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CASE NO.:
Appeal (civil) 4105 of 1999

PETITIONER:
MAKHAN LAL BANGAL

Vs.

RESPONDENT:
MANAS BHUNIA & ORS.

DATE OF JUDGMENT: 03/01/2000

BENCH:
R.C.Lahoti, S.V.Patil

JUDGMENT:

R.C. Lahoti, J.
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This appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter the RPA, for short) has been preferred by a candidate who won at the election but has lost in the election petition.

Elections for the legislative seat of No.216, Sabang Legislative Assembly Constituency in the district of Midnapore, West Bengal were held in May, 1996. There were four candidates in the fray. The appellant secured 60453 votes. The respondent no.1 secured 59628 votes. The other two candidates received 594 and 453 votes respectively. On 12.5.1996 the appellant was declared elected by a margin of 825 votes over his nearest rival, the respondent no.1.

On 17.6.1996, the respondent no.1 filed an election petition laying challenge to the election of the appellant and seeking a declaration that the result of the election was void. A declaration that the respondent no.1 was duly elected was also sought for. On trial the High Court has allowed the election petition and set aside the election of the appellant declaring the same to be void. No other direction has been made. The appellant and two other candidates who had contested the election were only arrayed as the respondents in the election petition filed before the High Court.

It is not necessary to set out the pleadings, evidence and other details of the case in view of our having formed an opinion that the judgment under appeal suffers from a serious lacuna going to the root of the matter and therefore

deserves to be set aside followed by a remand to the High Court with a direction to comply with the provisions of Section 99 of the RPA and thereafter decide the election petition afresh. The facts insofar as necessary to demonstrate the need for remand are stated in brief hereinafter.

The principal ground on which the election of the appellant was sought to be set aside was that the result of the election, insofar as it concerns the returned candidate was materially affected by corrupt practices committed in the interests of the returned candidate by the agents other than his election agent within the meaning of Section 100 (1)(d) (ii) of the RPA. The election petition alleged commission of corrupt practices as defined in sub-sections (2) (4) and (7) of Section 123 of the the RPA. For the purpose of this appeal it would suffice to note the issues framed by the High Court, the answers given and the findings recorded by the High Court. Issues

(1) Is the election petition maintainable in the present form?

(2) Is the respondent no.1, his election agent and/or his election agents is/are guilty of corrupt practices as alleged in paragraph 11 and sub-paragraphs thereunder of the election petition?

(3) Is the respondent no.1, his election agents, the Returning Officer, Assistant Returning Officer, counting Supervisors, counting Assistants acting as agent of the respondent no.1 resorted to corrupt practices as alleged in paragraph 27 and sub-paragraphs thereunder under of the said election petition?

(4) Is the election petitioner entitled to a declaration that the election of the respondent no.1 from the said 216, Sabang Legislative Assembly Constituency void?

(5) Was the Returning Officer of the said Assembly Constituency biased in favour of the respondent no.1?

(6) Is the election petitioner entitled to a declaration that the petitioner has been duly elected to the said constituency having received majority of valid votes?

(7) Is the election petitioner entitled to recounting of votes under the supervision of this court as prayed for in the petition?

(8) What relief, if any, the election petitioner is entitled to?

Findings

Issues settled are answered in the manner following

:-

Issue No.1 - The election petition is maintainable.

Issue No.2 - The respondent no.1, election agent and agents are guilty of corrupt practices.

Issue No.3 - The respondent no.1, the Returning Officer, the Assistant Returning Officer, the Counting Supervisor, Counting Assistant acting as agent of the respondent no.1 and resorted to corrupt practices.

I am not, however, inclined to declare the petitioner as elected or secured majority of votes. There is no question of recounting in the instant case inasmuch as the election is vitiated by corrupt practices since the election is declared void.

So far Issue Nos.2 and 3 are concerned, they are decided in the affirmative. I am of the view that the petitioner cannot be declared as elected.

For all the aforesaid reasons, in my view, it is proved that corrupt practices had been committed under Sections 123(2), 123(4) and 123(7) of the Representation of the People Act, 1951 by the returned candidate and/or his agents and the election of 216 Sabang Legislative Assembly constituency declaring the respondent no.1 should be declared void. (Sic.)

Considering all aspects of the matter I am of the view that corrupt practice under Sections 123(2), 123(4) and 123(7) of the Representation of the People Act, 1951 by the respondent no.1 and/or his agents has been proved in this case. Accordingly it is declared that the election of the respondent no.1 being the returned candidate from 216-Sabang Legislative Assembly Constituency is void.

In addition to the findings arrived at (extracted and reproduced as hereinabove from the operative part of the judgment of the High Court), a few other findings from the body of the judgment, not all but only a few by way of illustration, are extracted and reproduced, so as to demonstrate how, in the light of its own findings, the High Court has failed in discharging its statutory obligation cast by Section 99 of the the RPA resulting in vitiating the judgment. Those findings are:-

. . . . it can be safely concluded from a careful reading of the written statement that (a) Hem Bhattacharya, Dipak Sarkar, Debasis Bose, Nilanjan Chatterjee, Returning Officer, Anindya Kar, Block Development Officer and Assistant Returning Officer, Kushal Mitra, Officer-in-Charge of Sabang Police Station, Pradip Das, Joint BDO, Sabang, Hare Krishna Jana, Sabhapati, Sabang Panchayat Samity; Chitta Bera, election agent of respondent

no.1 and Basudeb Bag. Addl. S.P. Burdwan, all acted as agents of respondent no.1 being the part of the election machinery of CPI(M). It is further proved by admission that the political machinery of CPI(M) actively engaged itself not only to propagate for the respondent no.1 but also ensured win of the respondent no.1 by commission of several corrupt practices mentioned in the petition as agent of respondent no.1.

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It is clearly established from his evidence and also from several exhibits that the machinery of the CPI(M) its nemerous workers, cadres activists and supporters were all working for respondent no.1 as his agents and that the said corrupt practices committed by CPI(M) workers and leaders are no more than the works of the agents of respondent no.1 and for each such corrupt practice and/or act of the agents of respondent no.1 and as such the respondent no.1 is vicariously liable and is guilty of corrupt practices.

Thus, the High Court has clearly recorded a finding of corrupt practices having been committed at the election. The names of persons who have been proved at the trial to have been guilty of commission of the alleged corrupt practices and the nature of such practices has also been recorded. The applicability of sub-clauses (i) & (ii) of clause (a) of sub-section (1) of Section 99 (quoted supra) is clearly attracted. The High Court did not issue any notice to any person found and named in its judgment as having committed corrupt practice.

I.A.No.3 of 2000 has been filed by Shri Basudeb Bag, Superintendent of Police, Bankura, West Bengal and I.A. No.4 of 2000 has been filed by Shri Nilanjan Chatterjee presently Secretary, Women Development Undertaking, Department of Social Welfare, Government of West Bengal who was appointed as returning officer for the election in question by the Election Commission of India. Both the officers have sought for being impleaded as party-respondents or as intervenors in the appeal so as to lay challenge to the findings recorded and adverse remarks and observations made in the judgment under appeal which if not expunged may adversely affect service careers of the applicants. Their grievance is that they were not joined as parties to the election petition, they had no opportunity of hearing as they were never put on notice by the High Court and they have been condemned unheard.

Section 98 of the RPA provides for an order at the conclusion of the trial of an election petition being made by the High Court whereby (a) the election petition may be dismissed, (b) the election of all or any of the returned candidates may be declared to be void, (c) in addition to the preceding relief, the election petitioner or any other candidate may be declared to have been duly elected.

Section 99 provides as under :-

99. Other orders to be made by the High Court. - (1) At the time of making an order under section 98 [the High Court] shall also make an order -

[(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording-

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and]

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that [a person who is not a party to the petition shall not be named] in the order under sub-clause (ii) of clause (a) unless -

(a) he as been given notice to appear before [the High Court] and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by [the High Court] and has given evidence against him, of calling evidence in his defence and of being heard.

[(2) In this section and in section 100, the expression agent has the same meaning as in section 123.]

The ambit and scope of Sections 98 and 99 of the Act was considered in Dr. Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte & Ors., (1996) 1 SCC 130 wherein this court held:- While deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court under Section 99 is required to record the names of all persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of a person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. . . . . The opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to that person of defending

himself if he was not already a party to the petition. In other words the noticee has to be equated with a party to the petition for this purpose and is to be given the same opportunity which he would get if he was made a party to the petition. (Para 49)

Again in Manohar Joshi Vs. Nitin Bhaurao Patil & Anr., (1996) 1 SCC 169, this court laid down the procedure which should be followed by the High Courts while disposing of such an election petition pointing out the fatal effect which non-compliance would have on the judgment of the High Court declaring void an election of the returned candidate. It was held:- Section 98 contemplates the making of an order thereunder in the decision of the High Court rendered at the conclusion of the trial of an election petition. . . . . .There is nothing in Section 98 to permit the High Court to decide the election petition piecemeal and to declare the election of any returned candidate to be void at an intermediate stage of the trial when any part of the trial remains to be concluded. (Para 54)

Sub-section (1) of Section 99 begins with the words At the time of making an order under Section 98 the High Court shall also make an order of the kind mentioned in clauses (a) and (b) therein. . . . . There can be no doubt that the order which can be made under sub-section (1) of Section 99 has, therefore, to be made only at the conclusion of the trial of an election petition in the decision of the High Court made by an order disposing of the election petition in one of the modes prescribed in clauses (a), (b) and (c) of Section 98. This alone is sufficient to indicate that the requirement of Section 99 is to be completed during the trial of the election petition and the final order under Section 99 has to be made in the decision of the High Court rendered under Section 98 at the conclusion of the trial of the election petition. (Para 55)

The High Court cannot make an order under Section 98 recording a finding of proof of corrupt practice against the returned candidate alone and on that basis declare the election of the returned candidate to be void and then proceed to comply with the requirement of Section 99 in the manner stated therein with a view to decide at a later stage whether any other person also is guilty of that corrupt practice for the purpose of naming him then under Section 99 of the R.P. Act. The High Court has no option in the matter to decide whether it will proceed under Section 99 against the other persons alleged to be guilty of that corrupt practice along with the returned candidate inasmuch as the requirement of Section 99 is mandatory since the finding recorded by the High Court requires it to name all persons proved at the trial to have been guilty of the corrupt practice. The expression the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice in sub-clause (ii) of clause

(a) of sub-section (1) of Section 99 clearly provides for such proof being required at the trial which means the trial of an election petition mentioned in Section 98, at the conclusion of which alone the order contemplated under Section 98 can be made. (Para 57)

Therefore, the election of the appellant in the present case could not be declared void by making an order under Section 98 on the ground contained in Section 100(1)(b) of the R.P. Act without prior compliance of Section 99. Absence of notice under Section 99 of the R.P. Act vitiates the final order made under Section 98 by the High Court declaring the election to be void. (Para 60)

[emphasis supplied]

In Chandrakanta Goyal Vs. Sohan Singh Jodh Singh Kohli, (1996) 1 SCC 378, this court again emphasised the procedure to be followed by the Supreme Court when non-compliance by the High Court with Section 99 was brought to its notice in appeal, in these words:- Ordinarily in such a situation after setting aside the impugned judgment the matter is to be remitted to the High Court for deciding the election petition afresh after complying with the requirements of Section 99 of the Act by giving notice to the makers of the speeches and holding the requisite enquiry.

The same view has been reiterated in Moreshwar Save Vs. Dwarkadas Yashwantrao Pathrikar, (1996) 1 SCC 394, wherein this court has pointed out an alternative to be followed by the Supreme Court avoiding the necessity to remand by deferring the decision in appeal and in the meantime issuing notice under Section 99 to those persons and after the requisite enquiry by the High Court, its finding in respect of those persons being called for, deciding the case against the candidate and the noticees at one time while deciding the appeal in the Supreme Court and then opined that in the case such second course did not appear to be appropriate one.

All the decisions of this Court referred to hereinbefore are 3- Judges Bench decisions. A 2-Judges Bench has also taken the same view in Dr. Vimal (Mrs.) Vs. Bhaguji & Ors. (1996) 9 SCC 351.

We too are of the opinion that the fatal defect as noticed by us in the present case vitiates the judgment under appeal and an appropriate course, in the facts and circumstances of the case, would be to set aside the judgment under appeal and remand the case to the High Court for deciding the election petition afresh after compliance with the provisions of Section 99 of R.P. Act. In view of the above said remand, I.A. No.3 and 4 are rendered redundant. The applicants in the two applications seeking

intervention before us shall obviously be now noticed by the High Court and they would have a right of hearing in accordance with Section 99 of the RPA before the High Court.

Accordingly the appeal is allowed. The judgment under appeal is set aside. The election petition is remanded to the High Court for deciding afresh after compliance with Section 99 of the RPA and in accordance with law. No order as to costs in this appeal.

With the inevitable remand in the terms as abovesaid, the exercise of appellate jurisdiction of ours under Section 116-A of the RPA comes to an end. There are a few aspects of the case which have caused us concern and before parting with the case we would like to place on record our views in that regard. The manner in which the election petition has been tried defeats the very purpose of entrusting jurisdiction to try an election petition to the High Court by Representation of People (Amendment) Act, 1966. Out of severals, we propose to deal with only two aspects: (i) framing of issues, and (ii) recording of evidence.

In para 11, sub-paragraphs (a) to (q) (in all 17 sub-paragraphs) of the election petition there are about 11 corrupt practices, all of serious nature, alleged by the petitioner. On all these corrupt practices, one sweeping issue was framed __ issue No.2, reproduced in the earlier part of this judgment. So is the case with regard to the incidents alleged in sub-paragraphs (i) to (xii) of para 27 of the election petition whereon the petitioner sought to build up a case of corrupt practice having been committed by the appellant by obtaining or procuring or abetting or attempting to obtain or procure the services from the Gazetted officers and persons in the service of Government in committing corrupt practice by improper reception of invalid votes and, refusal or rejection of valid votes materially affecting the result of election. As regards various instances of corrupt practices as alleged in these sub-paragraphs also an omnibus issue no.3, has been framed.

An election petition is like a civil trial. The stage of framing the issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the court reflecting the pleadings of the parties pinpoints into issues the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of Order XIV of the Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by

one party and denied by other should form the subject of a distinct issue. An obligation is cast on the court to read the plaint/petition and the written statement/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the court may at once pronounce the judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies, not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided.

In the case at hand, each one of the corrupt practices alleged by the petitioner and denied by the defendant, should have formed the subject matter of a distinct issue sufficiently expressive of the material proposition of fact and of law arising from the pleadings. Failure to do so has resulted in an utter confusion prevailing throughout the trial and also in the judgment of the High Court as was demonstrated by the learned counsel for the appellant during the hearing of the appeal attacking the findings arrived at by High Court. On some of the points in dispute the High Court has observed that no proof of the said fact (alleged in the petition) was necessary so far as the petitioner is concerned because there was no specific denial of the allegations made or as there was no answer by the defendant to the allegations of the petitioner on points of substance. The contradiction with which the trial and the judgment suffer is writ large. If a material proposition of fact or law alleged in the petition was not denied or was not specifically denied in the written statement within the meaning of Rule 5 of Order 8 of C.P.C. and such tenor of the written statement had persuaded the learned designated Election Judge in forming an opinion (belatedly while writing the judgment) that there was an admission by necessary implication for want of denial or specific denial then there was no need of framing an issue and there was no need for recording of evidence on those issues. Valuable

time of the court would have been saved from being wasted in recording evidence on such averments in pleadings as were not in issue for want of traverse, if it was so!

However, in the facts of the present case, we are of the opinion that the defective framing of the issues though material, has not vitiated the trial inasmuch as we are satisfied that the parties have gone to the trial with full knowledge of the allegations and counter allegations made in the pleadings. None of the parties has complained of prejudice. None had made a prayer to the High Court, before going for trial, for amending or striking down any of the issues. We need say no more about the issues.

Now as to the recording of evidence. During the hearing of appeal the learned counsel for the parties took us through several statements of witnesses and read out many a passages while assailing or supporting the findings arrived at by the learned Designated Election Judge. A few aspects as to the examination of the witnesses and the manner of recording statements need to be adverted to. The record of evidence shows :

1. The statements of the witnesses are recorded not in narrative but in question-answer form. During the course of hearing in appeal we asked the learned counsel for the parties about this feature. We were told that such is the practice prevalent on the Original Side of the Calcutta High Court. 2. The witnesses are named but not numbered. 3. Some of the witnesses are asked a few preliminary questions the relevance whereof we have not been able to appreciate. Many a witness has been asked whether he was appearing in the Court on sub-poena and then asked to produce the sub-poena in the Court for perusal of the presiding judge. 4. A host of such questions have been asked, both in examination- in-chief and in cross-examination, as are not permitted by the provisions of the Evidence Act. To wit, witnesses (other than the parties) have been confronted with the contents of the election petition or the written statement and asked to make comments or offer explanation as to passages therefrom, overlooking that Section 145 of the Evidence Act permits a witness being cross-examined as to previous statement made by him and not by a third person. How can a witness be confronted or asked to explain the contents of or averments made in writing or document to which he is not a party? Same or similar questions have been allowed to be asked again and again. At places the witnesses have been grilled and compelled to answer embarrassing questions.

The statements of 18 witnesses examined by the parties have been placed before us in 18 volumes some of which run into about a hundred or even hundreds of pages each. We are told that 120 days were consumed in recording the evidence. The learned counsel were agreeable that if only the conducting of examination-in-chief and cross-examination would have been effectively controlled, the recording of

evidence could have been concluded in less than half of the time than what has been consumed and the bulk of the evidence could have been reduced to one-third or one-fourth of what it is. The reason behind giving such a long rope in examining and cross examining the witnesses, surprisingly enough what we were told is that in the trial of an election petition, the atmosphere is surcharged, conducting counsel get over-zealous and it is not considered advisable by the Court to interrupt the conducting of examination and cross-examination of the witnesses by the counsel. We are not amused at all. Curtailing delays is essential to expeditious disposal of the cases. Speedy disposal is the cry of the day. Courts cannot act as silent spectators when evidence is being recorded. Judges must have full control over the file and effectively conduct proceedings keeping in view that no litigant has any such right as to waste the precious time of the court.

In almost all the courts in the country holding trials in civil and criminal cases, the oral examination of the witnesses though conducted in question-answer form by the counsel, is generally recorded in narrative by the presiding judges. The court has power to regulate the manner of recording evidence. In spite of the manner of recording evidence being in narrative the presiding judge can wherever necessary direct a particular question or group of questions to be recorded in question-answer form. Wherever necessary a note as to demeanour of a witness can always be made by the presiding judge before whom the witness is being examined and such note on demeanour made in the presence of the witness and counsel for both the parties would be more useful to the trial court itself while hearing arguments of the counsel for the parties at the end of the trial and also for the appellate court rather than a mere record of the statement in question-answer form. Incidentally, and interestingly, it may be noticed that when the Code of Criminal Procedure, 1973 was enacted, repealing the 1898 Code, section 276 was introduced providing for evidence to be ordinarily taken down in the form of question and answer but vesting a discretion in the presiding judge to record the evidence in the form of a narrative. Within three years the Law Commission of India found this system causing delay in trial and hence not workable and on its recommendation, by the Code of Criminal Procedure (Amendment) Act (45 of 1978), section 276 was amended so as to provide that in trial before courts of session evidence shall ordinarily be taken down in the form of a narrative but the presiding judge may in his discretion take down or cause to be taken down any part of such evidence in the form of question and answer. Thus recording of evidence in narrative form is the rule. Such mode of recording evidence is statutorily provided for session trials where life and liberty of persons is at stake. We fail to understand why the recording of evidence in narrative cannot be a mode to be followed in the trial of election petitions. Assigning serial numbers to the witnesses on their depositions such as PW1 (and so on) for petitioners witnesses and RW1 or DW1

(and so on) for the respondents or defendants witnesses would provide a convenient mode of referring to the witnesses during the course of hearing and while writing the judgment. We hope Calcutta High Court would consider suitably amending its rules or practice as applicable to Original Side and/or to trial of election petitions.

It is not necessary to ask each witness whether he is appearing on sub-poena and to have the sub-poena produced for the perusal of the Court. Whether a witness is on sub-poena or not is a matter of record known to the parties, the court and the witness. If a doubt or dispute may arise reference can be had to the record. Such questions, asked in routine, add only to the length of the deposition and are avoidable.

An election petition is not a dispute between the petitioner and respondent merely; the fate of the constituency is on trial. A Judge presiding over the trial of an election petition, and any trial for the matter of that, needs to effectively control examination, cross-examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. Power to disallow questions should be effectively exercised by reference to Sections 146, 148, 150, 151 and 152 of the Evidence Act by excluding improper and impermissble questions. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross- examiner must not be allowed to bully or take unfair advantage of the witness. Though the trials in India are adversarial, the power vesting in the court to ask any question to a witness at any time in the interest of justice gives the trial a little touch of its being inquisitorial. Witnesses attend the court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the judge who has to see that they feel confident in the court. In Ram Chander Vs. State of Haryana AIR 1981 SC 1036 this Court observed, ... to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest. . . . . An alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way as to gain success for their respective clients is understandable but the obligation of the presiding judge to hold the proceedings so as to achieve the dual objective __ search for truth and delivering justice expeditiously __ cannot be subdued. Howsoever sensitive the subject matter of trial may be; the court room is no place of play for passions, emotions and surcharged enthusiasm.