
(1940) 04 CAL CK 0003
In the Calcutta High Court

Dr. Girish Chandra Ghose and Others

APPELLANT

Vs

Sudhir Chandra Ray Choudhuri

RESPONDENT

Date of Decision : 30-04-1940

Acts Referred:

Calcutta Municipal Act, 1923 — Section 46

Citation : AIR 1941 Cal 133

Hon'ble Judges : McNair, J

Bench : Division Bench

Judgement

McNair, J.—This is an application by three voters in Ward No. 3 of the Calcutta Municipality for an order that the election of Sudhir Chandra Ray Choudhuri as a councillor for Ward No. 3 be declared null and void and that such election be set aside, and for costs. One of the petitioners, Dr. Ghose, was a candidate at this election. Ward No. 3 is Bartola, a general constituency which elects two councillors and one of the seats is reserved for a member of the scheduled castes. The five candidates polled votes as follows : The respondent Sudhir Chandra Ray Choudhuri 1945, Jogendra Nath Mandal who is a member of a scheduled caste 1039, Radha Nath Das, also a member of a scheduled caste 717, Dr. Girish Chandra Ghose 589 and Mr. Haridat Saha 418.

2. The election is called in question on the ground of a corrupt practice within the meaning of Schedule 2, Part 1, Calcutta Municipal Act. It is alleged in the petition that amongst voters on the electoral roll was one Chunilal Bhattacharjee, that on 28th March 1940, the polling day, a fictitious person alleging himself to be Chunilal Bhattacharjee appeared and attempted to vote as Chunilal Bhattacharjee. He was challenged by Banku Behari Ghose, polling agent of Dr. G. C. Ghose and then by Dr. Ghose himself. Mr. Sudhir Chandra Ray Choudhuri then entered the polling booth and identified the alleged impostor who was allowed to vote after filling up the requisite form in which Dr. Ghose undertook to prove the offence of personation and Mr. Choudhuri signed as the identifier of the alleged impostor of Chunilal Bhattacharjee. Paragraph 6 of the petition alleges that in the

premises a corrupt practice under Schedule II, Part 1, Calcutta Municipal Act, was effected by the successful candidate Sudhir Chandra Ray Choudhury in

abetting the personator of the said Chunilal Bhattacharjee to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the said impersonator.

3. The alleged impostor recorded his vote. The respondent has taken two preliminary objections. He alleges that the petition is incompetent because the proper and necessary parties have not been joined. He also contends that the petition does not disclose any cause of action and that it has failed to set out any corrupt practice which has been committed by the respondent. It is noteworthy that the petition has been signed by Dr. Ghose who has verified all the facts stated in the petition as true to his knowledge. In that petition he states that he also relies on his affidavit and on the affidavit of Banku Behary Ghose who is his polling agent. In para. 4 of the petition it is stated that Chunilal Bhattacharjee, the voter, had been residing for the past five months and was actually residing on 28th March 1940 at Kunda in Deoghar in the Santal Pergannas and never attended the polling booth. In para. 6 of Dr. Ghose's affidavit he states, "I learnt on enquiry that Chunilal Bhattacharjee left Calcutta about five months back and was staying at Deoghar." So that apparently what has been stated in the petition as true to Dr. Ghose's knowledge is in fact derived from information, without any statement as to who was the informant. In paras. 9, 10 and 11 of Dr. Ghose's affidavit he sets out at considerable length a long conversation which he had with Chunilal Bhattacharjee and with a sircar named Jugal, neither of whom has made an affidavit. These allegations in the absence of any affidavit by the informants cannot be accepted. The offence of personation is defined in Schedule II, Part 1, Calcutta Municipal Act as,

the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person, whether living or dead, or in a fictitious name or by a person who has voted once at an election for a voting paper in his own name at the same election.

4. Nowhere in the petition or in the relevant portion of the affidavit in support is it stated that the respondent knowingly persuaded the impostor to obtain a voting paper. It is contended that the knowledge of the respondent is essential in order that a corrupt practice be proved. This view is supported by authority which I see no reason to disregard. It is also contended that knowledge should be alleged in the petition or affidavits in which the charge is made. It is true that the charge is not a criminal charge though it is possible that the facts if established might result in criminal proceedings. But it is in my opinion desirable that the charge should be set out with all possible particularity specifying the elements which the petitioner undertakes to prove. It must be remembered however that the petition must be drafted and presented within 8 days and if the nature of the charge is set out with sufficient clarity to enable the respondent to

meet it, the Court would have a discretion considering the circumstances of each case to decide whether or not the plea should be allowed. Neither in the facts contained in this petition nor in those facts which are admissible in the affidavit in support is there any suggestion that the respondent knew that the impersonator was not in fact Chunilal Bhattacharjee. There is a general allegation in para. 6 of the petition charging abetment of corrupt practice. I find the greatest difficulty in construing that paragraph. The corrupt practice in one place is stated to be abetting an impersonator to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the impersonator. So far as I can construe this paragraph the charge is that the respondent abetted the impersonator in procuring a voting paper. Looking then at the facts as set out by the petitioner it is quite clear that he did not allege that the respondent abetted the procurement of a voting paper. Paragraph 31 of the Government order for the conduct of elections under the Act sets out the procedure when an elector whose identity is in doubt asks for a voting paper. The presiding officer or the polling officer may, and if so required by the candidate or his election agent or polling agent must put certain questions to the elector so as if possible to establish his identity. If the elector gives the correct answer he is supplied with a ballot paper. Now, in the affidavit, Dr. Ghose states that he entered the polling booth when his agent "was challenging the identity of the alleged impersonator. Dr. Ghose also challenged his identity and the respondent entered the polling booth "at or about that time." Mr. Banku Behari Ghose, Dr. Ghose's agent, in his affidavit says that he challenged the alleged impersonator, that Dr. Ghose came in and challenged his right to vote as Chunilal Bhattacharjee. Immediately thereafter, says Mr. Ghose, the candidate, Sudhir Chandra Roy Choudhury, entered and insisted on the presiding officer handing over the ballot paper stating that he was ready to identify the alleged impersonator.

5. It would appear that the ballot paper had already been delivered to the elector under para. 31 of the Government order but that his right to vote was challenged. If that is so it cannot be stated that the respondent abetted procuring the ballot paper and if he did not abet the procuring of the ballot paper, in my opinion, there was no offence under Schedule II, Part I. Schedule II, Part I, para. 3 makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. In Hammond's Indian Candidate and Returning Officer on page 148 it is pointed out that the offence of impersonation is complete when the person applies for a ballot paper. At the time when the person applied for the ballot paper the respondent was apparently absent. Learned Counsel for the petitioner has suggested that it is not clear from the affidavits that the ballot paper had been handed over to the voter, prior to the entrance of the respondent. But on the facts as set out in the petition and in the affidavit of the petitioner, Dr. Girish Chandra Ghose, that appears to me to be the fact. In any event I am quite satisfied that the manner in which the charge has been set out in para. 6 of the petition is a charge which

no respondent could or should be called up on to answer. As I have already stated, there is no statement that the respondent had any knowledge that the alleged personator was not Chunilal Bhattacharjya nor is there any suggestion or statement that the respondent was instrumental in getting the alleged personator to apply for a voting paper in the name of some other person. On these grounds I am satisfied that the petition should be dismissed.

6. The second ground which has been argued at some length is that the petition is bad for want of parties. The petition has to be filed within eight days of the publication in the Gazette. No amendment to the petition could now be allowed and it is argued that the petitioner must in a constituency of this description apply for the entire election to be set aside, that is to say for the election of both the candidates and not merely of one candidate. If he applies for the election to be set aside the elected candidates should both be parties and one of those elected candidates is not a party to this petition. Reliance is placed in this connexion on the decision of an appellate Bench of this Court in *Rathis Chandra Munshi and Another Vs. Amulya Charan Ghatak*, In that case both the candidates had been joined as parties, and the question arose as to whether the election of the successful candidate No. 2 should be set aside although no fault had been found against him. In the course of his judgment Suhrawardy J. said at page 744 of the report:

There is no doubt that defendant 2 is not concerned in any irregularity or illegality connected with the election. His nomination paper was submitted in time and he was duly elected. The learned District Judge, however, thinks that it would be in the interest of all parties that the whole election should be set aside and he ordered accordingly. I gave my anxious consideration to this matter, because I find that defendant 2 is not guilty of any omission or commission and has been penalized for the irregularity committed by defendant 1. But it seems to me that an order to be passed in a joint election must be based on some principle. There is no doubt that if the election of defendant 1 alone is set aside there will be one vacancy in the constituency. But the intention of the Legislature is that two persons out of the total number of candidates should be elected from a particular ward at one election. It did not contemplate that an election may be held piecemeal.

Another difficulty suggests itself to me. If a fresh election is held in place of defendant 1 only, the voters who had voted for him will vote for one candidate only though under the law they are entitled to vote for two. In cases in which one candidate has to be elected and the rival candidate who has secured the next largest number of votes got the election set aside, it has been held that the latter is not entitled to be declared elected and a fresh election has always been ordered.

7. Costello J., who delivered a separate judgment on another point which is not relevant to this enquiry agreed with Suhrawardy J., on this point, and in the result the entire election was set aside. Learned Counsel for the respondent has

pointed out that in this case Ward No. 3 is a constituency for which two persons must be elected and one of them must be from the scheduled caste, and he argues, in my opinion with considerable justification, that if one of the elected candidates were to be unseated that there should be fresh election so that the electors might have an opportunity of deciding who were the two councillors whom they wished to represent them and the way in which they would give their votes.

8. An argument was also based on Sections 46 and 47, Calcutta Municipal Act, which have been the subject of much perplexity and some comment in the cases which have come before this Court in the past. Many Judges have found the same difficulty, which I find, in trying to place a construction upon these two sections which is consistent with the clauses of both. Section 46 (1) provides the occasions on which an application may be made to the High Court for hearing an election petition. One of those occasions is "if the validity of any election is questioned." Another is "for any other cause." The section provides that an application may be made to the High Court within eight days, and there follows a proviso which gives certain grounds on which no election may be called in question. Section 47 provides that if in any proceeding duly instituted u/s 46 the High Court is of a certain opinion, then "the election of returned candidate shall be void." Various grounds are given in Sub-clauses (a), (b) and (c) of Section 47 (1). Returning then to Section 46 (2). This sub-section provides "if the Court sets aside an election or declares an election to be null and void, a fresh election shall be held." There is a curious lacuna here, because Section 47 (1) merely provides that if the High Court is of a certain opinion the election of the returned candidate shall be void. It does not provide that the Court shall set aside the election, but Section 46 (2) assumes that the Court may set aside an election or declare an election to be null and void and provides that in that event a fresh election shall be held.

9. It is argued that Section 46 (1) contemplates the challenge of the validity of an election as an entire election to a constituency, that is to say in Ward No. 3, with which we are concerned, the election of two persons. It is then argued that if u/s 47 (1) the Court is of an opinion adverse to the elected candidate, the election of that candidate must be void, and as a consequence set aside. Reliance is then placed on the decision in *Rathis Chandra Munshi and Another Vs. Amulya Charan Ghatak*, for saying that if the election of one candidate is void then there must be a fresh election in the constituency. In my opinion Section 46 (1) must contemplate the challenge of the validity of an election whether it is an election of one person or of two persons, and where as in the present instance there are two candidates who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh. If that is so, it is obvious that both the candidates who may be affected by an election petition should be parties to it. That has not been done in this case, and that is, in my opinion, a fatal omission. The petition is therefore dismissed with costs. Costs as of a

hearing. Certified for two counsel.