

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

Present:

**The Hon'ble Justice Jyotirmay Bhattacharya
AND
The Hon'ble Justice Debi Prosad Dey**

F.M.A. 1965 of 2015

***Subhankar Kundu
versus
Municipal Returning Officer & Ors.***

For the Appellant : Mr. Achintya Kumar Banerjee,
Mr. Anit Kumar Das.

For the State -Respondents : Mr. Tapan Kumar Mukherjee,
Mr. Rabindra Narayan Dutta.

For the Respondent No.4 : Mr. Probal Kumar Mukherjee,
Mr. Nilanjan Bhattacharya,
Mr. Sayan De,
Ms. Debarati Bhattacharya.

Amicus Curiae : Mr. Malay Basu.

Heard On : 30.06.2015, 14.07.2015, 30.07.2015
& 06.08.2015.

Judgement On : 06-08-2015.

Jyotirmay Bhattacharya, J. : This first miscellaneous appeal arises out of an order being No. 4 dated 8th May, 2015 passed by the learned District Judge, Nadia at Krishnagar in Misc. (Election) Case No. 17 of 2015 whereby the appellant's election petition was dismissed by the learned District Judge while considering the appellant's application for interim injunction filed under Section 151 of the Code of Civil Procedure in connection with the said election petition.

As a matter of fact, not only the appellant's application for interim injunction was rejected, but the main election petition was also dismissed by the impugned order.

The legality and/or propriety of the said order is under challenge in this first miscellaneous appeal at the instance of the appellant who was the petitioner before the learned District Judge.

At the time of hearing of the first miscellaneous appeal for its admission, a question has cropped up as to whether such an order is assailable in appeal before this Hon'ble Court or is assailable in the revisional jurisdiction of this Court. Such question was raised in the context of the provisions contained in Sections 74, 75 and 76 of the West Bengal Municipal Elections Act, 1994.

Section 75 of the said Act prescribes the procedure for filing an election petition. It also prescribes the limitation within which such election petition can be presented. It also provides the forum before which such election petition can be filed. Condition for entertaining such election petition has also been mentioned therein. It is provided that such election petition will be entertained only on deposit of certain amount of specified money in Court as security towards cost. The proviso added to the said provision prescribes the circumstances in which the legality of any election cannot be called into question by way of filing an election petition before the prescribed forum.

Sub-section (2) of Section 75 provides that the provisions of the Code of Civil Procedure, 1908, shall apply, as far as may be, in the matter of adjudication of an election petition under sub-section (1).

Presently we are concerned with the forum before which such election petition can be presented.

As per Section 75(1) of the said Act such an election petition can be presented before the District Judge of the district within which the election has been or should have been held. The District Judge has been defined in Section 74 of the said Act in the following manner :-

“Definition. – In this Chapter, “District Judge” shall mean, -

- (a) for the purposes of elections to the Kolkata Municipal Corporation constituted under the Kolkata Municipal Corporation Act, 1980, the Chief Judge of the Court of Small Causes of Calcutta, or
- (b) for the purposes of elections to the Siliguri Municipal Corporation constituted under the Siliguri Municipal Corporation Act, 1990, the District Judge of Darjeeling or the District Judge of Jalpaiguri as the State Government may, by notification,
- (c) for the purposes of elections to a Municipality in any district, the District Judge of that district.”

In this context, a question came up for consideration before this Court as to whether when the District Judge holds an enquiry with regard to an election petition he acts as *persona designata* or as a court.

According to Mr. Tapan Kumar Mukherjee, learned senior counsel, appearing for the State-respondent when an election petition is considered by the District Judge, he acts as a *persona designata*. In support of such contention, Mr. Mukherjee has referred to the provision contained in Article 243ZG (b) of the Constitution of India which provides that notwithstanding anything in this Constitution, no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

Mr. Mukherjee lays much emphasis to the expression 'authority' used in Article 243ZG (b) of the Constitution of India. He contends that when the Constitution itself provides that such an election dispute can only be decided by an authority to be prescribed by the State Legislature and when the said State Legislature prescribes the District Judge of a District as an authority to decide the election petition, the District Judge should be regarded as a *persona designata* and not as a civil court.

Mr. Mukherjee, thus, argues that if the District Judge being an authority acts as *persona designata* and if such a *persona designata* passes an order by virtue of his special authorisation under the special statute, such an order passed by the special authority cannot be regarded as an order passed by the civil court. According to him, such an order is not amenable before the High Court in its Civil Appellate Jurisdiction.

Mr. Mukherjee, thus, contends that an order passed by such a *persona designata* may at best be regarded as an order passed by an authority prescribed under the special statute and such an order, according to him, may be challenged before this Hon'ble Court in its Constitutional Writ Jurisdiction.

Mr. Malay Basu, learned senior counsel who was appointed as an *Amicus Curiae* also argued in the same line as Mr. Mukherjee did.

Mr. Achintya Banerjee, learned advocate appearing for the appellant refutes such submission of Mr. Tapan Kumar Mukherjee by contending that when the State Legislature vested such jurisdiction to decide an election dispute upon the District Judges and at the same time prescribed the procedure for disposal of such application by applying the provisions of the Civil Procedure Code as far as possible, the District Judges while considering an election petition cannot be regarded as a *persona designata*.

Mr. Banerjee further submits that when the District Judges considering the election petition, decide the legal right of the parties, the District Judges cannot be regarded as persona designata. According to him, the District Judges while dealing with an election petition, acts as court of special jurisdiction and such jurisdiction is vested upon them by special statute in addition to their normal function as civil court. In support of his submission, Mr. Banerjee has relied upon the following decisions :-

- (i) In the case of Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker reported in (1995) 5 SCC 5.
- (ii) In the case of Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. & Ors. reported in (1991) 2 SCC 637.
- (iii) In the case of Pashupati Adhikary Vs. Pradyut Kumar @ Tarapada Adhikary reported in 2003 (4) CHN 347.

Relying upon the aforesaid decisions, Mr. Banerjee submits that since the impugned order was passed by the District Judge as a court of special jurisdiction, the order passed by the learned District Judge is assailable before this Court in its Civil Appellate Jurisdiction as an order passed by the civil court. He thus contends that the instant miscellaneous appeal is very much maintainable.

Let us now consider the contentions of the learned counsel of the respective parties in this regard.

We have considered the relevant provisions of the West Bengal Municipal Elections Act, 1994. We have already mentioned above that the said Act vested jurisdiction upon the District Judges to decide any election dispute when such dispute is raised within the jurisdiction of the District Judge of a district. We have already mentioned above that such authorisation to decide the election dispute was vested upon the District Judges by the State Legislature by making

appropriate legislation as per the provision contained in Article 243ZG (b) of the Constitution of India. The State Legislature by virtue of such authorisation in its own wisdom, vested the jurisdiction to decide the election dispute upon the District Judges and prescribed the procedure to be followed for deciding such election dispute. It is mentioned in Section 75 (2) of the West Bengal Municipal Elections Act, 1994 that such election dispute will be tried by following the provisions of the Civil Procedure Code, 1908 as far as possible.

In this context, we will have to consider as to whether such court while deciding such dispute, acts as a *persona designata* or as a civil court. In fact, identical issue arising out of the similar provisions of different Acts came up for consideration before this High Court as well as before the Hon'ble Supreme Court on repeated occasions. In this regard, we have considered the decisions cited by Mr. Banerjee as mentioned above.

In the case of *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker* (supra), the Hon'ble Supreme Court after considering the provision contained in Section 18 of the Kerala Rent Control Act held that since the District Judges function as appellate authorities under Section 18, such authorities are courts and not *persona designata*. It was further held therein that where the District Judges are appointed as appellate authorities under the provisions of a statute, they constitute a class and cannot be regarded as a *persona designata*.

Similarly, in the case of *Maharashtra State Financial Corporation Vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. & Ors.* (supra), the Hon'ble Supreme Court held that when special statute confers jurisdiction on District Judge, the District Judge will not be a *persona designata* but a court of ordinary civil jurisdiction to which the rules of procedure, order, decree etc. under the Code will apply.

The Division Bench of this Hon'ble Court, in the case of Pashupati Adhikary Vs. Pradyut Kumar @ Tarapada Adhikary (supra) while considering as to whether Munsifs and/or District Judges while considering the pre-emption applicaton and/or the appeal arising therefrom act as a persona designata or civil court, held that when the Munsifs and the District Judges deal with the pre-emption application and/or appeal arising therefrom they are not persona designata and the orders passed by the Munsifs and/or the District Judges in the pre-emption cases cannot be made subject to the jurisdiction of the Tribunal. It was held therein that the order passed by the District Judge in an appeal arising out of an order passed by the Munsif in pre-emption proceeding, is amenable to the jurisdiction of this Hon'ble Court.

If we consider the aforesaid decisions of the Hon'ble Apex Court as well as of this Hon'ble Court, we have no hesitation to hold that when the State Legislature conferred the jurisdiction upon the District Judges as a class to decide the election dispute by applying the provisions of the Civil Procedure Code, the District Judges cannot be regarded as a persona designata as, such District Judges while deciding the election disputes determine the right of the parties before them.

Thus, we hold that the District Judges while dealing with the election petitions are not persona designata. They discharge their function as a judicial authority by virtue of special authorisation given to them under the special statute framed by the State Legislature. Consequently, we hold that if any order is passed by the District Judges in dealing with an election petition, such order passed by the District Judges is amenable before the civil appellate jurisdiction of this Court. Hence, we hold that the appeal is maintainable.

After considering the impugned order and after hearing Mr. Banerjee, learned advocate we hold that the appeal should be heard. Accordingly, we admit this appeal.

However, since all the parties are before us and the appeal can be decided on the materials before us, we on the request of the learned counsel appearing for the parties, have decided to dispose of the appeal itself on its merit. Accordingly, we have heard the learned counsel appearing for the parties on the merit of this appeal.

Let us now consider the legality and/or propriety of the order passed by the learned District Judge which is impugned in this appeal.

The learned District Judge, while considering an application for injunction filed by the appellant herein in connection with an election petition, not only dismissed the appellant's application for interim injunction, but also dismissed the parent election petition by holding, inter alia, that such an election petition is not maintainable – (i) for want of service of notice under Section 80 of the Civil Procedure Code and (ii) for want of necessary averment in the election petition as to whether such election petition was presented within 10 days from the date of declaration of the election result or not.

The learned District Judge also held that an application under Section 151 of the Code of Civil Procedure for interim relief by way of injunction is not maintainable as the provision under which such interim relief can be asked for, is provided under Order 39 Rules 1 and 2 of the Civil Procedure Code itself. Since the appellant applied for some interim relief by filing an application under Section 151 of the Code of Civil Procedure, the learned District Judge held that such an application is not maintainable. Accordingly, the learned District Judge also rejected the appellant's application for interim injunction.

This is the nature of the impugned order which is now under our scrutiny in this appeal. No doubt, it is settled law that while considering an application for interim injunction, the court can consider, prima facie, the question regarding

maintainability of the suit and if it is found prima facie that the suit is not maintainable, the court may ultimately refuse to grant interim relief in such a suit, but dismissal of the suit itself on the date when the application for injunction was fixed for hearing, is unheard of.

As such, we hold that the learned District Judge committed an illegality in dismissing the election petition itself while considering the appellant's application for interim injunction on a date when the suit was not even posted for hearing even on the preliminary issue regarding maintainability of such election petition due to bar of any law.

Let us now consider the legality of the findings of the learned District Judge which was arrived at by the learned District Judge in support of his conclusion regarding maintainability of the said election petition for want of service of notice under Section 80 of the Civil Procedure Code.

In this regard, we may refer to a Division Bench decision of this Hon'ble Court in the case of Anil Pahar Vs. Subhas Mahato & Ors. reported in AIR 1985 Cal. 169 where the Division Bench of this Hon'ble Court while considering an identical provision under the West Bengal Panchayat Act held that for maintaining an application raising an election dispute, notice under Section 80 of the Civil Procedure Code need not be served.

We have already indicated above that Section 75 (2) of the West Bengal Municipal Elections Act, 1994 provides that the provisions of the Civil Procedure Code as far as possible will apply. The said provision makes it clear that the entire provisions of the Civil Procedure Code will not apply.

If the provision of Section 80 of the Code of Civil Procedure is applied, in that event the limitation which is prescribed for maintaining such application under Section 75 (1) of the said Act will be ineffective as the said provision

prescribes that an election petition should be presented before the appropriate authority within 10 days from the date of declaration of the election result. If such a litigant has to wait for 60 days for serving notice under Section 80 of the Code of Civil Procedure and then he files an election petition before the authority, his application will be barred by limitation and thus such application will be nipped in the bud. As such, we hold that Section 80 of the Code of Civil Procedure has no application for maintaining an application for election petition before the District Judge.

We thus hold that the learned District Judge committed an illegality by holding that the election petition is not maintainable for non-service of notice under Section 80 of the Code of Civil Procedure.

Let us now consider the other finding of the learned District Judge regarding maintainability of the said application.

The learned District Judge held that since the appellant has failed to make an averment in the application that the said election petition was presented within 10 days from the date of declaration of the election result, the election petition is not maintainable. This is an absurd finding made by the learned District Judge, inasmuch as, the record itself can demonstrate as to whether the election is barred by limitation or not. That apart, the bar of limitation is a mixed question of law and fact which cannot be decided in such a fashion. Of course, if it is ultimately found that such election petition was presented beyond 10 days after declaration of the election result, certainly the application may be rejected by the learned District Judge. We, thus, are unable to agree with such finding of the learned District Judge.

Let us now consider the other part of the finding of the learned District Judge wherein the learned District Judge held that the appellant's application for

interim injunction is not maintainable as the appellant has sought for such relief by filing an application under Section 151 of the Code of Civil Procedure.

No doubt, the Civil Procedure Code contains a particular provision under which an applicant can apply for interim injunction. Order 39 Rules 1 and 2 of the Code of Civil Procedure is the appropriate provision under which an applicant can claim some interim relief by way of injunction pending disposal of the parent proceeding.

It is rightly held by the learned District Judge that if any provision is contained in the Civil Procedure Code for seeking certain relief by following such provision, the parties cannot take the aid of inherent jurisdiction of the court for seeking any relief.

If we consider the present problem from that angle, we have no reason to differ from the findings of the learned District Judge in this regard, but at the same time, we cannot be unmindful of the settled position of law to the effect that an application cannot be decided by looking at the nomenclature and/or caption under which such application was filed; rather the substance of the application should be considered for rendering substantial justice to the litigants without looking at the caption under which it was filed.

Thus, if we consider the substance of the appellant's application, we have no hesitation to hold that in effect the applicant applied for interim injunction as per the provision of Order 39 Rules 1 and 2 of the Code of Civil Procedure.

Thus, we hold that the learned District Judge was not justified in rejecting the appellant's said application for interim relief on the ground as mentioned by the learned District Judge in the impugned order. We thus set aside the impugned order and send the main proceeding as well as the interlocutory

proceeding back to the learned District Judge for reconsideration in the light of the observations made hereinabove.

It is thus made clear that whatever objections including question of maintainability of the election petition will be raised by the respondents either in connection with the interlocutory application or in connection with the election petition, the learned District Judge will decide the same on its own merit and according to his own wisdom but as per law.

The learned District Judge is requested to dispose of the injunction application as well as the parent proceeding as early as possible without granting any unnecessary adjournment to any of the parties.

The appeal is thus disposed of.

Re: CAN 5101 of 2015 (Stay)

In view of disposal of the appeal in the manner as aforesaid, no further order need be passed on the application for stay. The said application being CAN 5101 of 2015 is thus deemed to be disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

(JYOTIRMAY BHATTACHARYA, J.)

(DEBI PROSAD DEY, J.)