

(1927) 07 CAL CK 0005
In the Calcutta High Court

I.J. Cohen

APPELLANT

Vs

Bipin Behary Sadhukhan

RESPONDENT

Date of Decision : 19-07-1927

Acts Referred:

Calcutta Municipal Act, 1923 — Section 46, 47

Citation : 116 Ind. Cas. 145

Hon'ble Judges : Philip Buckland, J

Bench : Single Bench

Judgement

Philip Buckland, J.—This is an application made on behalf of Mr. Immanuel Jacob Cohen who was a candidate for election to the Corporation of Calcutta at the last general election for an order that the election of his successful rival, Bipin Behary Sadhukhan, as Councillor for the non-Muhammadan constituency of Ward No. 13 on 16th March, 1927, be declared null and void.

2. The application is made under Sections 46, 47 and Schedule II, Part I, sub Section (3), Calcutta Municipal Act of 1923. Section 43 provides that if the validity of any election is questioned by reason of the commission of any corrupt practice by a candidate or his agent any person enrolled in the electoral roll may at any time within a specified period apply to the High Court. u/s 47 if the High Court is of opinion that any corrupt practice specified in Part I, Schedule II, has been committed the election of the returned candidate shall be void. Schedule II, Part I (3) provides that the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of the candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead is a corrupt practice.

3. In his petition the applicant has made the charges, but for the purpose of the hearing which the nature of the case requires should be decided upon oral evidence, the charges have been limited to three. The first is that one Lachman Tora whose name appeared as voter No. 1255 on the electoral roll at the time of the election, was dead; that somebody else appeared at the polling booth

representing himself to be Lachman Tora, and was identified by the agent of the successful candidate as Lachman Tora though Mr. Cohen challenged his identity, while Sadhukhan was present and allowed the impostor so to be identified.

4. The second charge is with reference to a voter of the name of Jasoda Lal Roy No. 1181. He too, it is charged, had died prior to the date of the election, and it is stated in the petition that with reference to him also the same occurred.

5. The third charge is that, among others, thirteen specified persons were out of Calcutta but that they were personated and the polling agent of the successful candidate identified them although the identity of each was challenged by Mr. Cohen. Though thirteen names are given, this item of charge has been limited at the hearing to the case of Sadhu Charan Pal, Voter No. 1156, the second on the list, who, Mr. Cohen says, was very well-known to him for a long time and was out of Calcutta on the day in question.

6. In answer a number of affidavits have been filed by Bipin Behary Sadhukhan and by others to whom the third of these charges relate. As regards Sadhu Charan Pal the affidavit is that of Radhanath Sett, his nephew, who asserts that his uncle was in Calcutta on the day of the election.

7. The parties have been cross-examined on their affidavits and in canvassing voters their procedure was much the same, but with different results. Mr. Cohen says that before the election he went round to a large number of the electors canvassing their votes in the manner which is usual in contested elections, and on calling at the shops where these two persons Lachman Tora and Jasoda Lal Roy were supposed to carry on business he was informed that they were dead. In the list which he had with him he made a note that they were dead, and accordingly prepared himself on the day of the election to challenge any votes that it might be attempted to record on their behalf.

8. Sadhukhan says that he was a member of the last previously elected body of Municipal Commissioners, and as such he was one of the Market Committee. It was his duty frequently to make tours of the Municipal Market and in that capacity he became well-acquainted with this individual by sight but not by name, who, when he enquired of him with special reference to this election, announced that his name was Lachman Tora.

9. The evidence with regard to Jasoda Lal Roy is much the same except that Sadhukhan does not say that he knew the man by sight beforehand.

10. Consequently, we have it that on one side on enquiry at the voter's places of business one candidate was told that they were dead while the other candidate was given to believe that they were alive and would vote in his favour. I may say at once that I see no reason to doubt either of these two stories. There is nothing on the record to show, or from which it can be inferred, that prior to the date of the actual election any body communicated either to Sadhukhan or to his agent that the voters in question were dead. That they both in fact were dead at

the time of the election is common ground. Subsequently Sadhukhan made enquiries and ascertained this, but that does not affect the matter.

11. On the day of the election at the polling booth where these persons were required to vote, two persons came and asked for voting papers in the name of Lachman Tora and Jasoda Lal Roy respectively. According to the evidence Mr. Cohen challenged them. They were identified by Sadhukhan's agent N.K. Dutt. It is of no consequence whether Sadhukhan also participated in the identification or not, in any case he was present and saw what happened. Mr. Cohen spoke up and on each occasion when the application of a voting paper was made informed the presiding officer that the two alleged voters were dead. There lies before me with regard to the votes, of these persons a printed form headed "list of challenged votes." It contains the name of the voter and the name of the identifier. Then follows the order of the presiding officer in the words questioned and allowed signed J.B. Ganguli, who was the presiding officer on the day in question. At the foot is a printed form in following terms:

I do hereby declare and undertake to prove the person applying for ballot paper under electoral roll serial No has committed the offence of personation.

12. This is signed in each case by Mr. Cohen himself and the Fenwick Bazar polling station, Booth No. 3 is specified.

13. Mr. Cohen said that the presiding officer simply enquired of the alleged voter what his name was. But as Sadhukhan would be more interested in giving the fullest possible account of what occurred I question him myself and he said that what happened was that the presiding officer asked of each of these persons who they were. They gave their name as being those of the alleged voters. The presiding officer pointed out to them that Mr. Cohen challenged them and cautioned them that he said that the persons whom they professed to be were dead. They re-asserted that they were the persons whom they professed to be. The presiding officer warned them of the risks they ran if they did not tell the truth. They repeated their assertions and they were allowed to vote.

14. As regards Sadhu Charan Pal nothing need be said for there is nothing in any way to connect Sadhukhan with the alleged impersonation other than the formal identification by his agent, It may be that this case could have been carried further but on the evidence I cannot hold that A.K. Dutt knew that the voter was not Sadhu Charan Pal even should I hold that Radhanath Sett is not to be believed.

15. The question is whether on the evidence there has been a corrupt practice by Mr. Sadhukhan or by his agent. This depends upon the meaning of the section which defines the offence of personation. The section is somewhat difficult to construe. There must be an application by some person for the voting paper. That is the basis from which the rest proceeds. It is corrupt practice if that application is made in the name of a dead person and if the application is procured or abetted or attempted to be procured by a candidate or his agent or

by any other person with the connivance of the candidate or his agent. If the words "by any other person with the connivance of a candidate" refer to the impostor himself, then the words, applying them to this case, refer to an application by an impostor, attempted to be procured by the impostor with the connivance of the candidate or his agent, which is not a very intelligible solution of the meaning of the section. In that view it is argued that I am not concerned with the word connivance. I do not think it is necessary strictly to construe the section and it may be assumed that connivance of the candidate or his agent is material. Convince in my judgment necessarily involves some degree of knowledge on the part of the candidate or his agent. The meaning of the word connivance according to Murray's Oxford Dictionary is "the action of winking at, overlooking or ignoring an offence, fault etc, often implying secret sympathy or approval, tacit permission or sanction; encouragement by forbearing to condemn."

16. All these meanings, in my opinion, involve in some degree at least knowledge on the part of the person guilty of connivance. It has been argued--that even if Sadhukhan or his agent had reason to believe that there was no imposture at the time when the voters came forward, he nevertheless by standing by, and, in the case of the agent, by identifying the voters when Mr. Cohen had challenged them, connived at the imposture. I cannot take that view for that would involve that their belief should change upon Mr. Cohen challenging the identity of the voters. It is, I agree, a suspicious circumstance that N.K. Dutt, the agent, has made no affidavit in this case. But nevertheless taking the view that I have expressed, in order to bring Sadhukhan or his agent within the section, I must come to a finding that either he or his agent knew of the imposture or at least had reason to believe that there was imposture. It is, therefore, immaterial that N.K. Dutt has made no affidavit, for there is no evidence upon which I could find that as a fact, or from which I should be justified in drawing such an inference. The application, therefore, must fail.

17. Before I part with the case, I desire to make some observations, both generally and as affecting the question of costs. Certain very definite facts have emerged. It has been established, first, that there were dead men on the register of voters, secondly, that there were impostors at the Municipal election, and that such impostors voted as representing the dead men whose names were on the register. Thirdly, it emerges from the evidence that the enquiry by the presiding officer was of the most perfunctory nature. That this was anything more than a brief interrogation is not the case, though there was a statement by a responsible person, namely, Mr. Cohen that this voter himself was dead--a statement which he furthermore supported by signing at the foot of the list of challenged votes that he undertook to prove that the person applying for the ballot paper had committed the offence of personation. Further, though the list of challenged votes contains a printed form at foot, which suggests from the mere fact of its existence in print that the offence is by no means a rare one, and though the presiding officer warned these persons that if they were not telling

the truth they would be punished, so far as I have heard in the course of this case nothing further has occurred. These things have undoubtedly been established in the course of this case. It would be for the present purpose but unprofitable speculation to enquire to what extent this prevails in Municipal elections in Calcutta. But on the evidence before me there is nothing to show that any serious attempt is made to prevent it. Whether any and what proceedings can be taken against impostures it is not my duty to enquire, nor is it my duty to say whether these abuses are due to defects in the law or to defects in the conduct of the Municipal election. But so far as the applicant has made it clear that such impostures can and do take place, and can, it would appear, be achieved with comparative ease, he has, in my opinion, rendered a considerable service to the public. This is a matter which I propose to take into consideration on the question of costs. In his evidence he has been moderate in his statement of facts, he has confined himself to such facts as came to his knowledge, and made no attempt to stress them for the purpose of pressing his case. His error has been in taking a mistaken view as to the knowledge of his successful rival.

18. Having regard to these matters and having regard to the public service which the applicant has undoubtedly, in my opinion, performed by bringing these abuses to light, in my opinion and judgment he should not be mulcted in the costs of this application, and though it must fail I make no order as to costs.