajay Maken (supra)*, while referring to one part of the judgment, the observations made by the Supreme Court of India in para 26 and 26.1 thereof had inadvertently escaped the attention of the Court.

26) Now it is to be examined if reliance on the case of *Muniraju Gowda P.M. (supra)*, while passing the order dated 09.02.2022 was incorrect.

In the said context, as per the facts of the said case, the returned

candidate had filed three interlocutory applications for striking out certain pleadings of the election petition, rejection of election petition owing to lack of cause of action and for striking out prayer (c) of the election petition, which was registered as I.A.(C) Nos. 2/2019, 3/2019 and 4/2016. The High Court had allowed I.A.(C) 4/2019 and ordered striking out the prayer (c) of the election petition. The said order to strike out prayer (c) was assailed by the returned candidate. The Supreme Court of India had affirmed the order of the High Court by holding that the High Court could not have granted prayer (c) in favour of the election petitioner as there were nine contesting candidates. In the present case in hand, the respondent had demonstrated that apart from the respondent there were eight other contesting candidates except the respondents. Thus, under such circumstances, as prayer no.1 in the election petition is to declare the petitioner as the returned candidate, the said prayer is the relief which can be prayed for as per Clause (a) of Section 82 of the RP Act, 1951. The relevant para 18 to 23 of the case of *Muniraju Gowda P.M. (supra)* are quoted below:

18. *Once it is found that neither the original election petition nor the amended election petition contains any pleading of material facts which would enable the High Court to form an opinion in terms of Section 101, there was no alternative for the High Court but to strike off Prayer (c).*

19. *There is one more reason why the petitioner cannot succeed. In the elections in question, there were 14 candidates in the fray, including the petitioner herein and the first respondent. In Vishwanatha Reddy v. Konappa Rudrappa Nadgouda, AIR 1969 SC 604, the Constitution Bench of this Court treated the votes polled in favour of the returned candidate as thrown away votes, on the ground that he was disqualified from contesting and that the election petitioner was entitled to be declared elected, in view of the fact that there was no other contesting candidate. But the Constitution Bench cautioned that the rule for the exclusion of the votes secured by corrupt practices by the returned candidate in the computation of the total votes and the consequential declaration of the candidate who secured the next highest number of votes as duly elected, can be applied only when there are just two candidates at an election.*

20. *The ratio in Vishwanatha Reddy (supra) was followed in Thiru John v.*

Returning Officer, (1977) 3 SCC 540. Though this case concerned election to the Rajya Sabha through single transferable votes, this Court observed in this case that it would be extremely difficult if not impossible, to predicate what the voting pattern would have been, if the electors knew at the time of election that one was disqualified. The Court pointed out that the question as to how many of the voters would have cast their votes in favour of other continuing candidates and in what preferential order, remained a question in the realm of speculation and unpredictability.

21. *In D.K. Sharma v. Ram Sharan Yadav, 1993 Supp. (2) SCC 117, this Court followed the dictum in Vishwanatha Reddy (supra) to the effect that where there are more than two candidates in the field, it is not possible to apply the same ratio as could be applied when there are only two candidates. This principle was also reiterated in Prakash Khandre v. Dr. Vijay Kumar Khandre, (2002) 5 SCC 568, where this Court pointed out: (Prakash Khandre's case SCC pp.579-80, para 24)*

"24. ...in the present case, for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern."

22. *Therefore, apart from the fact that in the election petition, there were no pleadings of material facts co-relatable to the ingredients of clause (a) or (b) of Section 101 of the Act, to sustain prayer (c), even legally the High Court could not have granted prayer (c) in view of the fact that there were 14 candidates in the fray.*

23. *In view of the above, the order (Muniraju Gowda v. Munirathna, 2020 SCC OnLine Kar 1633) of the High Court does not call for any interference. Hence these Special Leave Petitions are dismissed. No costs.*

27) Therefore, in the order dated 09.02.2022, though the Court had referred to the decision of *Muniraju Gowda P.M. (supra)*, but the said case was inadvertently appreciated without taking into account the context in which reference was made to clause (a) and (b) of Section 101 of the RP Act, 1951, which had inadvertently escaped the attention of the Court.

28) Thus, in the light of the various decisions cited above, the Court

is inclined to hold that the order dated 09.02.2022, passed in I.A.(C) 1484/2021, insofar as it relates to strike out prayer-1 in the election petition is concerned, is contradictory to the law laid down by the Supreme Court of India in the case of (i) *K. Kamaraja Nadar (supra)*, (ii) *Inamati Mallappa Basappa (supra)*, (iii) *K. Venkateswara Rao (supra)*, (iv) *Mohan Raj (supra)*, as the power to abandonment of a claim within the meaning of the provision of Order XXIII, Rule 1(1) CPC does not apply in an election petition. The said factor was not brought to the notice of the Court when I.A.(C) 1484/2021 was heard and disposed of.

29) The judgments of the Supreme Court of India are binding on this Court and therefore, judicial propriety demands that the precedents, viz., (i) *K. Kamaraja Nadar (supra)*, (ii) *Inamati Mallappa Basappa (supra)*, (iii) *K. Venkateswara Rao (supra)*, (iv) *Mohan Raj (supra)*, be followed. Therefore, the Court would have the inherent power to correct its mistake because apparently, if that part of the order to allow the petitioner to abandon prayer number (1) remains, it would run counter to the herein before referred judgments of the Supreme Court of India.

30) In the case of *Roshan Singh (supra)*, the Supreme Court of India had held that the object of the provision of Section 151 CPC is to supplement and not to replace the remedies provided in CPC and that the said provision confers power on the Court to make such order as may be necessary for the ends of justice. It was further held that Section 151 CPC would not be available when there is alternative remedy, which principle is the basis of the decision of this Court in the case of *Jyotsna Rani Ghosh (supra)*. Therefore, the decision in the case of *Jyotsna Rani Ghosh (supra)* does not debar this Court to take

recourse to Section 151 CPC and to correct its order, which runs counter to the four decisions of the Supreme Court of India, referred herein before.

31) We may also refer to the case of *Keshardeo Chamaria (supra)*, where the Supreme Court of India had affirmed the order of the trial Court under Section 151 CPC for correcting an omission in its order. Similarly, in the case of *L. Janakirama Iyer (supra)*, it was held by the Supreme Court of India that under Section 151 and Section 152 CPC, the Court has the power to correct a decretal order notwithstanding that the appeal had already been admitted in the Supreme Court of India. We may mention that the Court is conscious that in this case, the Court is not correcting an omission, but it is recalling its order on the ground that it runs counter to the decisions of the Supreme Court of India. We may also refer to the case of *Champa Devi (supra)*, where the Division Bench of the Allahabad High Court had held that Court has inherent jurisdiction under Section 151 CPC to correct its own mistake. Similarly, in the case of *Subodh Ch. Mukherjee (supra)*, the Division Bench of the Calcutta High Court had held that a Court has inherent power under Section 151 CPC to correct its own mistake.

32) In the said context, we may also refer to the case of *J. Jugraj (supra)*, cited by the learned senior counsel for the respondent wherein the Madras High Court had held that the trial Court has a duty to recall its order under section 151 CPC if it finds that the same is invalid and had been passed by a mistake of the Court. In this case, the impugned order dated 09.02.2022, demonstrably lays down an incorrect law. Therefore, the Court is of the considered opinion that no one can possibly argue that if an order, which is contrary to the four herein before cited decisions of the Supreme Court of India,

the respondent would not suffer any prejudice or injustice.

33) Thus, the point of determination no. 2 is answered in the affirmative and in favour of the respondent by holding that it would be permissible for this Court to invoke power under Section 151 CPC to recall the order dated 09.02.2022 passed in I.A.(C) 1484/ 2021.

34) Therefore, in light of the discussions above, the Court is inclined to recall the order dated 09.02.2022 passed in I.A.(C) 1484/ 2021. Resultantly, the proceeding of I.A.(C) No. 1484/2021 is restored to file for being heard afresh.

35) Before parting with the records, the Court is inclined to observe that nothing contained in this order shall cause prejudice to either of the parties when I.A.(C) No. 1484/2021 is heard afresh.

36) Thus, this interlocutory application stands allowed. However, under the circumstances, the parties are left to bear their own cost.

JUDGE

Comparing Assistant