

(1963) 07 GAU CK 0009
In the Gauhati High Court
Case No : Civil Rule No. 268 of 1062

Bibhuti Bhusan Das Gupta

APPELLANT

Vs

Bidya Dhar Sarma Barua and Others

RESPONDENT

Date of Decision : 04-07-1963

Acts Referred:

Assam Municipal Act, 1956 — Section 10, 15, 16, 16(3), 17(1)
Assam Municipal Rules, 1956 — Rule 104A, 23, 26
Constitution of India, 1950 — Article 220, 226
Limitation Act, 1963 — Section 12, 4, 9
Representation of the People Act, 1951 — Section 100, 100(2), 100(3)

Citation : (1963) 07 GAU CK 0009

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : P. Chaudhury and K. Lahiri, for the Appellant; G.K. Talukdar, Jr. Govt. Advocate, J.C. Medhi and S.N. Bhuyan, for the Respondent

Judgement

G. Mehrotra, C.J.—This Rule arises out of an application under Article 220 of the Constitution of India In the following circumstances. The applicant before us, Bibhuti Bhusan Das Gupta and opposite party No. 2 Satish Chandra Kar, were two candidates for the seat of the Commissioner from Ward No. VII of Nowgong Municipality and they both filed nomination papers. On the date of scrutiny, viz., the 26th of March, 1962 the Returning Officer rejected the nomination paper of Sri Satish Chandra Kar on applicant's objection and accepted the nomination papers of Sri Bibhuti Bhusan Das Gupta. After the rejection of opposite party No. 2's nomination only the Petitioner remained in the field and he should have been declared elected. The nomination paper of the Petitioner, as I have already pointed out, was accepted by the Returning Officer while the nomination paper of Sri Satish Chandra Kar was rejected. After the Returning Officer passed the order the present Respondent before us, Satish Chandra Kar filed a written objection to the nomination of Sri Bibhuti Bhusan Das Gupta (hereinafter called the applicant). That was rejected by the Returning Officer on the ground that it was filed after the nomination paper had been accepted and appropriate orders

passed on the nomination paper.

The Respondent Satis Chandra Kar then went up in appeal to the District Judge under proviso (c) to Section 10 of the Assam Municipal Act, 1956 (Assam Act XV of 1957) (hereinafter called the Act). In the appeal he challenged the order of the Returning Officer. In so far as the Returning Officer had held that Satish Chandra Kar was disqualified, the District Judge confirmed his findings and held that the nomination paper of Satish Chandra Kar was rightly rejected by the Returning Officer. In the appeal a further point was raised that the applicant was disqualified to be elected as a Commissioner u/s 15(viii) of the Act inasmuch as he was in arrear for more than three months on the date of submission of nomination paper in respect of municipal dues of certain holding of which he was an occupant.

The District Judge upheld this contention and on examination of the evidence before him held that Bibhuti Bhusan Das Gupta was in arrears and thus disqualified to be elected as a member u/s 15(viii) of the Act. The District Judge held that the applicant's nomination paper was improperly accepted. He allowed the appeal and set aside the order of the Returning Officer accepting the nomination of the applicant and directed the officer to call for fresh nomination papers and thereafter to hold the election. It is against this order of the District Judge that the present petition has been filed.

2. The Petitioner has raised a number of grounds. He has contended that the applicant was not disqualified inasmuch as he was not in arrears of the dues of the Municipal Board as no demand was made against him by the Municipal Board and further that he was not able to pay the Municipal Board for the taxes as the occupier of the premises. It was further contended that as no objection was raised to the nomination of the applicant on the ground that he was in arrears and was thus disqualified u/s 15(viii) no appeal lay against the order of the Returning Officer accepting his nomination paper. In effect the argument is that in such circumstance it cannot be said that the Returning Officer committed any mistake in accepting the nomination paper of the applicant. The District Judge thus was not competent to entertain an appeal on that ground and take fresh evidence and decide the matter. If the contention of the applicant is upheld that no appeal lay in those circumstances to the District Judge, the appeal in so far as it was against the decision of the Returning Officer accepting the nomination of the applicant was without jurisdiction and this Court under Article 226 of the Constitution will set aside that order.

In order to appreciate the points raised the provisions of the Act will have to be set out. Section 15(viii) of the Act provides as follows:

No person shall be eligible for election as Commissioner of a Municipal Board if such person is in arrear for more than three months on the date of submission of nomination paper or any dues to the municipality including the dues in respect of the holding of which he is a resident or occupant.

Section 16 of the Act provides as follows:

If the validity of an election of a Commissioner Is brought in question by an unsuccessful candidate or person qualified to vote at the election to which such question refers, such person may, at any time within twenty-one days after the date of the declaration of the result of the election, file a petition in the prescribed manner before the District Judge of the district within which the election has been or should have been held and in the case of the Shillong Municipality to the District Judge, Lower Assam Districts and shall at the same time deposit one hundred rupees in Court as security for the costs likely to be incurred:

Provided that the Deputy Commissioner or the Sub-divisional Officer, as the case may be, may be authorized by the State Government to receive election petitions on behalf of the District Judge for transmission to him:

Provided further that the validity of such election shall not be questioned. In any such petition:

- (a) on the ground that the name of any person qualified to vote has been omitted from the electoral roll; or
- (b) on the ground that the name of any person not qualified to vote has been inserted in the electoral roll; or
- (c) on the ground of acceptance or refusal of nomination of candidates provided further that an appeal in the manner prescribed shall lie to the District Judge against such acceptance or refusal of nomination.

3. Section 17(1) of the Act reads as follows:

Where a petition has been filed u/s 10 the District Judge, or any judicial officer subordinate to him and not below the rank of "a Subordinate Judge other than an officer exercising the powers of a Subordinate Judge" (hereinafter referred to in this chapter as the Judge) to whom the District Judge may transfer the petition, may after holding such inquiry as he deems necessary, in accordance with the prescribed procedure and subject to the provisions of Sections 18 and 19, pass an order confirming or amending the declared result of the election or setting the election aside.

Section 18 Clause (1)(c) reads as follows:

If the Judge after holding an enquiry is satisfied that the result of the election has been materially affected by any non-compliance with the provisions of this Act or the rules made there under or by any mistake in the use of any form proscribed for an election or by any error, irregularity or informality on the part of any officer charged with or carrying out any duty under this Act or rules made there under he shall declare the election of such candidate to be void and if the election is set aside for any cause which is the result of acts of a candidate or his agents may declare that candidate to be disqualified for the purpose of such

fresh election as may be held u/s 21.

4. The contention of the applicant is that Section 14 of the Act sets out the qualifications and Section 15 deals with the disqualifications. Section 16 lays down that the validity of an election petition can be challenged by an election petition. The "proviso to Section 16 lays down that the validity of such election will not be questioned on certain grounds and one of the grounds is that of acceptance or refusal of nomination of candidates provided further that an appeal in the manner prescribed shall lie to the District Judge against such acceptance or refusal of nomination. An appeal thus is provided against an order of acceptance or rejection of nomination papers in the prescribed form. The rules which have been framed in exercise of the powers to make better provisions for the organization and administration of municipalities lay down principles for scrutiny of the nomination papers.

(5) Rule 26 provides as follows:

Scrutiny of Nominations. (1) The day for the scrutiny of nomination papers shall be the second day after the last day of making the nominations.

(2) Scrutiny shall be made by the Magistrate in his office from 10 A.M. to 4 P.M. on the scrutiny day and may adjourn to the following office day if the scrutiny cannot be completed within the scrutiny day.

(3) The candidates or their agents authorized in writing in that behalf may attend the scrutiny and the Magistrate shall give them all reasonable opportunities for examining nomination papers of all candidates delivered within the time and in the manner laid down in Rule 23.

(4) The Magistrate shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objections or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:

(a) that the candidate either is not qualified or is disqualified from being chosen to be elected;

(b) that there has been a failure to comply with any provisions of Rule 23;

(c) that the signature of the candidate or of the proposer on the nomination paper is not genuine.

5. Nothing contained in clauses (b) and (c) above shall be deemed to authorize the rejection of the nomination of any candidate on the grounds of irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of other nomination paper in respect of which no irregularity has been committed.

6. The Magistrate shall not reject any nomination paper on the grounds of any defect which is not of a substantial character.

7. The Magistrate shall endorse on each nomination paper his decision accepting or rereading the same and, if the nomination paper is recited, shall record in writing a brief statement his reasons for such rejection.

8. For the "purpose of this Rule, a certified copy of an entry in the Electoral Roll for the time being in force of a Ward shall be conclusive evidence of the fact that the person referred to in that entry is an elector In that Ward.

9. Immediately after all the nomination papers have been scrutinized and declarations accepting or rejecting the same have been recorded, the Magistrate shall prepare a list of validly nominated candidates, that is to say candidates whose nominations have been found valid, and ailed it in the notice board of the Municipal Office.

The list of validly nominated candidates shall tie In Form v. appended to these Rules.

(6) Another relevant rule is Rule 104A which reads as follows:

Every appeal under (c) of the second proviso to Section 16 of the Act, shall be:

(i) in the form of a memorandum signed by the Appellant and verified In the manner prescribed for verification of pleadings In the CPC Code, 1908, and presented by the Appellant or his pleader or by his duly authorized agent;

(ii) accompanied by a certified, copy of the order appealed from; and

(iii) presented to the District Judge within a period of seven days from the date of acceptance or refusal of nomination:

Provided that such memorandum of appeal may also be presented to the Deputy Commissioner, or the Sub-divisional Officer as the case may be within the period of limitation for transmission to the District Judge.

Provided that for the "purpose of computing the period of limitation the provisions of Sections 4, 9 and 12 of Indian Limitation Act, 190S (Act IX of 1908) shall apply mutatis mutandis."

7. Section is gives power to the District Judge when dealing with the election petition to set aside the election on the finding that the election has been materially affected by non-compliance with any of the provisions of the Act. Heading Sections 10 and 18 together it will appear that the election can be challenged on grounds mentioned in Section is but not on the ground of acceptance or rejection of nomination papers. It was thought expedient that an appeal should be provided against an, order of acceptance or refusal of nomination papers of candidates if this matter is left to be determined after the election has been held, the whole matter is likely to be delayed and thus the legislature thought to make a provision for an appeal against the order of acceptance or refusal of nomination papers. The prohibition to challenge the validity of ejection on the ground of acceptance or refusal of the nomination Is

due to the fact that a right has been given to go up in appeal against the said order, in other words, the appeal lies only if the challenge to the validity of the election is prohibited on that ground.

The real matter which falls for decision is what is the ambit and scope of the right of appeal conferred under the proviso to Section 16(3) of the Act. In our opinion in cases where the nomination paper on the face of it is valid and the Returning Officer wrongly holds that it does not comply with the provisions of the rules so far as the form of the nomination is concerned, in that case that decision of the Returning Officer can be challenged by means of an appeal, in cases, however, where on the face of it the nomination paper is in order and to hold that the person is disqualified, certain facts have got to be investigated, the Returning Officer is bound only to make an enquiry after an objection is filed. If no objection is filed the Returning Officer is not bound to make any enquiry. If an objection is filed and that is rejected or allowed on the result of the enquiry it will be subject to an appeal to the District Judge.

But in cases where no objection is filed, it is not a case of an enquiry at all and in that case it cannot be said that the question of acceptance or rejection of the nomination will arise, and in such cases no appeal will lie. This contention finds support from the decision of their Lordships of the Supreme Court in the case of Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, though that case dealt with the provisions of the Representation of the People Act but the principle laid down in that case, in our opinion applies to the circumstances of the present case. Under the provisions of the Representation of the People Act, Section 100 provides the grounds on which the election can be set aside by the Election Tribunal. Section 100 Clause (1) of the Representation of the People Act, as it then stood was as follows:

Grounds for declaring election to be void the Tribunal is of opinion that the result of the election has been materially affected by the improper acceptance or rejection of any nomination the Tribunal shall declare the election to be void.

8. The election can be set aside by the Tribunal if the result of the election has been materially affected by the improper acceptance or rejection of any nomination. Clause (c) of Sub-section (2) of Section 100 as it then stood was that the election can be set aside by the Tribunal subject to the provisions of Sub-section (3), if the Tribunal is of opinion that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form.

9. Section 100 comprises of two parts. Under the first part the election could be set aside by the Tribunal if the nomination was wrongly accepted or rejected and under the second part if there was noncompliance with the provisions of the

Constitution or of the Act. The Supreme Court held that in cases where on the face of it the nomination is a valid nomination and when no objection is filed and the nomination is accepted, such a case does not come within the purview of Clause (c) of Sub-section (1) of Section 100 but it comes u/s 100 Sub-section (2) (c) as it will be a violation of the Constitutional provision. Applying the reasoning of the Supreme Court, in our opinion, this case comes u/s 18 and not Section 16(1)(c) proviso. That being so no appeal will lie. There can be no bar to the Tribunal to take evidence and decide whether any disqualification existed in case of an elected candidate. Under the Municipal Act cases which fall u/s 100(1)(c) of the Representation of the People Act come under proviso to Section 16(1)(c) while cases which come u/s 100(2)(c) of the Representation of the People Act come u/s 18. The Supreme Court decision to which I have already referred to has held that:

If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination.

This would be apparent from Section 36 Sub-section. (7) of the Act under which the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The acceptance of the nomination paper by the Returning Officer in the latter case must be deemed to be proper acceptance. It is certainly not final and the Election Tribunal may on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. A case of the description comes Under Sub-section. (2)(c) of Section 100 and not under Sub-section (1) (c) of the section as it really amounts to holding; an election without complying with the provisions of the Constitution.

10. This case was followed in another case by their lordships of the Supreme Court S.M. Banerji Vs. Sri Krishna Agarwal, The same principle was laid down in this case and another decision of the Supreme Court in 1959 was distinguished on the facts of that case in our opinion, therefore, in the circumstances of the present case where there was no disqualification apparent on the face of it and no objection was filed and no enquiry was made it cannot be said that the question relates to the acceptance or rejection of a nomination within Section 16(3) proviso. In this view of the matter, it is not necessary to further examine

the arguments of the- applicant"s counsel that he could not be said to be in arrear unless demand had been made or unless" he was the owner of the holding, it is also not necessary to enter into the arguments advanced by Dr. Medhi that the appellate Court had power to examine witnesses at that stage inasmuch though called an appeal, it was an application u/s 16.

11. In the result, therefore, we allow the petition and set aside the order of the District Judge in the circumstances of the case, the parties will bear their own costs.

S.K. Dutta, J.

12. I agree.