

## Sitaram Hirachand Birla Vs Yograjsing Shankarsing Parihar and Others

**Court:** Bombay High Court

**Date of Decision:** Dec. 19, 1952

**Acts Referred:** Limitation Act, 1908 " Section 22

Representation of the People Act, 1951 " Section 117, 32, 33, 36, 37

**Citation:** AIR 1953 Bom 293 : (1953) 55 BOMLR 334 : (1953) ILR (Bom) 865

**Hon'ble Judges:** Chagla, C.J; Dixit, J

**Bench:** Division Bench

**Advocate:** S.G. Patwardhan, for the Appellant; R.B. Kotwal, M.P. Amin, General and Little and Co., for the Respondent

### Judgement

Chagla, C.J.

(1) This is a petition filed by a successful candidate at an election held for a seat in the Bombay Legislative Assembly from the Erandol Taluka

Constituency. A petition was filed by opponent 1 challenging the petitioner's election. Seven nominations were received for this election. Opponent

7, although he was duly nominated, withdrew from the contest. The scrutiny of the nominations was held on 27-11-1951, and on 28-11-1951, the

Returning Officer published the list of valid nominations. The election took place on 7-1-1952, the counting of votes took place on 12-1-1952,

and the result of the election was declared on 19-1-1952, and as already pointed out the petitioner was declared to be duly elected. The first

opponent filed his election petition on 25-3-1952, and it reached the Election Commission on 27-3-1952. The Election Commission referred the

petition to an Election Tribunal which was appointed for the trial of the petition, and the petitioner has now come before us for a writ directed

against the Tribunal calling upon the Tribunal to dismiss the election petition.

(2) Mr. Patwardhan who appears for the petitioner has pointed out various defects which appear in the petition. It is pointed out that when the

petition was presented it was not properly verified, and Section 83(1), Representation of the People Act, provides that an election petition shall

contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid

down in the CPC for the verification of pleadings. Admittedly, the verification of the petition as presented to the Election Commission did not

comply with the provisions of the Code. A list was also furnished to the Commission in accordance with Section 83(2) and that sub-section

provides that the petition shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal

practice which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed such corrupt

or illegal practice and the date and place of the commission of each such practice. The verification of this list was not also in accordance with the

Civil Procedure Code. A further additional list was also sent to the Commission and the Commission in referring the petition to the Tribunal also

forwarded with the petition the list and the additional list which was submitted to it.

(3) In the first place, it is contended that the Election Commission should have dismissed the petition and should not have appointed an Election

Tribunal for the trial of the petition u/s 86 of the Act. Section 85 of the Act provides that if the provisions of Section 81, Section 83 or Section 117

are not complied with, the Election Commission shall dismiss the petition. Mr. Patwardhan contends that inasmuch as the petition and the list were

not verified as required by Section 83(1) and Section 83(2), it was obligatory upon the Election Commission to dismiss the petition. Now, this

petition is not directed against the Election Commission. The petitioner does not require any mandamus against the Election Commission to

discharge its statutory obligation. The election petition is directed against the Tribunal, and what we have to consider in this petition is not the

statutory obligations of the Election Commission but the statutory obligations of the Tribunal. If the Election Commission failed to dismiss the

petition, assuming that it was under an obligation to do so u/s 35, even so, once the election petition is referred to an Election Tribunal, the duty of

the Election Tribunal is to dispose of it according to law. It is not open to the Election Tribunal to challenge the competence of the Election

Commission to appoint the Tribunal or to refer the election petition to it for trial.

(4) It is then urged that if the Commission failed to dismiss the petition, the Tribunal itself u/s 90(4) should have dismissed the petition. What the

Tribunal has done is that on 30-10-1952, it has made an order by which it has allowed the petition and the list to be amended by these two

documents being properly verified, and Mr. Patwardhan contends that this order of the Tribunal was without jurisdiction, because it was obligatory

upon the Tribunal to dismiss the petition u/s 90 (4). That subsection provides that notwithstanding anything contained in Section 85, the Tribunal

may dismiss an election petition which does not comply with the provisions of Section 81, Section 83 or Section 117. It will be immediately

apparent that whereas in Section 85 dealing with the Election Commission the Legislature has used the expression ""shall dismiss"", in Section 90 (4)

the Legislature has used the expression ""may dismiss"". It is obvious therefore that no obligation is cast upon the Tribunal u/s 90 (4) to dismiss an

election petition which does not comply with the provisions of Section 83. Mr. Patwardhan asks us to construe ""may"" as ""shall"" and he says that

there is no reason why the same obligation should not be cast upon the Tribunal as has been cast upon the commission. When we find in the same

statute with regard to the same subject matter the Legislature using in one case the expression ""shall"" and in the other case ""may"", it is impossible

to hold that these two expressions were used with the same meaning and connotation. The Legislature obviously wanted to make a distinction

between these two expressions, and therefore whereas in the one case the Legislature wanted to cast an obligation upon the Commission to

dismiss the petition, in the other case the Legislature has given a discretion to the Tribunal whether to dismiss or not to dismiss the petition.

Therefore, in our opinion, there is no statutory obligation upon the Tribunal to dismiss a petition which does not comply with the provisions of

Section 83.

(5) It is then contended that the Act confers no power upon the Tribunal to amend the petition. Section 90 regulates the procedure before the

Tribunal and Sub-section (2) provides:

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, to the trial of suits.

Section 92 confers certain powers upon the Tribunal and these are powers which are vested in a Court under the CPC when trying a suit, and the

powers u/s 92 are enumerated and they deal with discovery and inspection, enforcing the attendance of witnesses, compelling the production of

documents, examining witnesses on oath, granting adjournments, reception of evidence taken on affidavit, and issuing commissions for the

examination of witnesses. Mr. Patwardhan's contention is that the Tribunal cannot exercise any power which a Court can exercise under the Code

of Civil Procedure, unless that power is specifically conferred upon it u/s 92. Mr. Patwardhan says that if the object of the Legislature was to

confer upon the Tribunal all powers under the Civil Procedure Code, then it was not necessary to enumerate certain powers u/s 92 and confer

those powers specifically upon the Tribunal.

(6) The further contention of Mr. Patwardhan is that whereas Section 90 (2) deals with procedure, Section 92 deals with the powers of the

Tribunal, and Mr. Patwardhan further contends that Section 90 (2) only comes into play after the hearing of the petition has actually commenced.

Mr. Patwardhan says that under this sub-section the Tribunal has only those powers which the Court enjoys under the Code under Order 18 of

the Code and subsequent Orders which deal with the trial of suits. In our opinion, the trial of suits does not mean the same thing as the hearing of a

suit. Order 18 in terms speaks of the hearing of a suit and not the trial of a suit. A Court is concerned with the trial of a suit from the time when it is

instituted. The hearing of a suit is only a part of the trial of the suit and the hearing is concerned with what happens in open Court when witnesses

are examined and cross-examined, addresses are delivered by counsel and judgment is delivered. But a great many things go on after a suit is

instituted which are all concerned with the trial of a suit, and, there is no reason why Sub-section (2) of Section 90 should be limited and confined

to procedure which applies only at the hearing of the suit and not outside that hearing. Therefore the power conferred upon the Tribunal to try a

petition in accordance with the procedure applicable under the CPC is a power much wider than merely applying procedure which would be

applicable to the hearing of a suit. But even so Mr. Patwardhan wants to distinguish between procedure referred to in Sub-section (2) of Section

90 and the powers referred to in Section 92. Undoubtedly there is considerable force in Mr. Patwardhan's contention, but on the other hand Mr.

Kotwal has drawn our attention to the fact that whereas Sub-section (2) of Section 90 is made subject to not only the provisions of the Act "out of

any rules, made thereunder, Section 92 is not made subject to any rules, and Mr. Kotwal suggests that the scheme of the Act is that the powers

conferred upon the Tribunal u/s 92 are minimum powers which cannot be taken away by any rules framed under the Act, whereas the general

power of procedure given to the Tribunal u/s 90 (2) is a power which is subject to the rules and the rules may modify, limit or restrict the power

that a Tribunal may exercise similar to the power exercised by a Court under the Civil Procedure Code.

In our opinion, Mr. Kotwal is right, because on principle it is difficult to make a distinction between procedure and the powers of a Court as

suggested by Mr. Patwardhan. The whole of the Civil Procedure Code, as its very name implies, deals with procedure, in the course of procedure

the Court always exercises powers and when the Court is exercising its powers, it is exercising them in order to carry out the procedure laid down

in the Code. Therefore procedure and powers in this sense are really interchangeable terms and it is difficult to draw a line between procedure and

power. The power conferred u/s 92 is not any substantive power, it is a procedural power, a power intended for the purposes of carrying out the

procedure before the Tribunal. Therefore, in our opinion, the Tribunal was right when it took the view that it had the power to amend the petition

under Sub-section (2) of Section 90 of the Act. It is also difficult to believe that when dismissing a petition is not made obligatory upon the Tribunal

u/s 90 (4), the Legislature should not have given the power to the Tribunal to amend the petition and to bring it into conformity with Section 83. If

the intention of the Legislature was that every petition that did not comply with the provisions of Section 83 must be dismissed and no amendment

should be permitted, then the Legislature would have used appropriate language and would have cast an obligation upon the Tribunal to dismiss the

petition. But the very fact that the Legislature has left it to the discretion of the Tribunal clearly goes to show that the Legislature conferred the

power upon the Tribunal in proper cases to amend a petition and to bring it in conformity with Section 83 so that it need not be dismissed.

(7) The more substantial opposition that has been presented to the order made by the Tribunal is that the Tribunal has added a party to the petition

when it had no Jurisdiction to do so. The party came to be added under the following circumstances. Opponent 7, as had already been pointed

out, was duly nominated a candidate for this election at Erandol, but before the valid nominations were published he withdrew his candidature and

therefore his name did not appear in the list of valid nominations. When opponent 1 presented this petition to the Commission, he did not make

opponent 7 a party to the petition. He then applied before the Tribunal that he should be made a party and the Tribunal has made an order making

opponent 7 a party to the petition, and Mr. Patwardhan's contention is that this order is also without jurisdiction. According to Mr. Patwardhan, in

the absence of opponent 7 the petition was not maintainable and the Tribunal should have dismissed the petition and should not have proceeded

with it. The relevant provision as regards parties to the petition are to be found in Section 82 and that section provides that a petitioner shall join as

respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated. A petition can be

presented under. Section 81 either by a candidate at such election or any elector, and the first question that we have to consider is as to what is the

correct interpretation of the expression "'all the candidates who were duly nominated at the election'". Mr. Patwardhan's submission is that the

candidates referred to in this expression are the candidates who were duly nominated and even though a candidate may have withdrawn from the

candidature, and although his name may not have appeared in the list of valid nominations, he still was a candidate who was duly nominated, and

therefore he is a necessary party to the petition. Mr. Patwardhan says that there is a distinction between a candidate who is duly nominated and a

candidate who is validly nominated. A candidate is validly nominated after his name appears in the list of nominations published by the Returning

Officer, whereas a person is duly nominated whose nomination paper has been accepted as laid down under the law. Therefore the fact that a duly

nominated candidate withdraws his candidature does not relieve the petitioner of his obligation to make him a party to the petition.

(8) Now, the expression used by the Legislature is not "all the candidates who were duly nominated", but "all the candidates who were duly

nominated at the election", and proper meaning and significance is to be given to the expression "at the election". If the intention of the Legislature

was that the petitioner should join as parties all candidates whose nominations were accepted, irrespective of the fact whether they contested the

election or not and irrespective of the fact whether they were candidates at the election or not, it is difficult to understand why the expression

candidates who were duly nominated" is qualified by the expression "at the election". It is clear that there is a vital distinction between a candidate

for an election and a candidate at an election. You are a candidate for an election long before the election takes place. You may cease to be a

candidate for that election and you may not be a candidate at the election. "At the election" emphasises the point of time when the election takes

place. It emphasises the fact that you are a contestant at the election and that the voters have a right to vote for that candidate. It also emphasises

the fact that the candidate has not withdrawn and has no right to withdraw and in law he must be considered to be a person who is contesting the

election along with other candidates. The distinction between a candidate "for an election" and "at an election" is brought out by Section 32. That

section provides that any person may be nominated as a candidate for an election to fill a seat in any constituency if he is qualified to be chosen to

fill that seat under the provisions of the Constitution and this Act. Therefore at that stage a person is nominated as a candidate for an election. Then

Section 33 provides for presentation of nomination paper and requirements for a valid nomination. Section 36 provides for the scrutiny of

nominations, and Section 37 provides for the withdrawal of candidature. After that time is passed, Section 38 provides for the Returning Officer

preparing and publishing a list of valid nominations. Once this has been done and once the right of the candidate to withdraw has disappeared, then

the candidate becomes a candidate at an election and it is this candidate who has got to be made a party to the petition. If the other view was

accepted, the view pressed for by Mr. Patwardhan. it is difficult to understand how a candidate who has withdrawn from the contest is in any

better position than any other elector he has no rights other than the rights enjoyed by an elector: and why the Legislature should have taken the

view that a candidate who has withdrawn should be made a party to the election petition is difficult to understand. The Legislature might as well

have provided that all electors to an election should be made parties to the petition. The object of Section 82 is that all parties who were

concerned with the actual election and who contented the election should be before the Tribunal, but a person who did not contest the election and

who withdrew from the fight does not stand in the same position as candidates who not only were duly nominated but who were candidates at the

election. Therefore, in our opinion, the construction suggested by Mr. Kotwal is not only the proper construction according to the plain natural

language used by the Legislature, but it is also more consistent with the principle underlying the section. Therefore, if respondent 7 was not a

necessary party to the petition at all, the fact that the Tribunal has added him as a party is a mere surplusage and no further question can arise as to

the jurisdiction of the Tribunal.

(9) But we are prepared to assume in favour of Mr. Patwardhan that opponent 1 was a necessary party to the petition and that he was not made a

party when the petition was presented. The question is, what is the effect in law? It is rather significant that Section 85, which confers the power

upon the Election Commission to dismiss a petition, does not provide that a Commission should dismiss the petition if there is non-compliance with

the provisions of Section 82. Therefore, whereas the Legislature attached importance to the provisions of Sections 81, 83 and 117, it did not

attach the same importance to the question of joining parties, and when we come to Section 90(4) the position is the same. When discretionary

power is given to the Tribunal to dismiss the petition for non-compliance of certain provision of the Act, that power was not given to the Tribunal if

there was non-compliance with the provisions of Section 82. Therefore the Legislature advisedly did not desire a petition to be dismissed because

there was non-joinder of parties. Mr. Patwardhan is at the outset confronted with this difficulty that there is neither a statutory obligation nor even a

statutory discretion vested in the Tribunal to dismiss a petition for nonjoinder of parties. Therefore, far from our ordering the Tribunal to dismiss the

petition, we would have to restrain the Tribunal if it were to dismiss a petition for non-joinder. If the Tribunal does not exercise its discretion to

dismiss a petition u/s 90 (4). its statutory duty is to decide the petition on merits and it can only dismiss a petition u/s 98 at the conclusion of the trial

of the election petition. It is clear that u/s 98 the power given to the Tribunal to dismiss the election petition is not on any preliminary or technical

ground; the power given is to dismiss the petition on merits; and we do not think that Mr. Patwardhan can seriously contend that dismissing a

petition for nonjoinder would be a dismissal on merits. Therefore, it is only after the merits have been gone into that the power of a tribunal would

arise to dismiss the petition.

(10) It is then urged by Mr. Patwardhan that the Tribunal has no power to add a party to the petition and that argument is based on the same

contentions as were advanced in the case of amendment of the petition. It is urged that Section 92 does not confer the power upon the Tribunal to

add a party, and Section 90 (2) does not deal with a case of addition of parties. Our answer to this contention is the same as our answer to the

contention with regard to amendment of the petition. In our opinion, the power to add parties is derived from the wide language used by the

Legislature in Section 90 (2).

(11) It is then urged by Mr. Patwardhan that even assuming that the Tribunal has the power to add opponent 7 as a party to the petition. opponent

7 was made a party beyond the period of limitation and therefore the petition is liable to be dismissed. The petition has to be presented within the

time provided by Section 81(1) and this petition was so presented. But Mr. Patwardhan says that inasmuch as opponent 7 was brought on the

record on 30-10-1952, which was long after the due date for the presentation of the petition, by virtue of Section 22, Limitation Act, the petition

must be deemed to have been preferred against opponent 7 only on that date, and as Section 82 requires that the petition must contain all the

parties, the petition as a whole or rather the proper petition must be deemed to have been presented not on the date when it was presented but on

30-10-1932 and therefore Mr. Patwardhan says that the proper petition as required by law was not before the Tribunal and the Tribunal should

have dismissed it. The law with regard to limitation only provides that if a party is added after the period of limitation, the suit must be deemed to

have been instituted as against him when he was made a party, and assuming that that principle applies to the present case, all that can be said is

that the petition must be deemed to have been presented against opponent 7 at the date when he was made a party. It does not follow that

because a party to a suit or to an application or to a petition is brought on the record at a later stage and even beyond the period of limitation that

the suit, application or petition must fail as a whole. It is for the Court to consider what is the effect of non-joinder. If relief can be granted to the

plaintiff in the absence of the party who is not before the Court during the period of limitation, the Court is not bound to dismiss the suit as a whole;

the plaintiff may be given a limited relief. In this very case, assuming Mr. Patwardhan is right, it would be for the Tribunal to consider whether the

petitioner is entitled to any relief by reason of the fact that opponent 7 was not brought on the record within the period or limitation. It would be for

the Tribunal to consider whether the petition should be wholly dismissed or whether opponent 7 was merely a "pro formal party and that the right

of opponent 1 to obtain relief against the petitioner was in no way affected by the absence of opponent 7 from the record of the petition. But that

question cannot arise at this stage. At this stage the only question that arises is whether the Tribunal acted with jurisdiction in bringing opponent 7

on the record of the petition. As we have pointed out, in our opinion opponent 7 was not a necessary party at all u/s 82, and assuming he was a

necessary party, we have held that the Tribunal had the jurisdiction to bring him on record.

(12) It is then urged by Mr. Patwardhan that the list which has got to be filed u/s 83(2) was not a proper list at all and that it did not contain the full

particulars as required by that sub-section. In our opinion, that is not a question that we have to consider. It is either for the Commission at the

earlier stage or for the Tribunal to decide whether the list complies with the provisions of Section 83(2) or not. Apparently, the view taken both by

the Commission, inasmuch as it did not dismiss the petition u/s 85, and also by the Tribunal is that the list does comply with the provisions of

Section 83(2) and what the Tribunal has done is, it has allowed opponent 1 to give further particulars and to amend the particulars given in the list

by treating the additional list as falling u/s 33(3). These are matters of merit into which we are not entitled to go on a petition for a writ. But the

central point that arises on this petition and which we have to decide apart from all these refinements is whether there is anything in the Act which

casts a duty upon the Tribunal under the circumstances alleged by the petitioner to dismiss the petition. It is only if we are satisfied that there is such

a clear and unequivocal statutory obligation upon the Tribunal that we can issue a writ and direct the Tribunal to dismiss the petition. In our opinion,

no such statutory obligation appears on a plain reading of the statute, and therefore apart from any other consideration the petition must fail and is

dismissed with costs.

(13) Petition dismissed.