
(1986) 04 CAL CK 0043
In the Calcutta High Court
Case No : A.O. D. No. 620-21 of 1986

Arunabha Bhattacharjee

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-04-1986

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 90 CWN 1158

Hon'ble Judges : Susanta Chatterjee, J; Mukherjee, J

Bench : Division Bench

Advocate : D. Pal, Asok Kumar Ganguly and Gautam Dutta, for the Appellant; A.P. Chatterjee, Dipak Banerjee and S.K. Chatterjee, for the Respondent

Judgement

Mookerjee, J.—These two appeals have been preferred against the judgment dated February 18 1985 passed by the Hon"ble Mr. Justice P. K. Majumdar dismissing the writ applications filed by the appellants challenging, inter-alia, the proceedings of the Court of Kalyani University for formation of the panel for appointment of Vice-Chancellor of the said University in terms of sub-section(1) section 9 of the Kalyani University Act, 1981. On 17th August, 1985 the Registrar, Kalyani University had issued notices for holding of the first meeting of the Court of the Kalyani University on 31st August, 1985 to consider the appointment of the Vice-Chancellor of the said University according to the provisions of section 9(1) of the Kalyani University Act, 1981. On 31st August, 1985 the said meeting of the Court of Kalyani University was held. There being no unanimous recommendation and for election to the panel the following four were proposed who polled the number of first preference votes mentioned below against their names :

1.

S. Mukherjee

- 1400 (first preference) -

2.

J. Ghosh

- 600 (" ") + 252 (by transfer at second count) = 852

3.

N. G. Som

- 500 (" ") + 252

(by transfer + 40 a: the second count) (at transfer
at third count) = 800

4.

G. K. Manna

- 700 (") + 84 (") = 784

2. Dr. Sitangshu Mukherjee (after first count), Dr. J. Ghosh (after second count) and Prof. N. G. Som (after third count) were elected to the panel of three out of which the Chancellor of the said University in consultation with the Minister was to appoint the Vice-chancellor of Kalyani University. On August 30, 1985, i.e., one day before the holding of the aforesaid meeting of the Court of the University, Ajit Kumar Pramanik and Amitabha Banerjee had moved the first writ application. Hon'ble Mr. Justice Umesh Chandra Banerjee had directed service of notices on respondents and made an interim order to the effect that the meeting of the court might be held on 31st August, 1985 but no effect was to be given to the resolution passed at the said meeting. On September 5 1985 Arunabha Bhattacharjee moved the second writ application challenging, inter-alia, the election to the panel for appointment of the Vice-chancellor of Kalyani University held on 31st August, 1985. The learned trial judge issued notices and made interim orders in terms of the order that had been made in the earlier writ application of Ajit Kumar Pramanik and another. As already stated, P. K. Majumdar, J. has dismissed both the writ applications.

3. The court of the Kalyani University, u/s 17 of the said University Act, 1981, is to consist of 47 persons. By his notice dated 17th August, 1985 the Registrar of the said University had invited 41 persons to attend the Court's first meeting which was to be held on 31st August, 1985 for election to the panel for appointment of the Vice-Chancellor. As early as on 21st September, 1983 polling of votes took place for election to the Court of the two persons from the registered graduates of Kalyani University. There were five candidates including Ajit Kumar Pramanik from registered graduates constituency. On 23rd September 1983, the Registrar of the University as the presiding and Returning Officer counted the votes as a result of which it was found that Ajit Kumar

Pramanik had obtained 249 votes. Nripendra Kumar De and Provash Chandra Manna each polled 243 votes. Purnachandra De obtained 240 votes. Md. Mahasin, the remaining candidate got 14 votes. According to the Returning Officer, he had cancelled three ballot papers and ten ballot papers were rejected on disputed validity. Out of 512 votes cast, valid ballot papers were 499 in number. After completing the counting of votes, the Registrar as the Returning Officer did not declare as elected Ajit Kumar Pramanik, in whose favour highest number of votes had been cast. He did not draw lot in respect of Nripendra Nath De and Pravash Chandra Manna, who had secured equal number of votes. The Registrar as the Returning Officer and the Presiding Officer upon the sheet for Accounts of Election had recorded. "In view of the disputed votes and votes of doubtful validity, I decided to refer the entire matter to the election tribunal."

4. The Registrar of the Kalyani University had treated as vacant the two seats in the court from the Registered Graduates constituency. As a result thereof the two representatives from the Registered Graduates" constituency could not participate in the first meeting of the court held on 31st August, 1985 for electing the panel for appointment of the Vice-Chancellor of the Kalyani University.

5. In January, 1985 the seat of one representative of the Research Scholars and Research Fellows of the University in the court fell vacant But the election for filling up the said vacancy was not held prior to 31st August, 1985 when the Court elected the panel u/s 9(1) of the Kalyani University Act, 1981. On 10th September, 1985 the said election took place and Amitabha Banerjee, the appellant No. 2 in F.M.A.T. No. 621 of 1986 was elected to the Court from the Research Scholars and Research Follows.

6. The appellants have submitted that the court's meeting held on 31st August, 1985 was invalid and the election of the panel purported to have been elected u/s 9(1) of the Kalyani University Act, 1981 was null and void. The Vice-Chancellor and the Registrar illegally, wrongfully and malafide had excluded Ajit Kumar Pramanik who had polled highest number of votes, from amongst the candidates from the Registered Graduates Constituency his participation in the said meeting would have materially affected the results of the election to the panel u/s 9(1) of the said University Act of 1981. On 31st August, 1985 the Constitution of the Court was not complete and therefore the holding of its first meeting on the said date was void.

7. we propose to consider first whether the Returning Officer had acted illegally or malafide in not declaring the results of the election from the Registered Graduates Constituency on the ground he proposed to make reference to the Election Tribunal appointed/under section 38 of the Kalyani University Act, 1981. The appellants had denied that the Registrar of the University as the Returning Officer had in fact ever made reference to the Election Tribunal of any election dispute regarding the said election.

8. In our view, the Registrar of the University had acted illegally and without any lawful authority by not declaring the results of the said election from the Registered Graduate" Constituency. According to the Presiding Officer and Returning Officer himself, he had counted the votes polled by each of the candidates from the said constituency. He had cancelled three ballot papers and found further ballot papers as invalid. u/s 38(1) of the said University Act, even assuming that the Registrar was still entitled to refer the question regarding the rejected and disputed ballot papers to the Election Tribunal there was no provision either in section 38 or elsewhere in the said Act conferring power upon the Returning and Presiding Officer after counting of votes to withhold declaration of the results of an election. In fact u/s 38 of the said Act the Election Tribunal itself has not been vested with any express power to grant stay of declaration of results after polling and completion of counting of votes. On behalf of the respondents it has been submitted that the Registrar as the Presiding Officer and the Returning Officer for the election from the Registered Graduates Constituency himself was not entitled to refer to the Election Tribunal the said question of disputed ballot papers because he was bound to declare as elected those who had obtained highest number of votes. At the date of the polling of the election from the said constituency no Rules u/s 51 of the Kalyani University Act has been framed. The Kalyani University Election Tribunal Rules framed u/s 51 if the said Act came into force with effect from 24th July, 1984. The language used in Rule 3 of the said Rules is substantially the same with sub-section (1) of section 38 of the said University Act which provides "any question to be referred to Election Tribunal under foregoing Rule shall be referred by presentation of a petition addressed to the Tribunal and filed in the office of the Secretary to the Tribunal." According to Rule 5, a petition may be presented by any candidate or a person who is eligible for nomination or by an elector. The Rules do not provide for any reference by the Presiding Officer and the the Returning Officer in the manner claimed by the respondents. The respondents however have pointed out that the said Tribunal Rules are directory.

9. We may also refer to the provisions of Chapter III of the University Statutes relating to the constitution, power and duties of the Authorities of the Kalyani University. Statute 8(24) clauses (a) to (f) deal with procedure for counting of votes. Under clause (f) without prejudice to the powers and jurisdiction of the Election Tribunal, the decision of the Returning Officer as to the validity of a ballot paper or a vote shall be final. The said provision clearly indicates that at the time of counting of votes the Returning Officer is to decide the validity of a ballot paper when the same is challenged before him. His decision is final subject to the decision by the Election Tribunal. Under Statute 8(28) the Returning Officer is required to declare forthwith the candidate in whose favour highest number of valid votes have been cast to be duly elected. Under clause (b) of Rule 8(25) the Returning Officer is to keep in sealed packed valid and invalid ballot papers until disputes regarding election arc finally disposed of. In view of these provisions in the Statute, the Registrar of the University had clearly acted

illegally by not declaring as elected the candidates in whose favour highest number of valid votes has been cast by the Registered Graduates.

10. According to sub-section (3) of Section 36 of the Kalyani University Act, 1981 vacancy arising by efflux of time in the seats of elected members of any authority or body shall be filled by election to be held not later than six months or such extended period as the Chancellor may by any order made in this behalf specify, so that the aggregate period shall not exceed one year from the date on which the vacancy arises. In the instant case vacancy in the membership of the Court from amongst the research scholars and research scholars fellows occurred in January 1985. Vacancy was not filled up within six months. We are not aware whether the Chancellor had extended the period. But the said election of members from amongst research scholars and research fellows was held on 10th September, 1985, i.e. after the court's meeting dated 31st August 1985, for formation of the panel of three names for appointment of the Vice Chancellor. The respondents did not advance any reason which made holding of the election from research fellows constituency on any date earlier than 31st August, 1985 not feasible.

11. The respondents have strenuously submitted that in view of Section 37 of the Kalyani University Act, 1981 the University Court's proceedings relating to election to the panel for appointment of Vice Chancellor could not be invalidated by reason of not holding election of all persons from amongst the registered graduates and of one member from amongst the research scholars and research fellows of the University. Section 37 of the said Act laid down :

No Act or proceeding of the University or of any authority or body of the University shall be deemed to be invalid merely by reason of the existence of a vacancy or vacancies among its members or the invalidity of the election of any of the members.

Explanation - For the avoidance of doubt it is hereby declared that where the office of the member of any authority or body of the University cannot be filled up, when such authority or body is constituted for the first time, on account of any election or appointment not being for any reason feasible, there shall be deemed to be a vacancy in the office of such member until such election takes place or such appointment is made.

12. Section 37 of the Act obviously would not apply in case of malafide acts on the part of the authorities when deliberately and for malafide reason some of the seats in the Court are kept vacant. Section 37 of the said Act in that event cannot be relied upon for upholding the proceedings. The explanation to Section 37 has made the said validating provision applicable at the time the different authorities and bodies Of the University were to be constituted for the first time. Said explanation is not, however, wide enough to cure all illegalities and infirmities in the matter of the Constitution of the University. Section 37 would be attracted when the office of any member of any authority or body of the

University cannot be filled upon account of any election or appointment for any reason not being feasible. The expression "not feasible" in the context means inapplicable, impossible or impracticable. In other words, when holding of the election of a member is not possible or practicable, then notwithstanding such vacancy the remaining members of the said authority or body may lawfully function.

13. The validating provisions contained in Section 37 of the said Act cannot be stretched beyond its legitimate object of curing irregularities in the acts of the authorities of the University which may otherwise arise by reason of existence of a vacancy which was not feasible to fill up. When there was no impediment either in the holding of an election or in not declaring the results even after votes are polled and they are counted, the respondents by relying upon Section 37 cannot be allowed to claim that in spite of not deliberately filling up the vacancy the authority or authorities concerned had been validly constituted and were entitled to discharge their functions under the Act. After all, the explanation to Section 37 contains a deeming provision and, therefore application of the legal fiction contained in the said explanation cannot be used for a purpose which is not legitimate. The explanation to Section 37 by legal fiction makes Section 37 applicable in case any election or appointment for any reason is not feasible. When the filling up of the vacancy was feasible but is not done, explanation to Section 37 of the Kalyani University Act, 1981 would have no manner of application.

14. We are unable to subscribe to the view that exercising powers under Article 226 of the Constitution this court cannot decide whether in fact any reason existed which made holding of election from particular category not feasible. In the present case, we are not really concerned with the sufficiency of the reason for not declaring the results of the election from the registered graduates constituency even after polling and counting of votes took place. The real question is whether the Returning Officer for the said election had any authority or power to postpone declaration of results on the ground that he proposed to make a reference to the Election Tribunal u/s 38 of the said Act. Determination of the said question does not really involve assessment or appreciation of facts. The court is required to decide whether under the provisions of the said Act and the Statutes framed thereunder relating to the procedure for holding of the election, the Returning Officer had any jurisdiction to stop declaration of results of the said election because he proposed to make reference to the Election Tribunal. The Returning Officer failed to discharge his duty by not declaring the results after he had counted the votes of candidates from the register : graduates constituency. Therefore the respondents cannot rely upon Section 37 of the Kalyani University Act to justify the validity of the election of the panel for appointment of the Vice Chancellor after exclusion of two persons including the appellant, Ajit Kumar Pramanik, from participating in the said proceedings. For the reasons already mentioned in our judgment, there was no impediment in the way of completion of the election from the said constituency by declaring the results and on the

other hand the Returning Officer was bound to make such declaration. Section 37 of the said Act would be inapplicable in the instant case.

15. We are not prepared to throw out the cases in lamina on the ground of the alleged delay on the part of the petitioner no. 1. In the first place, materials placed before us indicate that on the very date of the ejection immediately after counting, Ajit Kumar Pramanik made a written complaint to the Registrar who was the Returning Officer and had requested him to forthwith publish the results. Although according to the respondents, the Returning Officer did not refer the said election to the Tribunal according to letter dated 11th September, 1985 of Sri S. K. Mukherjee, Election Tribunal, no records of the election were lying with him. Mr. Mukherjee in his said letter to the Registrar had inter alia stated that the petitioners were quite right in saying that the petitioner no. 1 was not aware that the case relating to election of registered graduates and constituency had been referred to the Election Tribunal. He had further stated it is therefore strange that although the election tribunal was at no point concerned with the election of registered graduates" constituency, the petitioner have made the election tribunal a party to the writ proceeding. Mr. Mukherjee thus has categorically stated that the said dispute was never referred to the Election Tribunal. The respondents produced before this court the office notes containing reference to some of the provisions of the Kalyani University Act and of the Statutes relating to election matters. Incidentally, the said note itself indicates that the ballot papers in dispute could have been cancelled by the Returning Officer directly in terras of sub-clause (vi) of clause (6) of paragraph 24 of the statute 8 (Election). The said note is dated as late as 6th February, 1984, suggesting that the Registrar might examine the draft put up with the note and submit the same to the Election Tribunal if necessary under the knowledge of the Vice Chancellor. Thus, the note itself belied the claim that on 21st September, 1983 the Returning Officer had made a reference to the Election Tribunal. The said note also contained an endorsement dated 30th June 1984 by the Registrar to the effect submitted to the election tribunal for consideration and necessary action¹. On the same date there was another endorsement with the note regarding dispute relating to election from registered adulates" constituency had been discussed with the Election Tribunal at his residence by the Registrar and the Returning Officer. The contents were heard by the Election Tribunal and the file was now being returned to the Registrar. On 5th September, 1985 the Registrar has noted, Received back the file from the office of the Election Tribunal today, 5.9.85 at an incomprehensibly late stage. The Registrar further recorded that the Secretary of the Election Tribunal had expressed his difficulty in commencing proceedings in the absence of election tribunal rules. He promised to finalise the rules and thereafter to start the proceedings. According to the Registrar, the Rules had been finalised and it was not quite understood why the file should be sent back to him. On 12th September, 1985 the Registrar acknowledged receipt of the aforesaid letter of the Tribunal dated 11th September, 1985 and purported to write that it was not correct that the concerned dispute was never referred to the

Election Tribunal, was at no point of time concerned with the dispute. He again directed for placing the file before the Election Tribunal.

16. Thus while according to the Election Tribunal the dispute regarding graduates' constituency had been never referred to it, according to the Registrar there was some discussion with the Election Tribunal and thereafter the file was returned on 30th June, 1984 but received by the Registrar on 5th September, 1985. Even if we had accepted the correctness of the no-tings made by the Registrar, we are bound to hold that formally the Returning Officer did not refer to the Tribunal any dispute regarding election from the registered graduates constituency. No formal petition was filed. The Returning Officer did not also indicate the precise dispute which required adjudication by the Election Tribunal. We have already referred to the notes which mentioned Statute 8 (Election), the same made it incumbent for the Returning Officer himself to decide validity or otherwise of the ballot papers for the election subject to the decision by the Election Tribunal. He was bound under the said Statute to himself decide about the validity of the election. Further neither the Act nor the rules have given any authority to the Returning Officer to postpone the declaration of results. By not declaring the results the Returning Officer had purported to grant an interim stay although he possessed no such right to grant interim orders. Therefore, in any view of the matter, the Returning Officer failed to perform his duty by not completing the election and declaring the results from the registered graduates constituency. Even if an election dispute had been really pending, there could have been no legal bar to members elected from the registered graduates' constituency from participating in the proceedings of the University including those for the formation of the panel for appointment of the Vice Chancellor of the University.

17. Mr. Arun Prokash Chatterjee, learned Standing Counsel appearing on behalf of the University, submitted that even assuming that the Registrar as the Returning Officer did not act in accordance with law in not publishing the results of the election from the Registered Graduates' constituency, same was not a valid ground for holding as invalid the election to the panel for appointment of the Vice-Chancellor. Mr. Chatterjee relied upon a number of reported decisions under the Representation of Peoples Acts, 1950 and 1951 which have laid down that the defect in the electoral roll were not grounds for setting aside an election unless the same amounted to corrupt practice (vide *Bhabani Prosad vs. Jagadish Narain* 16 Election Law Reports (1958) 143 etc.) As present advised, we are unable to accept the extreme contention that defects in the electoral roll could never be a ground for setting aside an election. Each particular election law lays down the grounds upon which an election may be set aside. In a particular election law, defects in the electoral roll which materially affect results of the election held on the basis of such roll might be a ground for challenging the election. The scheme of the Representation of Peoples Acts, 1950 and 1951 cannot be compared with the provisions contained in the Kalyani University Act, 1981 for election to the panel for appointment of the Vice-Chancellor. Secondly,

the appellants challenge the election to the said panel prepared u/s 9(1) on the ground that the court was not validly constituted in the absence of persons elected from registered graduates" constituency. Ajit Kumar Pramanik complained that he had been deprived of his right to participate in the ""first meeting of the court by reason of malafide on the part of the Vice-Chancellor and the Registrar of the University. We have held that the Registrar as the Returning Officer had acted without lawful authority by withholding declaration of results from v the registered graduates" constituency. The same amounted to at least legal malafide. It is not disputed that if the persons elected from registered graduates constituency were allowed to participate the pattern of votes polled would have been different and the panel might have been differently constituted. In this case there was no unanimous choice and therefore it is not relevant that even if by reason of persons elected from registered graduates" constituency casting their votes, Sri G. K. Manna would have polled larger number of votes, still Prof. S. Mukherjee would have remained in the said panel. In the absence of unanimity, the panel u/s 9(1) must consist of three persons from amongst whom the Chancellor, in consultation with the Minister was to appoint the Vice-Chancellor. If one out of the three included in the panel was ineligible, the formation of the entire panel must be held to be bad and in breach of section 9(1) of the Kalyani University Act, 1981.

18. The Chancellor u/s 9(1) of the Kalyani University Act, 1981 is not bound to appoint as the Vice-Chancellor, the one who obtains the largest number of votes among the three elected to the panel. Therefore, when there is no unanimous recommendation by the court, the election of all the three persons to the panel ought to be valid, so that only eligible persons are considered by the Chancellor. We are unable to agree that only Sri G. K. Manna had cause of action for filing the present writ petition. The appellants also had cause of action for challenging the legality of the court's meeting dated 31st August, 1985 and the panel formed at this meeting.

19. The appellants have submitted that in view of the provisions of sub-section (1) of section 55 of the Kalyani University Act, 1981, the Heads of Departments of the University, University Professors, University Readers and University Lecturers and Teachers of the University appointed after the date of the appointment of the first Vice-Chancellor of the University were not eligible to sit as members of the University Court, the Executive Council, Faculty Council etc. According to the petitioners only those who are before the date of appointment of the first Vice-Chancellor could participate in the first meeting of the Board for election to the panel for appointment of the Vice-Chancellor. We are not prepared to allow the appellants to argue the above point relating to sub-section (10) of section 55 of the said Act because in their two writ petitions they have not given any particulars of the persons who might have been appointed to their respective posts as professors, readers, lecturers and teachers after the appointment of the Vice-Chancellor of the University. Persons whose eligibility might be challenged have not also been made parties. We understand that the Chancellor of the

University has appointed Sri Sitanghu Mukherjee as the Vice-Chancellor of the University. The said appointment is obviously subject to the decision in these appeals and since we have held that the panel u/s 9(1) of the Kalyani University act, 1981, was not validly constituted, the said panel and the appointment made therefrom must be struck down.

20. While the appeals were being heard, the appellants in. F.M.A.T. No. 62 of 1986 made an application for amendment of the writ petitioner by insertion of a prayer to the affect that the respondents be commanded to declare the results of the elections from the registered graduates constituency. The respondents opposed the said prayer. In our view, in order to completely and effectually determine the questions in controversy between the parties, the said prayer ought to be allowed. Same would not result in making any new case to the prejudice of the respondents. Secondly, there are already averments in the writ petition regarding the illegality on the part of the returning Officer in withholding the declaration of results from the registered graduates" constituency. Therefore, the said application ought to be allowed. We accordingly allow the two appeals in part, set aside the judgment of the trial court dismissing the writ petitions. We allow in part the two application, quash the notices issued by the Registrar for holding the first meeting of the Court of the University for election to the panel for appointment of the Vice-Chancellor. The proceedings of the meeting of the Court dated 31th August, 1985 including election to the panel prepared under section. 9(1) of the Act is quashed and set aside. The respondents are commanded not to give effect, or further effect to the said panel. Appointment if any made from the said panel is also quashed. The respondents are commanded to declare the results of the election from the registered graduates" constituency subject to the decision in election dispute, " if any, which may be filed and referred to the Election Tribunal. The respondents are further commanded to hold a fresh meeting of the Court of the Kalyani University for election to the panel for appointment of the Vice-Chancellor in terms of section 9(1) of the Kalyani University Act, 1981. There will be no order as to costs.

Susanta Chatterjee, J.

I agree.