

## CIVIL MISCELLANEOUS

Before R. S. Narula, J.

KANWAL SINGH,—Petitioner.

versus

HARDWARI LAL,—Respondent.

Civil Misc. No. 48-E of 1971.

In

Election Petition No. 1 of 1970.

March 15, 1972.

*Representation of People Act (XLIII of 1951)—Sections 80, 80A, 98 and 119—High Court accepting election petition and setting aside an election—Supreme Court in appeal preferred by the returned candidate dismissing the petition and making no order as to costs incurred in the High Court—Returned candidate—Whether entitled to such costs—Proviso to section 119—Whether applies.*

Held, that the proviso to section 119 of the Representation of People Act, 1951, operates only as an exception to the purview of that section, and not as an independent provision. The party concerned, therefore, is entitled to invoke the proviso as a matter of right only at the stage when the High Court is called upon to exercise its discretion in the matter of costs under that section. That stage reaches when an election petition is disposed of by the High Court under sections 98(b), 99 and 119 of the Act, whereafter the High Court becomes *functus officio* and is no longer seized of the case. The language of section 119 leaves no doubt in the matter that the section deals with the question of discretion of the High Court in awarding costs of an election petition at the time of disposing it of under section 98. As soon as an appeal against the decision of the High Court is preferred under section 116-A of the Act, the question of the liability for payment of costs incurred by the parties in that Court as well as in the trial Court falls within the exclusive jurisdiction and discretion of the Supreme Court. Hence where the High Court accepts an election petition and sets aside an election but the Supreme Court in appeal preferred by the returned candidate dismisses the petition making no order as to costs in the High Court, the returned candidate is not entitled to costs incurred by him in the High Court under proviso to section 119 of the Act. (Paras 8 and 9).

*Application on behalf of Hardwari Lal, Respondent-petitioner praying that the costs incurred by the petitioner in contesting the petition be ordered to be paid by the election petitioner. The sum of Rs. 2,000 lying as security deposit on behalf of the election petitioner and any unspent diet money deposited by him, be ordered to be paid and a certificate for the balance be granted and that the unspent money deposited by the petitioner, for the summoning of his witness be ordered to be refunded to him.*

R. S. Hooda, Advocate, for the election petitioner.

Respondent applicant in person.

## JUDGMENT

R. S. NARULA, J.—This application arises out of election petition No. 1 of 1970. Kanwal Singh, respondent, filed that petition for setting aside the election of Hardwari Lal applicant. By my judgment and order, dated December 24, 1970, the election petition was allowed with costs and the election of Hardwari Lal was set aside. Civil Appeal No. 129 (NCE) of 1971, preferred by the applicant against the judgment of this Court was allowed by the judgment and order of their Lordships of the Supreme Court, dated December 7, 1971. The relevant part of the formal order drawn in pursuance of the judgment of their Lordships reads as follows:—

- “(1) THAT the judgment and order, dated the 24th December, 1970, of the Punjab and Haryana High Court at Chandigarh in Election Petition No. 1 of 1970, be and are hereby set aside and in place thereof an order dismissing the Election Petition No. 1 of 1970, filed by the respondent herein in the said High Court be and is hereby substituted;
- (2) THAT the parties herein do pay and bear their costs in this appeal AND THIS COURT DOTH FURTHER ORDER that this ORDER be punctually observed and carried into execution by all concerned.”

(2) Hardwari Lal, then made the present application, dated December 9, 1971, for a direction to the respondent to pay the costs incurred by the applicant in contesting the election petition in this Court and for a further direction to the effect that the amount of such costs due to the applicant may be paid out of the sum of Rs. 2,000 lying as security deposit on behalf of the respondent (the election-petitioner), and out of any unspent diet money deposited by him, and that a certificate for the balance of the amount of costs payable to the petitioner may be granted. This prayer has been made and pressed before me on the ground that though no order as regards costs of the parties incurred in this Court has been passed by their Lordships of the Supreme Court, the applicant is entitled to recover from the respondent the costs incurred by the applicant on account of the mandatory requirements of the proviso to section 119 of the Representation of the People Act, 1951 (hereinafter called the Act).

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(3) On notice of the application having been given to the election-petitioner, it has been argued by his counsel that the application is misconceived and that this Court has no jurisdiction to supersede or add to the judgment of the Supreme Court, which did not make any order as to costs incurred by the parties in the High Court. The applicant has submitted that appeal is a continuation of the original proceedings and is a part of the trial of case which in this particular case came to an end only with the pronouncement of the judgment of the Supreme Court. He has argued that the judgment of the Supreme Court amounts to dismissing the election petition under section 98(a) of the Act, and, therefore, it is his statutory right to recover the costs incurred by him in the High Court from the opposite party, though the costs incurred by him in the Supreme Court have not been awarded to him as those were in the discretion of their Lordships of that Court. According to the applicant section 119 of the Act applies to dismissal of an election petition irrespective of whether it is dismissed at its initial stage in the High Court or at its appellate stage by the Supreme Court.

(4) On the other hand Mr. H. S. Hooda, the learned counsel for the respondent, has submitted that the proviso to section 119 applies to the same stage to which the purview of that section applies, i.e., the stage at which the High Court has to normally exercise its discretion in the matter of deciding the question of costs. The learned counsel has argued that the stage for passing any order under section 99 by this Court expired on December 24, 1970, and this Court has no jurisdiction to deal with the matter after that day unless the Court is directed to exercise any particular function by the order of their Lordships of the Supreme Court. On that basis he has argued that under section 121 of the Act it is only a party in whose favour costs have been awarded, who is permitted to apply for an order for payment of the amount of costs out of the security deposit or otherwise. He has further submitted that the judgment and order of this Court having been wiped out, the only operative order, which holds the field now is the above quoted portion of the formal order of the Supreme Court. Counsel submits that not making any order as to costs of this Court by the Supreme Court amounts to their Lordships saying that there shall be no order as to costs incurred by the parties in the High Court.

(5) I have no doubt in my mind that their Lordships of the Supreme Court could have, while disposing of the applicant's appeal

before them, passed an order in regard to the costs incurred by the parties in this Court. In fact a reference to the various judgments whereby election appeals were previously decided by their Lordships of the Supreme Court shows that whenever their Lordships intended to pass an order in regard to the costs incurred by the parties in the High Court, they did not leave the matter in any doubt. In *Dal Chand Jain v. Narayan Shankar Trivedi* (1), their Lordships held in the end as below:—

“In the result, the appeal is allowed, the orders of the High Court under sections 98(b) and 99 are set aside and the election petition is dismissed. Respondent No. 1 will pay to the appellant the costs in this Court and in the High Court.”

Again in *Abdul Gani Namthali v. Gulam Mohammad Paray* (2), the operative part of the judgment of the Supreme Court reads as follows:—

“The appeal is, therefore, allowed and the election petition dismissed. But in the circumstances of the case, specially in view of the irregularity in the trial of the election petition, we direct the parties to pay and bear their own costs throughout.”

Another instance of similar orders in the case of reversal of the High Court judgment in an election appeal is furnished by the decision in *Atam Das v. Suriya Prasad* (3), wherein the last paragraph of the judgment of their Lordships is in the following words:—

“The appeal is allowed and the order passed by the High Court set aside. The respondent will pay the costs in the Trial Court as well as this Court including costs of the hearing for recording findings on the issues.”

Still another instance of similar orders in the case of reversal of the High Court in an election appeal is the decision in *Shri Ram Dev v.*

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(1) Unreported Judgments (S.C.) 23 (1969), decided on 30th January, 1968.

(2) Unreported Judgments (S.C.) 83 (1969), decided on 17th April, 1968.

(3) Unreported Judgments (S.C.) 63 (1969).

*Smt. Sarla Prashar and another* (4), wherein the last paragraph of the judgment is in the following words:—

“The appeal is, therefore, allowed and the order passed by the High Court is set aside. The appellant will be entitled to his costs in this Court and in the High Court”.

(6) Without any attempt to multiply similar orders, I may notice at least one more judgment which is relevant for this purpose. In *J. K. Chowdhary v. Virender Chander* (5), their Lordships observed as below:—

“For the reasons mentioned above this appeal succeeds and the judgment of the trial Court is set aside and the election petition dismissed with costs both in this Court as well as in the trial Court.”

Since the main claim of the applicant before me is based on section 119 of the Act, I have referred only to the appellate judgments in election cases, and have not thought it necessary to refer to numerous Civil Appeals decided by their Lordships wherein also directions have invariably been given regarding costs incurred by the parties not only before the Supreme Court, but also in the Courts below.

(7) The last paragraph of the judgment of their Lordships in the present case is in the following words:—

“For these reasons, the judgment of the High Court is set aside. The appeal is allowed. The election petition shall stand dismissed. The parties will pay and bear their costs in this appeal.”

It is the above quoted operative part of the judgment which has been reflected in the formal order of the Supreme Court to which reference has been made in the beginning of this order. I feel that what I am being asked to do is to add to the judgment of the Supreme Court which passed an order only in regard to the costs incurred by the parties in the appeal before that Court and did not pass any order

(4) C.A. No. 2048 (NCE) of 1969, decided by Supreme Court on 19th August, 1970.

(5) C.A. No. 1702 of 1968, decided by Supreme Court on 8th April, 1969.

in regard to the costs incurred by them in the High Court though their Lordships were admittedly competent to pass such an order, and it is usual for that Court to pass an order to that effect if it is intended to do so. The only inference which I am able to draw from this situation is that their Lordships have not passed any order as regards costs incurred by the parties in the High Court. The judgment of the Supreme Court in *Abdul Gani Namthali's case* (2) (supra) clearly shows that the proviso to section 119 of the Act has no application to the dismissal of an election petition by the Supreme Court at the appellate stage.

(8) I find great force in the submission of Mr. Hooda to the effect that the proviso to section 119 operates only as an exception to the purview of that section, and not as an independent provision, and, therefore, the party concerned is entitled to invoke the proviso as a matter of right only at the stage when the High Court is called upon to exercise its discretion in the matter of costs under the purview of that section. That stage had reached before me on December 24, 1970, when I disposed of the election petition by passing orders under sections 98(b), 99 and 119 of the Act. After the disposal of the election petition by passing orders under sections 98 and 99 of the Act, this Court became *functus, officio* and is no more seized of the case. It is, therefore, not open to me to add anything to the judgment of the Supreme Court which stands substituted for the original judgment of this Court.

(9) A combined reading of sections 80 and 80-A of the Act shows that the only "Court having jurisdiction to try an election petition" is the High Court. The stage of "conclusion of the trial of an election petition" is reached only before the High Court. It is at that stage that section 98 comes into play and requires the High Court to make any one of the orders specified in clauses (a) to (c) of that section. Sections 117 to 121 in Chapter V of Part VI of the Act deal with the stages of the election petition—commencing with the filing of the petition and ending with its disposal by the High Court. The language of section 119 leaves no doubt in the matter that the section deals with the question of discretion of the High Court in awarding costs of an election petition at the time of disposing it of under section 98. The Supreme Court does not dispose of the petition under section 98, but under Chapter IV-A. That chapter commences with section 116-A which provides for filing of appeals to their Lordships of the Supreme Court against orders

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passed by the High Court under section 98 and/or section 99. Section 116-C(1), which prescribes the procedure to be followed by the Supreme Court for hearing and determining an election appeal is in the following words:—

“Subject to the provisions of this Act and of the rules, if any, made thereunder, every appeal shall be heard and determined by the Supreme Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of an appeal from any final order passed by a High Court in the exercise of its original civil jurisdiction, and all the provisions of the Code of Civil Procedure, 1908 (Act 5 of 1908) and the Rules of the Court (including provisions as to the furnishing of security and the execution of any order of the Court) shall so far as may be, apply in relation to such appeal.”

This provision shows that the procedure to be followed by the Supreme Court in the matter of determination of an election appeal under the Act is the one provided in the Code of Civil Procedure insofar as it is applicable and subject to the relevant provisions contained in the Rules framed by the Supreme Court itself under Article 145 of the Constitution. The powers of a Court of Civil Appeal are given in Rule 33 of Order 41 of the Code. That provision states that the appellate Court has power to pass any decree and make any order, which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The contents of an appellate decree are enumerated in rule 36 of Order 41 of the Code. Sub-rule (3) of rule 35 provides as below:—

“The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and *the costs in the suit* are to be paid.”

This shows that the Code of Civil Procedure requires an appellate Court to give a definite direction not only as regards costs incurred by the parties in the appeal, but also the costs incurred at the trial stage. The Code of Civil Procedure is, however, not applicable as such to proceedings in the Supreme Court which are governed by the Supreme Court Rules framed under Article 145 of the Constitution. That is why the expression “so far as may be” has been used in relation to the applicability of the provisions of the Code of Civil

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Procedure to the hearing and determination of appeals in the Supreme Court in section 116-C of the Act. The result is that though the Supreme Court is empowered to pass an order in regard to costs incurred in the High Court in an election petition while disposing of an election appeal, it is not bound to pass an order in that respect. The costs incurred by the parties before the Supreme Court as well as in the Court below are in the discretion of the Supreme Court,—*vide* Rule 1 order XLI of the Supreme Court Rules, 1966, which is in the following terms:—

“Subject to the provisions of any statute or of these rules, the costs of and incidental to all proceedings shall be in the discretion of the Court. Unless the Court otherwise orders an intervener shall not be entitled to costs.”

This rule authorises their Lordships to give any direction as regards costs incurred in the litigation right from its initial stage. Once an order of this Court under section 119 of the Act is pronounced, the function of this Court in regard to making provision for payment of costs of an election petition comes to an end. As soon as an appeal against the decision of the High Court is preferred under section 116-A of the Act, the question of the liability for payment of costs incurred by the parties in that Court as well as the trial Court falls within the exclusive jurisdiction and discretion of the Supreme Court. In the instant case the election petition was never dismissed by the High Court under section 98(a) of the Act and so the proviso to section 119 was not attracted at any stage. The petition has been dismissed by the order of the Supreme Court under section 116-C of the Act.

(10) The proviso to section 119 has, therefore, no application to the facts of this case. If this were not so and if the applicant's contention were to prevail, the Supreme Court could not have left the returned candidate in *Abdul Gani Namthali's case* (2) to bear his own costs incurred in defending the election petition in the High Court, while allowing his appeal and dismissing the election petition at the appellate stage.

(11) For the foregoing reasons I hold that this application is not maintainable. The application is accordingly dismissed though without any order as to costs.

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N. K. S.