Surjit Singh
v.
Raj Pal and another

Khanna, J.

the matter of that any agency of the State is in charge of the conduct of the prosecution, I fail to understand as to how the Public Prosecutor can withdraw from such a prosecution. To accept the view that a Public Prosecutor can withdraw from the prosecution even in cases instituted on private compliant would also lead to all kinds of abuses and mischiefs. Cases can always arise where, because of the status or influence of the person complained against, the police refuses to register a case against him and the aggrieved person has had to take recourse to the filing of a complaint. If the Public Prosecutor under directions of the District Magistrate or other Executive authority applies for withdrawal from the prosecution, the aggrieved party would be deprived of the only effective remedy. The fact that the withdrawal from the prosecution by the Public Prosecutor, can only be with the consent of the Court no doubt provides some safeguard but this may not prove to be sufficiently adequate in a number of cases. Apart from that, the considerations which would weigh with a Court in giving consent to the withdrawal by the Public Prosecutor from the prosecution would be substantially different from those which would weigh with it when dealing with a case on merits.

I would, therefore, hold that a Public Prosecutor cannot withdraw under section 494 of the Code of Criminal Procedure from the prosecution of a case pending before a Magistrate, instituted upon a private complaint, despite the complainant's objection to the withdrawal of the case. The revision is, consequently, accepted and the order of the learned Sessions Judge, Barnala, as also that of the trial Magistrate allowing withdrawal of the case against Raj Pal accused, are set aside.

Falshaw, C.J.

D. FALSHAW, C.J.—I agree.

R.S.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

RAM DAYAL,—*Petitioner.*

versus

GULBHAR SINGH AND ANOTHER,—*Respondents.*

Civil Writ No. 2212 of 1965.

1965

December, 20th.

Punjab Gram Panchayat Act, 1952 (*IV of* 1953)—*S.* 13G—*Gram Panchayat Election Rules* (1960)—*Rules* 42—Ex parte *order accepting election petition—Whether can be set aside by Prescribed Authority—Prescribed Authority—Whether becomes functus officio after deciding the election petition* ex parte.

Narula, J.

Held, that there being nothing inconsistent with the provisions of Order 9, rule 13 of the Code of Civil Procedure, 1908, in the Punjab Gram Panchayat Act or the Gram Panchayat Election Rules, it is clear that the Prescribed Authority has the jurisdiction, by operation of section 13-G of the Act, to set aside *ex-parte* order passed by it in suitable cases.

Held, that a reference to rule 42 of the above-said rules makes it clear that all election petitions under the Act have to be tried by the Ist Class Executive Magistrate of the illaqa. Before the separation of the Executive from the Judiciary, the relevant expression in rule 41(1) was "Illaqa Magistrate". That being so, the petition lies to a Court which is otherwise constituted and functioning in the area. It cannot be said, therefore, that after deciding any case which comes before a regular Court, it becomes *functus officio* in the absence of a statutory provision to that effect.

Petition under Articles 226/227 of the Constitution of India praying that a Writ in the nature of Ceriorari, Mandamus, or any other appropriate writ, direction or order be issued quashing the order dated 29th July, 1965, passed by respondent No. 1.

H. L. SARIN AND MISS ASHA KOHLI, ADVOCATES, for the Petitioner.

ANAND SWAROOP AND R. S. MITTAL, ADVOCATES, for the Respondents.

ORDER

Narula, J.

NARULA, J.—Ram Dayal, petitioner filed an election petition under sections 13-B and 13-O of the Punjab Gram Panchayat Act, 4 of 1953 as amended by the Punjab Act 26 of 1962 read with rule 42 of the Gram Panchayat Election Rules, 1960 to set aside the election of Moni Ram, respondent No. 2 as Sarpanch of Gram Panchayat of village Thuian, tehsil Fatehabad, district Hissar. It is not disputed that the petitioner deposited the amount of security required under section 13-C of the Act read with rule 44(1) of the above-said rules. The contesting respondent did not appear at the trial of the petition and proceedings were held *ex parte* against him by orders of the Prescribed Authority dated March 28, 1964. At the conclusion of the trial on April 30, 1964, the Prescribed Authority accepted the election petition and set aside the election of despondent No. 2 as Sarpanch. The petitioner was indisputably entitled to obtain refund of the amount of security deposited by him at least thirty days after the grant of his election petition.

The petitioner allowed substantial time to elapse and applied for the withdrawal of his security deposit. This application was allowed and the amount of the security was refunded to the petitioner in full.

On June 15, 1964, resondent No. 2 made an application for setting aside the *ex parte* order allowing the election petition. In reply to that application the petitioner contested the jurisdiction of the Prescribed Authority to set aside the *ex parte* order. Written objections against the application of the second respondent were put in on behalf of the petitioner. Copy of those objections has been field as annexure C to the writ petition. The Prescribed Authority respected all those objections and by order dated July 29, 1965 (copy annexure D to the writ petition) allowed the application of the second respondent dated 15th June, 1964, and set aside the *ex-parte* order allowing the election petition. He then adjourned the case to 12th August, 1965, for Moni Ram, respondent to file his written statement in reply to the election petition. It is at that stage that this writ petition was filed on August 9, 1965, to quash and set aside the order of the Prescribed Authority dated 29th July, 1965.

Mr. H. L. Sarin, the learned Senior counsel for the petitioner has firstly submitted that there is no provision in the Act or the rules authorising the Prescribed Authority to review its earlier order. Of course there is no such provision. But I do not think that the Prescribed Authority exercised any power in the nature of review while passing the impugned order. The order is in the nature of one under Order 9, rule 13 of the Code of Civil Procedure which merely amounts to setting aside the *ex parte* judgment or decree. Section 13-G of the Act provides that every election petition has to be tried by the Prescribed Authority, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure. There being nothing inconsistent with the provisions of Order 9, rule 13, of the Code in the Act or the rules it is clear that the Prescribed Authority has the jurisdiction by operation of section 13-G of the Act to set aside an *ex-parte* order in suitable cases. In another case a Prescribed Authority under the Act had restored an election petition on the analogy of the provisions of Order 9, rule 9, of the Code of Civil Procedure after dismissing it in default. The order

Ram Dayal
v.
Gulbhar Singh
and another

Narula, J.

restoring the petition was challenged in this Court by a petition under Article 227 of the Constitution, C. M. No. 1990 of 1964, by Banwari petitioner. A short note of that Judgment appears in *Banwari* v. *Anokh Singh and another* (1), Shamsher Bahadur, J., held in that case on 28th October, 1964, that by virtue of the provisions of section 13-G of the Act the Illaqa Magistrate had the jurisdiction to set aside the order dismissing the election petition in dafault but that it was necessary for the Illaqa Magistrate to have the notice of the application issued to the opposite party before actually restoring the election petition. Though *Banwari's case* related to the provisions of Order 9, rule 9, of the Code and the instant case relates to a decision under Order 9, rule 13 of the Code of Civil Procedure, the question of law, which arises for decision in this writ petition is almost similar to that which arose in *Banwari's case.* I do not, therefore, find any force in the first contention of the learned cunsel for the petitioner.

It was then contended that after pronouncing his final order, though *ex parte,* in the election petition, the Prescribed Authority was *functus officio* and had no jurisdiction to entertain any subsequent petition relating to the case which had been finally disposed of. This could be so if the Prescribed Authority had been appointed only for the trial of the particular election petition. But a reference to rule 42 of the above-said rules makes it clear that all election petitions under the Act have to be tried by the Ist Class Executive Magistrate of the Illaqa. Before the separation of the Executive from the Judiciary, the relevant expression in rule 42(1) was "Illaqa Magistrate". That being so, the petition lies to a Court which is otherwise constituted and functioning in the area. It cannot be said, therefore, that after deciding any case which comes before a regular Court, it becomes *functus officio* in the absence of a statutory provision to that effect. I am, therefore, not able to uphold the second contention of the learned counsel either.

The practical difficulty and a possible hurdle is then referred to by Mr. Sarin. The petitioner apprehends, it is stated by Mr. Sarin, that the second respondent may not now take up an objection before the Prescribed Authority to the effect that the election petition is liable to be dismissed under rule 45 of the afforesaid rules as the deposit

(1) 1965 P.L.R. Short Note 11 at Page 5.

required under rule 44(1) of the rules which had admittedly been made at the appropriate stage is no more in existence and that even if the petitioner redeposits the same, an argument may be made about there having been no subsisting deposit for some time during the trial of the petition. There appears to be no basis for this apprehension. It is not disputed that the requirements of rule 44(1) were duly complied with and the requisite deposit had been made by the petitioner at the appropriate time. It could not be expected that the petitioner should continue to leave to deposit with the prescribed authority even after the expiry of the normal period for setting aside the *ex parte* final orders of the Illaqa Magistrate. If the *ex parte* order has been subsequently set aside it is no fault of the petitioner. In any case it is needless for me to go further into this question in this particular case as Shri Anand Swaroop, the learned counsel for respondent No. 2, the elected candidate, undertakes not to raise such an objection before the Prescribed Authority. He also concedes that such an objection would be futile if the election-petitioner redeposits the amount, of security in question within one montth from the date on which a copy of the written statement of second respondent is delivered to him.

In this view of the matter without expressing any final opinion on the pure question of law involved on this item, I direct under Article 227 of the Constitution that in view of the concession made by the second respondent the election petition of the petitioner herein shall not be dismissed by the Prescribed Authority on the ground that he had withdrawn the security deposit after the passing of the *ex-parte* order. Nothing stated in this judgment shall debar the second respondent from taking up or pressing any other plea in the nature of limitation or otherwise to the maintainability of the election petition before the Prescribed Authority. No other direction is necessary. This writ petition is disposed of accordingly. The parties may appear before the Prescribed Authority on 31st January, 1966, for further proceedings. There will be no order as to costs.

R.S.