

Election Petition No. 012 of 2014
With
Application (In EP) No. 018 of 2016
(In Election Petition No. 012 of 2014)

DATE : 24TH FEBRUARY 2017

ORAL ORDER :

01. None appeared for the petitioner on 07.03.2016. Even on 04.04.2016, none appeared for the petitioner. This Court had issued notice to the petitioner, keeping in view that his Advocates had filed '*no instruction Pursis*'. The next date for hearing was 20.06.2016.

02. Considering that the learned Judge, who was allotted this matter, has demitted office on retirement, this matter was allotted to this Court.

03. As none appeared for the petitioner on 13.01.2017, notice was again issued to the petitioner on the address mentioned in the cause title of the Election Petition. Office report indicates that the petitioner has been served with the Court notice.

04. Shri Kale, learned Advocate for the respondent, submits that the Hon'ble Apex Court [Three Hon'ble Judges' Bench] in the case of ***Dr. P. Nalla Thampy Thera Vs. B.L. Shanker & others*** [AIR 1984 SC 135] has held that an Election Petition can be dismissed in default.

05. The Hon'ble Apex Court in ***Dr. P. Nalla Thampy Thera's case*** (*supra*) has observed in paragraphs 15, 16, 17 and 18 as under :-

"15. We proceed next to examine whether the election petition could be dismissed in the absence of the election petitioner and whether the appellant could apply for its restoration though he himself was not the election petitioner. The basis of the appellant's contention that the election petition cannot be dismissed for the absence of the election petitioner is that once an election petition is filed, it concerns the entire constituency. Purity of the electoral process in democracy it is contended, is of paramount importance and an election petition cannot be permitted to be dismissed for default inasmuch as that would lead to situations brought about by manipulation, undue influence, fraud or winning over of the election Petitioner. The 2nd respondent's counsel has not disputed before us and rightly in our view that purity of the electoral process is paramount in a democracy and an election petition should not be permitted to be abandoned by undue influence or pressure over the election petitioner. It may be pointed out that there was no allegation of undue influence or pressure over the election petitioner to justify his conduct in this case. It is relevant to mention that the 2nd respondent who was the elected candidate was expelled from the Lok Sabha in Dec., 1978, and in August, 1979, the Lok Sabha to which respondent 2 had been elected was dissolved. It was after these supervening events that in October, 1979, the request to delete prayer (c) was made and the other orders followed. This explanation given by respondent 2's counsel to justify the conduct of the election petitioner is a relevant feature.

16. There is no support in the statute for the contention of the appellant that an election

petition cannot be dismissed for default. The appellant contended that default of appearance or non-prosecution of the election petition must be treated as on par with withdrawal or abatement and, therefore, though there is no clear provision in the Act, the same principle should govern and the obligation to notify as provided in Ss. 110 or 116 of the Act should be made applicable. We see no justification to accept such a contention. Non-prosecution or abandonment is certainly not withdrawal. Withdrawal is a positive and voluntary act while non-prosecution or abandonment may not necessarily be an act of volition it may spring from negligence, indifference, inaction or even incapacity or inability to prosecute. In the case of withdrawal steps are envisaged to be taken before the Court in accordance with the prescribed procedure. In the case of non-prosecution or abandonment, the election petitioner does not appear before the Court and obtain any orders. We have already indicated that the Act is a self-contained statute strictly laying down its own procedure and nothing can be read in it which is not there nor can its provisions be enlarged or extended by analogy. In fact, the terms of Section 87 of the Act clearly prescribe that if there be no provision in the Act to the contrary, the provisions of the Code would apply and that would include Order 9, Rule 8 of the Code, under which an election petition would be liable to be dismissed if the election petitioner does not appear to prosecute the election petition.

17. In many cases it has been held that an election petition can be dismissed for default. A Full Bench of the *Punjab High Court in Jugal Kishore v. Dr. Baldev Parkash*, AIR 1968 Punj. 152 at pp. 158-159, had occasion to consider

this question when Grover J. delivering the judgment of the Court spoke thus :

" It has been repeatedly said that an election petition once filed is not a contest only between the parties thereto but continues for the benefit of the whole constituency. It is for that purpose that in the Representation of the People Act, 1951, provisions have been made in Sections 109 and 110 relating to withdrawal of an election petition and Ss. 112 and 116 relating to abatement of such a petition the effect of which is that the petition cannot come to an end by the withdrawal thereof (or) by the death of the petitioner or by the death or withdrawal of opposition by the respondent, but is liable in such cases to be continued by any person who might have been a petitioner. There is nothing in the entire Act providing or indicating that a similar procedure is to be followed in the event of a petitioner failing to prosecute the petition. Such failure can be due to various causes. The petitioner can by force of circumstances, be genuinely rendered helpless to prosecute the petition. For instance, he may find that his financial condition has suddenly worsened and that he can no longer afford the expenses of litigation. He may even owing to exigencies of business or vocation or profession have to go to such a distant place from the seat of the High Court where the election petition is being tried that he may find it impossible to prosecute the petition in a proper manner. There would be two courses open to him and that will depend entirely on his volition. He can either file an application for withdrawal of the petition disclosing the circumstances which have brought about such a situation in which case there would be no difficulty in following the procedure laid down in Sections 109 and 110 of the Act, or he may choose to simply absent himself from the Court or cease to give any instructions to the counsel engaged by him or fail to deposit the process-fee and the diet

money for witnesses or take the necessary steps for summoning the assesses. In which case the Court will have no option but to dismiss the election petition under the provisions of the Code of Civil Procedure which would be applicable to the election petitions in the absence of any express provisions in the Act. The dismissal will have to be under the provisions contained in O. 9 or O. 17 of the Code It is quite clear that there is no distinct provision in the Act laying down any particular or special procedure which is to be followed when the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the petition. The provisions of the Code of Civil Procedure would, therefore, be applicable under S. 87 of the Act. I am further of the opinion that any argument which could be pressed and was adopted for saying that the inherent powers of the Court could not be exercised in such circumstances would be of no avail now as the High Court is a court of Record and possesses all the inherent powers of a Court while trying election petitions."

It is relevant to note the observations of Hidayatullah, C.J. in *Sunderlal Mannalal v. Nandramdas Dwarkadas* (AIR 1958 Madh Pra 260), where he indicated (para 5) :

"Now the Act does not give any power of dismissal. But it is axiomatic that no Court or Tribunal is supposed to continue a proceedings before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which every Tribunal possesses."

18. Similar view has been expressed by another Full Bench of the Allahabad High Court in *Duryodhan v. Sitaram*, AIR 1970 All 1. A four Judge Bench of this Court in *Rajendra Kumari Bajpai v. Ram Adhar Yadav*, (1976) 1 SCR 255 at

p. 260, referred to the Punjab case, Fazal Ali, J. speaking on behalf of the Court quoted a portion of the judgment of Grover, J. which we have cited above and said :

"We fully approve of the line of the reasoning adopted by the High Court in that case." It, therefore, follows that the Code is applicable in disposing of an election petition when the election petitioner does not appear or take steps to prosecute the election petition. Dismissal of an election petition for default of appearance of the petitioner under the provisions of either O. IX or O. XVII of the Code would, therefore, be valid and would not be open to challenge on the ground that these provisions providing for dismissal of the election Petition for default do not apply."

06. This Court by relying upon the judgment of the Hon'ble Apex Court in the case of **Dr. P. Nalla Thampy Thera's case** (*supra*) has taken a similar view while dismissing the Election Petition in default, in the case of **Dahaybhai Vallabhai Patel Vs. Lalubhai Patel & others** [2011(4) Bom.C.R. 877] and in the case of **Surendra Budhaji Borkar Vs. Narayan Tatu Rane** [2010(6) Bom.C.R. 137].

07. It appears that despite several opportunities granted to the petitioner, he has not conducted this matter. Despite service of Court notice, even after his Lawyers withdrew from the proceedings, he has failed to appear in this matter.

08. In the light of the above, this Election Petition is dismissed in default. Consequently, Application No. 018 of 2016 filed in this Election Petition does not survive and the same stands disposed of.

(Ravindra V. Ghuge)
JUDGE

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