

(1960) 02 BOM CK 0018

In the Bombay High Court

Case No : Special Civil Application No. 1290 of 1959

Dr. Dattatraya Balkrishna Kulkarni

APPELLANT

Vs

Sakataprasad Mahanand Upadhyaya

RESPONDENT

Date of Decision : 09-02-1960

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 33

Citation : (1960) 62 BOMLR 710

Hon'ble Judges : V.S. Desai, J; S.T. Desai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.T. Desai, J.—This petition raises a question of considerable importance affecting the validity of ballot papers which do not strictly conform in some respects to the requirement of Election Rule 27 contained in the Bombay Municipal Corporation (Conduct of Elections) Rules framed under the Bombay Municipal Corporation Act, 1888. Rule 27(7) is as under:

27. Recording of votes.—(1) On receiving the voting paper, the voter shall forthwith proceed to the cubicle provided for the marking of voting papers and shall, without undue delay, record therein his votes by placing a cross or crosses, as the case may be, on the right hand side of the voting paper in the space provided for the purpose, opposite the name or names of the candidate or candidates for whom he desires to vote, The voter shall then fold the voting paper so as to conceal his votes and proceed to the ballot-box, show the indelible ink mark to the Polling Officer in charge of the ballot-box, deposit the voting paper in- the ballot-box and quit the polling station immediately.

To state it without refinement, the principal question that we have to determine is whether a voter, who, instead of putting a cross on the right hand side on the voting paper in the space provided for the purpose opposite the name or names of the candidate or candidates for whom he desires to vote, puts some other

mark in that space on his voting paper, can be said to have validity recorded his vote ?

2. The petitioner and nine others were candidates at the municipal election in ward No. 26, Naigaum, Greater Bombay, held on May 9, 1957, for five elective seats. The petitioner belonged to one party and respondents Nos. 1 and 2 belonged to a rival party. The result of the election was declared on May 11, 1957, and the result so far as it affected the petitioner and respondents Nos. 1 and 2 was that respondents Nos. 1 and 2 defeated the petitioner by a margin of respectively 97 and 57 votes. Respondent No. 1 had polled 10414 valid votes, respondent No. 2 had polled 10375 valid votes and the petitioner had polled 10317 valid votes. The petitioner filed an election petition, which was heard before the learned Chief Judge of the Court of Small Causes at Bombay u/s 33 of the Bombay Municipal Corporation Act. In that petition, he challenged the validity of the election of respondents Nos. 1 and 2 on various grounds. He alleged various corrupt practices. He also alleged various procedural irregularities committed by the Polling Officers and their staff in counting, checking and scrutiny of valid and invalid votes and prayed for a declaration that the petitioner was and the respondents were not duly elected candidates at that election. A mass of evidence was led and after a protracted hearing, the learned Judge decided on all points against the petitioner. For the purposes of the present petition, it is unnecessary to give a resume of all those allegations nor is it necessary to summarise the defences raised by the two contesting candidates or the Municipal Commissioner for Greater Bombay, who is respondent No. 3 to this petition. It will suffice to refer only to those contentions which have been pressed before us by Mr. Bhasme, learned Counsel for the petitioner.

3. The first contention urged before us by Mr. Bhasme is-and that is his principal contention-that a number of voting papers which were accepted as valid votes contained marks other than a cross (X). It is said that the provisions of Rule 27 as regards recording of votes were not followed or observed by the Presiding Officers at the various polling booths. That rule, as we have already mentioned, requires a voter to place a cross or crosses "on the right hand side of the voting paper in the place provided for the purpose, opposite the name or names of the candidate or candidates for whom he desires to vote". At the time of counting of the votes, it was revealed that several voting papers did not bear cross or crosses but bore other marks on them. Such voting papers were taken into account by the Presiding Officers and treated as valid, and that, according to Mr. Bhasme, was clearly wrong in law. Those voting papers, it is argued, should have been rejected and not having been rejected, the election should have been set aside by the learned Judge.

4. Section 28 contains a number of provisions respecting contested ward elections. Clause (f) of that section lays down:

in plural councillor wards every elector shall have as many votes as there are councillors to be elected at such election for such ward, and may give all such

votes to one candidate, or may distribute them among the candidates as he thinks fit.

Section 27 requires that a poll should be taken when a ward election is contested. There is no dispute and it is not disputable that poll had to be taken at the election and the voting had to be by secret ballot.

5. The crux of the argument on behalf of the petitioner is that all voting papers which bore on them any mark other than a cross or crosses were invalid and should have been rejected. There was some evidence on this point led before the learned Judge, and the conclusion reached by him is this:

So far as this contention is concerned, it is admitted by the Municipal Commissioner that marks other than crosses were taken into account if the intention of the voter to cast his vote for a particular candidate or candidates was clear." Some marks were dots and some marks were straight lines. In some cases, there were crosses but the crosses were put outside the squares provided on the ballot paper. At this stage, we shall confine our consideration to marks other than crosses.

6. On the other hand, it has been contended by the learned Advocate General, who appears for respondent No. 3, the Municipal Commissioner for Greater Bombay, that Rule 27 should not be read as laying down any absolute requirement and the Court should look at the intention of the voter and the substance of the matter in arriving at the decision as to whether a voter had validly recorded his vote or not. On this point, the learned Chief Judge of the Small Causes Court has relied on an earlier judgment of the same Tribunal given by Chief Judge Lalkaka in an earlier case. The learned Advocate General has drawn our attention to a passage from Halsbury and two decisions of Courts in England. In *Woodward v. Sarsons* (1875) L.R. 10 C.P. 733 it was held-

To render an election void under the Ballot Act, by reason of a non-observance of or non-compliance with the rules or forms given therein, such non-observance or non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election.

The Ballot Act, 1872, contains precise directions as to the way in which voters are to mark their ballot papers, and the question that arose in that case was whether all or any of those directions were imperative or merely directory, for, if they were to be treated as imperative, it was admitted, that, in accordance with the general rule any ballot papers not marked precisely in accordance with those directions would have to be rejected as invalid. Now, that Act was divided into two parts-the principal part, and two schedules which contained rules and forms, which rules and forms were in Section 28 spoken of as "directions", although it was enacted by the same section that they were to be "construed and have

effect as part of the Act". The use of the epithet "directions", as applied to the rules and forms, led the Court to the conclusion that the enactments in the two schedules were to be treated as merely directory, but that those contained in the principal part of the Act were to be considered as imperative and absolute. The decision in that case turned primarily on the expression "directions", in Section 28 in referring to the rules and forms. Even so, the general principle enunciated in the passage which we have quoted above is of assistance in considering the validity of an election by secret ballot.

7. The learned Advocate General has also relied on Rule 41 of the Election Rules. Sub-rule (1) of that rule is as under:

41. Rejection of voting papers.-(1) A voting paper shall be rejected if-

(a) the number of votes recorded thereon exceeds the number of elective seats for the ward;

(b) no vote is recorded thereon;

(c) it is void for uncertainty;

(d) it bears any mark or writing by which the voter can be identified;

(e) it bears any serial number different from the serial number of voting papers authorised for use at the polling station at which the ballot box in which it was found was used; and

(f) it is found to be a spurious voting paper or is so damaged or mutilated that its identity as a genuine voting paper cannot be established.

Founded on this Sub-rule, the argument is that the Legislature has expressly stated the cases in which a voting paper can be rejected. Therefore, it is only in cases falling under any of the Clauses (a) to (f) of Sub-rule (1) of Rule 41 that a voting paper can be rejected and in no other case. The argument has proceeded that rigid compliance with the requirement of Rule 27 cannot be said, to have been contemplated because, if that was so, the Legislature would have said so in Rule 41.

8. Before we turn to examine the arguments on either side, we may state some general principles which must guide us in our approach to the principal question that arises for our determination. A franchise must be exercised strictly according to the terms of the statute which creates or confers it. The mode or manner of recording of votes by a voter at any election by ballot must be in conformity with the requirement of the relevant provisions of the statute and the statutory rules and there should be no deviation from any mandatory provision affecting the mode of recording of votes. Any such provision would be strictly construed.

9. Strict construction, however, is a relative and not a very precise expression. Interpretation of a provision which requires to be so construed does not permit enlargement of its ambit and necessitates a close adherence to its literal and its

textual sense. It does not permit of any deliberate weighing in favour of the validity of a recorded vote and the Court in interpreting the provision must give to it its logical and rational meaning without invoking the aid of what is termed as liberal interpretation. The rule of strict interpretation does not, however, consist in construing words stintingly or giving them their narrowest meaning. While it does not permit of enlargement or curtailment of the plain language of the provision, it does permit of a distinction being made between one which is mandatory and imperative and that which is merely directory.

10. It is in the light of these few observations that we have made that we turn to examine the main contention of the petitioner, which rests upon an insistence that Rule 27 requires that a valid vote can only be recorded by a voter by placing a cross or crosses, as the case may be, on the right hand side of the voting paper in the place provided for the purpose opposite the name or names of the candidate or candidates for whom he desires to vote. The emphasis is on the words "by placing a cross or crosses". As to Rule 41(7)(b), it is urged by Mr. Bhasme that the words "A voting paper shall be rejected (i) if no vote is recorded thereon" can mean no more or no less than that a voting paper must be rejected if no vote is recorded thereon in the manner prescribed by Rule 27. To state it somewhat fully, the argument is that a voter who purports to record a vote by placing any mark or marks other than a cross or crosses on the voting paper cannot be said to have recorded any vote or votes on the voting paper. The use of the mark of "a cross", according to the submission of Mr. Bhasme, is an absolute requirement which permits of no deviation. Rule 27 is absolute and mandatory and, therefore, so the argument ran, putting on the voting papers any mark other than a cross is nothing short of non-compliance with the requirement of law and the voting paper must be invalid.

11. The crucial question, therefore, is whether this enabling requirement of Rule 27 relating to recording of a vote or votes by putting cross or crosses is imperative and absolute. Is it such that the Court must exact rigorous observance of it and visit any departure from it with the consequence of invalidity and nullity? Now, if there is one rule of interpretation clearer than any other, it is this, that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially". There is no general rule as to when an enabling enactment is to be regarded as absolute and when directory. There is no general rule that any enactment expressed in negative and prohibitory language must be considered as being absolute. Nor on the other hand is there any general rule that an enactment expressed in an affirmative language must not be considered as absolute. Authorities abound on the subject and one guiding principle of the matter is what was stated by Lord Campbell in *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379:

...No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory,

with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.

In another leading case on the subject *Howard v. Bodington* (1877) 2 P.D. 203. Lord Penzance cited this dictum of Lord Campbell and added (p. 211) :

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory... I have been very carefully through [all the principal] cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Bank v. Turner*.

12. During the hearing of this petition, we had time to look into the statement of the law on the subject of elections in *Corpus Juris Secundum*, Vol. 29. It is not necessary to burden this judgment with any extensive quotations from the law as there summarised. It appears that there are a number of statutes in the United States specifying the nature of the mark to be used by a voter in indicating his choice on the ballot. It also appears that under most of those statutes the mark required to be used for the purpose of recording a vote is a cross. Some of those statutory provisions have been considered by the Courts as mandatory; whereas other similar provisions have been considered as directory. One general rule stated in *Corpus Juris*, Vol. 29 at pp. 254-255 is:

While statutory provisions governing the manner of indicating the voter's choice on the ballot must be complied with, the voter may not be disfranchised where he made an honest, although partly unsuccessful, effort at compliance, and, in general, his intent will be given prime consideration. Ballots will not be treated as void merely because of technical errors or because of irregular or unauthorised markings which appear to have been innocently made as the result of accident, awkwardness, nervousness, inattention, mistake, ignorance, or physical infirmity, if the lawful intent of the voter can be ascertained.

13. Still, it is not always easy to determine whether any particular provision specifying the nature of the mark to be used by a voter is imperative or directory. One broad principle which emerges from decided cases is that a provision relating to the essence of the thing to be performed or to a matter of substance is imperative; and that which does not relate to the essence of the thing or the substance of it and compliance of which is rather a matter of convenience than of substance is directory. In a case falling under the latter category non-compliance of the requirement is not fatal; its substantial

compliance must suffice. There is no infallible way, however, of determining whether there is substantial compliance with an election rule relating to the use of the specified mark on a ballot paper. That, obviously, must be resolved like any other question of fact. The prime consideration is to ascertain the intent of the voter. That intent must, of course, be gathered from the voting paper itself examined in the light of all relevant surrounding circumstances.

14. We have examined the relevant provisions of the Act and the relevant rules and particularly Rules 27 and 41 which obviously must be read together. It is true that a provision expressed in affirmative language has sometimes to be read as having a negative implied. It may be so worded and may be so explicit that the Court must treat it as mandatory and peremptory. But, in our opinion, there is no compelling nor any sound reason why Rule 27 relating to the placing of a cross or crosses should be understood as an absolute rule laying down something imperative from which the voter may deviate at his peril. Had Rule 27 stood by itself, we would have perhaps felt some difficulty, though on a balance of the relevant considerations, we should have certainly leaned in favour of the view that requirement of Rule 27 was not imperative and peremptory. Moreover Sub-rule (f) of Rule 41, which we have already set out, contains language, which, in our opinion, must be sufficient to dispel any doubt even assuming that the language of Rule 27 is such as leaves the matter in dubio. It is clear that there is nothing in Rule 27 or any other rule which lays down that any departure from that rule is prohibited. What is prohibited is to be found only in Rule 41 and that rule does not contain any prohibition against placing some other mark or marks in the place provided for the purpose of recording a vote or votes by a voter at a municipal election. Had the Legislature intended to enforce rigid and inflexible adherence to the manner and method of recording a vote, stated in Rule 27, the easiest thing would have been to say so in terms express and explicit. Not only is there nothing in the language of Rule 41 or in any other rule which can be said to lay down any prohibition against the use of any other mark or marks but there is not even an indication that the intention of the Legislature was to prohibit the use of any such mark or marks and to render null and void a voting paper which does not strictly conform to the requirement of Rule 27. There is nothing inviolable or sacrosanct about the form or shape of a mark that may be chosen for the purpose of recording his vote by a voter at a municipal election and we are not prepared to read Rule 27 as carrying with it an implied negative prohibiting the putting of the mark in some other mode or manner. The prime intention of the voter should be regarded as of greater importance and cogency rather than the figuration or fashioning of the mark when the pith and purport of the mark actually used by the voter is sufficiently indicative of that intention.

15. A requirement of the nature before us not affecting or inhering in the essential nature of the thing or act to be performed should not, therefore, be treated as touching the substratum or sufficiency of the voting papers. As to marks other than crosses put by voters in the place provided for the purpose, there is no real difficulty in ascertaining the prime intention of the voters. We

have little doubt that in those cases, by putting a straight line or a dot, the voters acted under the honest belief that they were recording their votes in favour of the candidates against whose name the marks were placed. That they were partly unsuccessful in carrying out strictly the requirement of Rule 27 should not, in our opinion, be permitted to make any difference. For reasons already stated, it seems to us that we must look at the essence and substance of the matter and the intention of the voter, albeit to be gathered from what he has marked on the voting paper itself and the other relevant circumstances. Having regard to all these considerations, we have reached the conclusion that the learned Chief Judge of the Small Causes Court was right in the view taken by him that marks other than a cross or crosses were rightly regarded by the Polling Officers as recording of valid votes by the voters.

16. Another contention urged before us by Mr. Bhasme is that in some cases the marks used were crosses but the crosses were put outside the squares provided on the voting papers. We have already mentioned that there were 10 candidates and there were five elective seats. Therefore, every voter could cast five effective votes. He could give them to one or more persons as he chose. In the place provided for the purpose of marking a cross or crosses opposite the name or names of the candidates were provided 5 squares. That was obviously to enable the voter to put his mark in a manner easily discernible and to prevent slovenly marking. There is no sanctity about those squares and the mere fact that the cross or crosses were put outside the squares cannot, in our opinion, make any real difference. It is not the contention that the cross or crosses were not in the place provided for the purpose. There is, therefore, no force in the present contention and it must be negatived.

17. There remains for consideration one more contention urged before us by Mr. Bhasme, and that contention is that the learned Judge should have directed a scrutiny and recounting of the votes. It is said that the margin by which the petitioner lost was narrow being that of 97 votes as against respondent No. 1 and 58 votes as against respondent No. 2. The material part of Rule 42 of the Election Rules is as under:-

42. Statements of votes recorded.-When the counting of the voting papers from all the boxes has been completed, the Presiding Officer shall compile and record the total number of votes polled by each candidate in Form 7 and forward the same to the Polling Superintendent in charge of the Ward:

Provided that, upon the application of any candidate or his Agent in that behalf, before the compilation of the statement in Form 7 a total or partial recount shall be made by the Presiding Officer and the result of the recount shall be recorded in Form 7.

Now, in the present case, the Statement in Form 7 was made by the Presiding Officer and at no time till that was done was any attempt made by or on behalf of the petitioner to ask for a total or partial recount of the voting papers. A

separate application was made to the learned Judge requesting him to direct a scrutiny and recounting of all the votes recorded in the entire constituency. It is clear from the judgment of the learned Judge that no ground whatever was made out by the petitioner for a scrutiny or recounting of the votes. Much, however, has been made before us by Mr. Bhasme of the fact that in the course of hearing of the petition, the learned Judge himself directed an examination of the voting papers contained in two boxes. It is said that the learned Judge was satisfied that there were serious mistakes in counting the votes and that there was no point in getting the votes only in two boxes counted for the purpose of finding out the nature and the number of mistakes made in the counting. This is what the learned Judge has said in his judgment:

As several witnesses have deposed that there were mistakes in counting; that some mistakes were pointed out and corrected; that the mistakes in counting were due to the fact that the polling staff was overworked and that they had no time to re-check, in order to satisfy myself I directed the Municipality to produce the ballot boxes in Court. Out of the several ballot boxes, two from polling booths Nos. 111 and 112, which were selected by the petitioner, were opened in the presence of the parties, and their Advocates and the votes were recounted and scrutinised.

It was found that there was no mistake in counting except that respondent No. 1 had received one vote less than announced. This makes no difference to the result of the election. It may be stated that the learned Advocate of the petitioner requested the Court that all the ballot boxes should be opened and the votes recounted. I declined to accede to this request as I was not inclined to allow the petitioner a general recounting of all votes from all the wards just for his satisfaction.

Now, it is true that at first blush it may seem that the learned Judge felt that mistakes might have been committed in the counting. But we have carefully gone through his judgment and particularly the passage from his judgment, which we have quoted above, and we are satisfied that there is no reason for acceding to the suggestion of Mr. Bhasme that the learned Judge was satisfied that mistakes had in fact been made in the counting. We understand that passage to mean that since some witnesses had said something about some mistakes which were pointed out and corrected by the Polling Officers, he thought it desirable for his own satisfaction to know whether any mistakes could have been made in the counting. We do not think we would be justified in interpreting in any other manner that care and anxiety on the part of the learned Judge to satisfy himself in the manner he thought fit to do. The learned Judge was not bound to have the votes in the two boxes counted, and, as we have already mentioned, he did so only for his own personal satisfaction. We, may also mention that the learned Judge had asked the petitioner to select for that purpose any two of the several ballot boxes. We see no reason for acceding to the contention that there were mistakes in counting or that the learned Judge

should have directed a scrutiny and recounting of the votes. There is no substance in the present contention and it must be rejected.

18. In the result, the petition fails and will be dismissed with costs.