

(1958) 08 GAU CK 0008
In the Gauhati High Court
Case No : First Appeal No. 11 of 1958

Khagendranath Nath

APPELLANT

Vs

Umesh Chandra Nath

RESPONDENT

Date of Decision : 12-08-1958

Acts Referred:

Criminal Procedure Code, 1898 — Section 401
Criminal Procedure Code, 1898 (CrPC) — Section 401
Representation of the People Act, 1951 — Section 100, 100, 7(b), 7(b), 8(a)

Citation : AIR 1958 Guw 183

Hon'ble Judges : Sarjoo Prosad, C.J. and H.Deka, J

Bench : Division Bench

Advocate : E.M.Goswami, G.S.Bhattacharjee, S.M.Lahiri, B.Das , S.K.Ghose, R.C.Choudhary, N.M.Lahiri, J.P.Bhattacharjee, H.Goswami, Advocates appearing for Parties

Judgement

Sarjoo Prosad, C. J.

1. This is an appeal under section 116A of the Representation of the People Act, 1951 (Act No. XLIII of 1951, hereinafter called the Act), against the order, dated 1731958. passed by Sri B. C. Barua, Member, Election Tribunal, Gauhati (hereinafter described as the Tribunal), in Election Petition No. 25 of 1957. By the order in question Sri Barua has declared void the election of the appellants to the Assam Legislative Assembly.

(2) The case relates to the election of candidates for the Assam Legislative Assembly from the Goalpara constituency, which is a doublemember constituency, one of the seats being reserved for the Scheduled tribes of the district. Various candidates filed nomination papers for that election including the appellants Khagendranath Nath and Hakim Chandra Rabha, the latter being a member of the Scheduled Rabha tribe.

The candidature of the appellants was sponsored by the Congress Party. The respondents Kalipada Sen and Aniram Basumatari were the nominees of die

Praja Socialist Party, the latter being also a member of the Scheduled Kachari tribe, while one Joshimuddin Ahmed filed his nomination as an independent candidate. At the scrutiny, the Returning Officer rejected the nomination papers of Aniram Basumatari and Joshimuddin Ahmed. The polling then took place according to schedule on 25/2/1957 and on the counting of the votes polled, the appellants were declared to have been duly returned from that constituency.

Umesh Chandra Nath, who is an elector in the said constituency, then presented the election petition, as authorised under section 81 of the Act, calling in question the said election of the appellants. The principal grounds taken by the petitioner in support of the election petition are:

- (1) that the nomination papers of Aniram Basumatari, the Praja Socialist Party candidate and of Joshimuddin Ahmed were wrongly rejected;
- (2) that the returned candidates or their agents procured motor vehicles for the conveyance of voters to and from the polling stations of Kothakuti, Karbala and Bhoiskhuli, thereby committing corrupt practice as contemplated by S. 123(5) of the Act; and
- (3) that the said candidates also obtained or procured the assistance of certain Revenue Officers and village accountants for the furtherance of the prospects of their election, thereby committing corrupt practice as specified in S. 123(7) of the Act.

The respondents Joshimuddin Ahmed, Kalipada Sen and Aniram Basumatari filed written statements supporting the petitioner; while the appellants in a joint written statement disputed his claim, denied the allegations of corrupt practice and submitted that the nomination papers concerned were rightly rejected by the Returning Officer. They also denied the other irregularities complained of by the petitioner in the conduct of the election and they further stated that the application had been presented in collusion with and at the instance of a defeated candidate Bhupendra Narayan Chowdhury, who is the brother-in-law of the petitioner.

The Tribunal found on all the other points substantially against the petitioner; but held that the nomination paper of the respondent Aniram Basumatari had been improperly rejected by the Returning Officer. It accordingly, under clause (c) of subsec. (1) of S. 100 of the Act, declared the election of both the returned candidates to be void, since the constituency was a double-member constituency and Aniram Basumatari, being a member of the Scheduled Kachari tribe, was as such entitled to contest both the general and the reserved seats.

The appellants have accordingly preferred this appeal, while the respondents have filed crossobjections to some of the other material findings of the Tribunal on the points decided against them and have thus sought to support the order under appeal.

(3) The question Which, therefore, primarily arises for adjudication in the appeal

is whether the nomination paper of the respondent Aniram Basumatari was improperly rejected by the Returning Officer. This question formed the subject matter of Issue No. 4. The relevant facts bearing on the point need mention. Aniram Busumatari, in his deposition admits that some time earlier, he was a leader of the Revolutionary Communist Party of India.

In the course of his revolutionary activities, he was convicted in several criminal cases. In one case (Sessions Case No. 41(k) of 1952), he was convicted under S. 4(b) of the Explosive Substances Act (Act VI of 1908) and sentenced to rigorous imprisonment for three years on 1071953, by the Additional Sessions Judge at Gauhati. In another case (G. R. Case No. 827 of 1949), he was convicted by a Magistrate of Gauhati under S. 411 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year for being found in unlicensed possession of a stolen gun.

There was yet another case started against him under S. 19(f) of the Arms Act for unlawful possession of the said gun, numbered as G. R. Case No. 1016 of 1950, in which again he was convicted under the said section and sentenced to rigorous imprisonment for a year, these sentences being consecutive. In the sessions case aforesaid in which he was awarded three years rigorous imprisonment by the Additional Sessions Judge, the sentence was ultimately remitted by the Governor of Assam under S. 401 of the Criminal Procedure Code (Act V of 1898) by an. order dated 8111954; and the respondent was actually released from prison on 14111954 in pursuance of that order, after he had served out a period of about a year and four months in jail.

The said order of remission appears to have been made in consideration of the fact that the convict had declared and furnished an undertaking that he did not believe in violence and would not resort to violence for achievement of his political objectives; and the order of release was, therefore, without any condition being imposed upon him. The case of the petitioner and the respondent in this appeal is that, in view of the remission granted by the Government of Assam in respect of the unexpired portion of his sentence, no disqualification attached to Aniram Basumatari under S. 7(b) of the Act and his nomination paper could not be rejected on that account.

It is also admitted that Aniram Basumatari filed a petition to the Election Commission of India for removing his disqualification, if any, but his petition was rejected and a communication to that effect was sent to the Returning Officer. When, therefore, the nomination papers came up for scrutiny, one of the candidates seeking election objected to the validity of the nomination and the Returning Officer after a consideration of the matter rejected his nomination paper as he found that under S. 7(b) of the Act, Aniram Basumatari was disqualified from seeking election as a Member of the Legislative Assembly and his disqualification had not been removed by the Election Commission.

The submission of the contesting respondents to this appeal, on the contrary, is

that by virtue of the remission granted to Aniram, the unexpired portion of the sentence has been completely wiped out and S. 7(b) of the Act was not attracted to this case. The Tribunal in dealing with the matter has mainly considered the effect of the remission order passed under S. 401 of the Code of Criminal Procedure on the analogy of the grant of an out and out pardon, without scrutinising the language of S. 7(b) itself and held in favour of the petitioner that no disqualification attached to Aniram Basumatari.

(4) The learned Advocate General for the appellants contends that the Tribunal was in error in not placing due reliance upon the language of S. 7(b) of the Act or even directing his attention to the wordings of the section. His argument on the point is twofold.

He submits that on the plain language of the section, the remission of the unexpired sentence imposed by the Court did not affect the legal position as to the statutory disqualification imposed by S. 7(b) of the Act. He has also challenged the validity of the order of remission itself passed under S. 401 of the Criminal Procedure Code and urges that for the purposes of the disqualification under which Aniram Basumatari laboured in the present case on account of the sentence imposed by the Court, the remission granted to him could not at all be taken into account. Both these arguments may be considered in their order. Section 7(b) of the Act runs as follows:

"7. Disqualification for membership of Parliament or of a State Legislature. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State

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(b) if whether before or after the commencement of the Constitution, he has been convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release;"

This provision may be split up into two parts. The first part refers to the fact that where a person has been convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years, he is disqualified for being chosen as a Member of either House of Parliament or of the Legislative Assembly or Council of a State, unless a period of five years has elapsed since his release.

The second part empowers the Election Commission to reduce the period of disqualification, which would otherwise last for a period of five years from the date of his release to any shorter period that it thinks proper. The emphasis in the section is on the conviction by a Court in India of any offence in which he is sentenced to imprisonment for not less than two years.

In that case, *prima facie*, the disqualification will attach to the person so convicted and sentenced. A remission of punishment in respect of the unexpired portion, even if validly granted under S. 401 of the Criminal Procedure Code, is not the same thing as a sentence passed by a Court. A person may not for various reasons serve out the entire period of the sentence imposed by the Court; he may get remission of his sentence on account of Jail rules or on account of some general amnesty or he may get remission of his sentence for political and other considerations under S. 401 of the Code.

That may enable him to earn his release earlier than the, period of sentence imposed by the Court, but that earlier release does not affect the actual sentence passed in the case. The section makes a clear distinction between the period of the sentence and the period of the person's release. The disqualification lasts for a period of five years not from the date of the expiry of the sentence, but from the date of release, though at the discretion of the Election Commission, this period may be reduced to any shorter period that it thinks proper.

Therefore, the fact that the person convicted and sentenced has served out only a fractional part of his sentence and not the whole period does not mean that his sentence was actually reduced by any Court to the period that he spent in jail. Section 401 of the Criminal Procedure Code merely empowers the appropriate Government or the Government concerned to remit the whole or any part of the punishment to which any person has been sentenced; but this power, which is exercised under the Code, is largely an executive power vested in the appropriate Government and by reducing the sentence the authority concerned does not thereby modify the judicial sentence, which was passed by the Court.

In doing so, the appropriate Government may be guided by various considerations, not merely judicial, but also extrajudicial or political. This is conceded by the learned counsel for the petitioner; but he argues that since this power is exercised under the statute by the appropriate Government, it has the effect of modifying the sentence as if the sentence itself had been passed by a Court. I am unable to entertain this contention for the obvious reason that the remission granted may be and is effective for the purpose of releasing the petitioner at an early date according to the directions contained in the order; nevertheless, it is not an order modifying the sentence of the Court.

An attempt was also made to contend that the word "Court" as used in S. 7(b) of the Act has no particular significance, except that the Act intended to make a distinction between Courts in India and Courts in foreign lands. This presupposes that the emphasis was not laid by the Legislature, so much on the word "Court" as on "Courts in or outside India" a distinction, which is apparently meaningless in the section. I do not think that the language of the section is capable of that interpretation. In my opinion, the use of the word Court and the order of conviction and sentence by the Court is significant. Further, the second part of the section furnishes a key to the interpretation of the section itself.

As I said, in the latter part of the section the authority to reduce the period of disqualification, which runs from the date of release, lies with the Election Commission; and in a given case if the Election Commission is satisfied that the period of disqualification should be reduced, it can very well do so. In the present case, it is not disputed that Aniram Basumatari had made such an application to the Election Commission, which the Commission finally rejected. The Election Commission considered all the grounds urged by the petitioner and concluded as follows:

"The judgment of the Court shows that the applicant who was once a SubInspector of Police was in unlawful possession of an electric detonator, which is an explosive substance with the intention of endangering life or causing serious injury to property. He was therefore found guilty of serious antisocial conduct and it is difficult to take a light view of his offence and the disqualification arising therefrom.

In the circumstances, the Commission is unable to take a lenient view of the case or to persuade itself that the delinquency on the part of the applicant was of such a character that the disqualification should be completely removed or the period of its operation should be reduced." In Weaver's "Constitutional Law", the effect of reprieves and pardons visavis the judgment passed by the Court imposing the sentence or punishment has been very lucidly brought out. The learned author observes thus:

"A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such, punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power and the executive power over sentences are readily distinguishable," observed Justice Sutherland. "To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment".

This passage very clearly indicates that the sentence imposed by the Court is something different from the power of reprieve or pardon granted by the executive authority or the appropriate Government. The same view prevailed in the decision of the Madras High Court in re, Maddela Yerra Channugadu, AIR 1954 Mad 911 (A), where Chandra Reddy, J. after an elaborate discussion of the relevant texts and authorities bearing on the point, summed up the legal position in the following words :

"The principles deducible from these authorities are that the pardon power is an executive function, that it extends to all offences, that it may be exercised immediately after the commission of the offence either before or after the trial, that it would not in any way alter the judgment qua judgment, that the exercise of such a right would not in any way interfere with the course of justice and that the courts are free to adjudicate upon the guilt or otherwise of the concerned

persons. That the power to grant pardons is purely an executive function is also evident from the observation of the Judicial Committee in "Balmukund v. King Emperor" AIR .1915 P. C. 29 (B).

"The tendering of advice to His Majesty as to the exercise of the prerogative of pardon is a matter for the Executive Government, and is outside the Lordships' province". "

The learned Judges, therefore, concluded in that case that the release of prisoners condemned to death in exercise of powers conferred under S. 401 of the Criminal Procedure Code and Article 161 of the Constitution did not amount to interference with the due and proper course of justice, as the power of the Court to pronounce upon the validity, propriety and correctness of the conviction and sentence remained unaffected.

In order to attract the disqualification referred to in S. 7(b) of the Act, it is not necessary that the person should have undergone any part of the sentence imposed upon him. What is necessary is the actual sentence imposed by the Court and where the sentence is two years or above, the mischief of the section begins to operate against the person concerned.

The fact that the person had preferred an appeal against the conviction and sentence and the appeal was pending at the time when his nomination papers were being considered would not remove the disqualification under S. 7(b), except in the case of a sitting Member, who has been convicted after his election," as provided under S. 8(a) of the Act.

An illustration in point is the decision of the Election Tribunal in Udainath Singh v. Jagat Bahadur Singh, 3 Ele LR 36 (C), on which reliance has been placed by the learned Advocate General. The Tribunal there rightly observed that there was nothing in clause (b) of S. 7 of the Act to indicate that execution of the sentence was necessary to disqualify a convicted person to offer himself as a candidate for the election and nothing could be read in the section, which was actually not there.

According to accepted rules of construction of statutes, if the words used are plain and unambiguous, they have to be construed in their ordinary grammatical sense and the fact that in some cases it might lead to hardship is no ground for applying a different construction.

(5) The Tribunal here was in error in drawing upon the analogy of a case of pardon in construing "the language of S. 7(b) of the Act or for the matter of that of S. 401 of the Criminal Procedure Code. to the present case, the order of remission of sentence was passed by the State Government on 8/11/1954. At that time, the said section as it stood after the Adaptation of Laws Order, 1950, did not contain any provision for grant of pardon.

It only provides that when any person has been sentenced to punishment for an offence, the "appropriate Government" may at any time without conditions or

upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. Subsection (5) of S. 401, as it stood prior to the Adaptation of Laws Order, provided that nothing contained in S. 401 should be deemed to interfere with the right of His Majesty or of the Central Government when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment.

The words "Central Government" in the above subsection appear to have been substituted for the "GovernorGeneral in Council" after the Indian Independence Act. Even so, the right to grant pardons was vested in His Majesty or in the Central Government, when that right was so delegated. As a result of the Adaptation of Laws Order, which came into force along with the Constitution, subsecs. (5) and (5A) of S. 401 stood repealed. Apparently, this was done because the Constitution itself made provision for the grant of pardons and reprieves, or remissions of sentences.

The President, under Art. 72 of the Constitution, enjoys the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union extends; and similar powers have been given to the Governor of a State, under Article 161 of the Constitution, to grant pardons, reprieves, respites or remissions of punishment, etc., to any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

We will have occasion to discuss the significance of these Articles in connection with the other branch of Mr. Lahiri's submissions. As a result of these changes in the Constitution, the words "Appropriate Government" were substituted in place of the words "Provincial Government" in S. 401 of the Criminal Procedure Code by the Adaptation of Laws Order. At present, it is sufficient to remember that S. 401 had nothing to do with the grant of pardons and therefore, no such right of pardon could be exercised by the Government of Assam in the exercise of its powers under" S. 401.

The Tribunal does recognise that the present case was not a case of full pardon, but a case of remission of sentence; in spite of it, it appears to assume that all the consequences, which flow from a case of pardon equally flow from a case of remission of sentence, because in either case the Government concerned grants an amnesty to the person affected. In Halsbury's Laws of England, Third Edition, Volume 7, the effect of pardon has been summarised thus:

"The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualification following upon conviction. It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was

convicted In the matter of A. H. Garland, (1865) 18 Law Ed 366 (D), Field, J. when confronted with the problem observed thus:

"A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." The considerations, therefore, which arise in the case of pardon do not necessarily arise in the case of a mere remission of a part of the sentence, even though the remission may be unconditional to that extent. The vital difference between a pardon and a mere remission of sentence lies in the fact that in the former case, it affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself; in the latter case, the guilt of the offender is not affected nor is the sentence of the Court affected, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it.

Pardon and remission, therefore, stand on different footings and give rise to different consequences. The cases, therefore, on which reliance has been placed in support of the contention that the candidate concerned was relieved from the statutory disability, on account of the remission of sentence granted to him, have no material bearing on the present case, they being mostly cases of pardon. For instance, the case of *Hay v. Justices of the Tower Division of London*, (1890) 24 QBD 561 (E) was a case of pardon.

Section 14 of the English Licensing Act provided that every person convicted of felony shall be prevented from selling liquor by retail. It appeared that the applicant had been convicted of felony, but he received a free pardon under the Royal Sign Manual and it was held by the Queen's Bench Division that the disqualification imposed upon him by S. 14 of the Licensing Act was removed by virtue of the pardon and that he was entitled to the grant of licence for the purpose of carrying on the grant of selling liquor by retail. There, Baron Pollock \has pointed out the distinction between pardon and the discharge of the prisoner from any further imprisonment. The learned Judge stated:

"By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offence. The King's pardon, says Hale, "takes away poenam et culpam" : 2 PC 278. This

points to the character, condition, and status of the convict. Again, in *2 Hawkins* PC S. 48, the author says that pardon "does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an

action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness"

So, in another textbook of authority, 1 Chitty's Criminal Law, 775, it is said that "the effect of a pardon like that of the allowance of clergy, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character"". Similar was the case in (1865) 18 Law Ed. 366 (D). The Tribunal was, therefore, in error in extending these principles, which arose in a case of pardon to a case of mere remission of sentence. In this context, a reference was also made to an isolated passage in the judgment of Bose, J., as he then was, in his decision in Venkatesh Yeshwant v. Emperor, AIR 1938 Nag 513 (FB) (F). The learned Judge there observed that

"the effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for."

That was a case where a convicted person had been ordered to be released on remission of his sentence, but two days before the date of release, the previous order appears to have been varied and it was directed that he should not be released until further orders.

A petition for habeas corpus on those facts was filed under S. 491(b) of the Criminal Procedure Code and their Lordships directed his release. It was held by the Full Bench that the previous order granting remission of sentence validly took effect and any subsequent change of the order by a memorandum addressed to the Superintendent of the Jail as a sort of a departmental intimation signed by the Assistant Legal Remembrancer and not "for or by order" of the Governor did not affect the right of the petitioner to obtain his release under the previous order of remission.

The observation of the learned Judge, therefore, should be read in the relevant context. It means nothing more than this that the person concerned was clearly entitled to be released as a result of the order of remission, because by virtue of the order the sentence remitted did not take effect for the purpose of detaining him any further in jail.

Much, therefore, cannot be made of that isolated passage in the judgment of the learned Judge, which has its full significance in the context of that case. In construing S. 7(b), one has to remember that it is the sentence passed by the Court, which is the measure of the gravity of the offence and of making the offender subject to the disqualification laid down by the section; and the consideration whether the said sentence was remitted by the appropriate Government or that on account of certain remissions which he earned under the jail rules or under some order of general amnesty the person was released earlier, does not affect the measure of the disqualification.

(6) The learned counsel for the petitioner has advanced lengthy arguments to

persuade us to hold that the section should be liberally construed so as to give as much freedom to a candidate to seek election to the Houses of the Legislature as possible. He even tried to impress upon us that criminals may also possess administrative efficiency and skill. These considerations, if at all sound, may affect the policy of the legislation, but are wholly out of place in construing the language of the statute.

There is no question of liberal or strict interpretation, so long as the interpretation is natural " and grammatical and warranted by the plain words of the section. What is not permissible is to give a forced interpretation to the language of a statute, : which it is not capable of bearing, in order to suit : the exigencies of a certain case. It would be necessary, however, to examine some of the election cases to which reference has been made in the course of the arguments and which appear to have found acceptance with the Tribunal in this case.

In particular reliance has been placed on die decisions in Ganda Singh v. Sampuran Singh, 3 EleLK 17 (G) and Braja Kishore Chandra Singh Deo v. Gobinda Pradhana, (Sen and Poddar on Election Cases 82) (H). These cases no doubt support the contention of the respondents, but I do not feel imEressed with the reasonings advanced by the Members of the Tribunal in those cases to justify their construction of S. 7(b) of the Act. In Ganda Singh's case (G) (ibid) the whole argument is built upon the text of the observation of Bose, J. in the case of AIR 1938 Nag 513 (F), which I have just discussed.

The Tribunal in the case in question appears to take the view that remission by the Government executive authority has the same effect as an order passed by a Court of Law on appeal or under revision. This is evidently fallacious. I do not see how a remission given by an executive authority, though it may be effective for certain purposes, can be equated with the sentence passed by a Court.

It was also observed that the word "sentence" in S. 7 of the Act meant in fact the final sentence to which a person was subjected; it was quite immaterial whether the order about the final sentence was passed by a Court of Law or by an executive authority. I agree that the word "sentence" means the final sentence; but, I entirely disagree, with the utmost deference to the Members of the Tribunal, with the latter part of their observation: the final sentence is the sentence passed by the Court whether on appeal or revision; the remission by an executive authority does not mean the final sentence, it only relieves the person from serving out the remaining part of the sentence.

It was further observed that while considering the amount of sentence for the purpose of S. 7(b) of the Act, the order of remission passed by an executive authority is equally effective for reduction of sentence. Here again, I am of the view that whatever the effect of the remission may be, the sentence passed by the Court is not affected and for purposes of S. 7(b) we have to look not to the remission of the punishment by the executive authority under S. 401 of the

Criminal Procedure Code, but to the conviction and sentence passed by the Court of Law.

Besides, the decisions suffer from the weakness that they seem to attach no importance to the latter part of S. 7(b), wherein the Election Commission is authorised to reduce the period of the disqualification. The other decision of the Tribunal in Braja Kishore Chandra Singh Dec's case (H) (ibid) is also not of any better assistance in the interpretation of S. 7(b) of the Act. /

On the plain language of the section it appears to me that the order of Remission of the sentence granted under S. 401 of the Code of Criminal Procedure does not affect the sentence passed by the Court and as such the disqualification mentioned in section 7(b) of the Act attached to Aniram Basumatari and the period of the disqualification not having been reduced by the Election Commission, his nomination paper was validly rejected by the Returning Officer.

It is futile in the face of that language of the statute to treat an order passed under S. 401 of the Code of Criminal Procedure remitting the punishment as a sentence passed by a Court either in appeal or in revision.

(7) The next branch of Mr. Lahiri's contention relates to the validity of the remission order itself. He contends that the Governor or the State Government had no authority to grant remission of the sentence imposed on the petitioner in relation to his conviction for an offence under the Explosive Substances Act, 1908.

It has been already pointed out that by virtue of the Adaptation of Laws Order, 1950, which was made under Art. 372 (2) of the Constitution, the words "appropriate Government" were substituted for the words "Provincial Government" in the various subsections of S. 401 of the Code of Criminal Procedure. This was done with a view to bringing the provisions of the Code, which was the law in force in the territory of India at the time when the Constitution took effect, in accord with the provisions of the Constitution.

These modifications in the Code under the Adaptation of Laws Order came into effect along with the Constitution. As a result of this change in the law, the "appropriate Government" only had the power to grant the remission of sentence. In subsec. (3) of S. 402 of the Code of Criminal Procedure, the expression "appropriate Government" has been defined to mean:

"(a) in cases where the sentence is for an offence against or the order referred to in subsection (4A) of S. 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in other cases, the State Government". So we have to see whether the executive power of the Union or the State Government extended to cover the present case: if the executive power of the Union extended to this case, then the State Government ordinarily would not have jurisdiction to grant the remission.

It, therefore, becomes necessary to examine the relevant provisions of the Constitution in order to determine this point. Article 72 of the Constitution provides that the President has the power *inter alia* to grant remission of punishment or sentence of any person convicted of any offence in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. Article 73 lays down that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws.

Item 5 of List I of the Seventh Schedule of the Constitution shows that the Parliament has got the power to legislate in regard to arms, firearms, ammunition and explosives. The Explosive Substances Act is an Act of the Central Legislature and "explosives" fall in its special field of legislation. Therefore, in relation to sentences for conviction under the Explosive Substances Act, the President had the power to grant remission of punishment or sentence.

Similarly, Art. 161 of the Constitution authorises the Governor of a State *inter alia* to grant remissions of punishment or sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends, and this executive power of the State is laid down under Art. 162 of the Constitution as extending to the matters with respect to which the Legislature of the State has power to make laws. In the present instance, therefore, as the sentence related to a conviction under the Explosive Substances Act the appropriate Government under S. 401 of the Criminal Procedure Code, which had the authority to grant remission of sentence was the President and not the Governor of the State. The argument of Mr. Lahiri on the point as to the actual legal position on the state of the law as it is after the Constitution, appears quite formidable.

The learned counsel for the petitioner, Mr. Bhattacharjee, with commendable resourcefulness had laboured to wriggle out of the situation by advancing various contentions before us. His first contention is based upon certain notifications issued under the provisions of the old Government of India Act delegating the power to sanction prosecution under S. 7 of the Explosive Substances Act to the Provincial Government.

The power to sanction prosecution is not the same as the power to grant remission of sentences; and at any rate nothing has been brought to our notice that after the Constitution came into force, there was any such delegation of power under Art. 258 of the Constitution, as claimed by the learned Advocate for the petitioner (respondent before us). Reliance has also been placed on the proviso to clause (1) of Art. 73 of the Constitution as also on clause (2) of that Article.

The proviso says that the executive power referred to in subclause (a), in other words, the matters with respect to which Parliament has power to make laws,

shall not extend to any State with relation to matters with respect to which the Legislature of the State has also power to make laws, save as expressly provided by the Constitution or in any law made by the Parliament.

This proviso apparently does not afford protection in this case, because the law with which we are concerned here, is not the Code of Criminal Procedure, which is in the concurrent list, but the Explosive Substances Act; nor does clause (2) of Art. 73 have any application to this case, because after the Adaptation of Laws Order and the modifications in the Code, it cannot be argued that the Governor of the State or the Provincial or State Government continued to exercise the executive power or function for granting remissions and pardons in such cases as they did immediately before the commencement of the Constitution.

If the contention of the learned counsel for the petitioner were to be accepted, then the modifications in the law introduced by the Adaptation of Laws Order would become superfluous. I am, therefore, unable to give any weight to these contentions of the learned counsel. There is, however, one thing, which must be conceded in favour of the petitioner's contention; this aspect of the matter was not specifically raised before the Tribunal.

Although we are doubtful whether under Art. 258 of the Constitution, there was any such delegation of power in respect of these cases to the State Government by the President, even if such a delegation were permissible in this respect, we hesitate to express any final opinion on the matter, though as we have said, there appears to be a good deal of substance in the contention of the learned Advocate General.

To sum up we are unable to uphold the decision of the Tribunal on this issue and in our opinion, the nomination paper of Aniram Basumatari was properly rejected by the Returning Officer, as the candidate concerned was disqualified under S. 7(b) of the Act. The election of the appellants, therefore, could not be declared void on that ground.

(8) The contesting respondents in this Court have, however, tried to support the order of the Tribunal quashing the election on some of the other grounds taken in their petition in respect of which the Tribunal has found against them. The first point raised by the respondents relates to the rejection of the nomination paper of Joshimuddin Ahmed. This has been dealt with under Issue No. 3 by the Tribunal.

The nomination paper of Joshimuddin Ahmed was rejected on the ground that the thumb mark of his proposer, Sabdul Sheikh had not been duly attested as required by law and the rules framed under the Act. Both Joshimuddin Ahmed and Sabdul Sheikh have been examined in the case. The evidence of Joshimuddin Ahmed is that his proposer Sabdul Sheikh was an illiterate person and as such, he put his left thumb mark on his nomination paper in token of his signature and he did so in the presence of the Returning Officer; on the presentation of the nomination paper to the Returning Officer, the latter

questioned both of them regarding certain particulars for verification of the electoral roll and after being satisfied as to these informations, the Returning Officer accepted the nomination paper for later scrutiny.

It is alleged that the Returning Officer, however, did not sign his name in token of the attestation of the thumb mark of Sabdul Sheikh as he ought to have done. Sabdul Sheikh also corroborates the evidence of Joshimuddin Ahmed. Both these persons depose that they were present at the scrutiny when they informed the Returning Officer that the thumb mark in question was the thumb mark of the proposer Sabdul Sheikh. To the same effect is the evidence of the petitioner.

The Returning Officer unfortunately could not be examined in the case and from the orders passed by him on the nomination paper (Ext. 8) there is nothing to show that Sabdul Sheikh put his thumb mark in his presence. It is, however, contended for the respondents in this appeal that it was the duty of the Returning Officer to put his signature on the nomination paper in proof of his attestation; and Joshimuddin Ahmed, the candidate, could not suffer for the laches of the Returning Officer, who was under a legal obligation to attest the thumb mark of the proposer.

To appreciate this argument a reference to the relevant provisions of the Act is necessary. Section 33 of the Act requires that on or before the date appointed for making nominations, each candidate shall either in person or by his proposer within specified hours, deliver to the Returning Officer at the place specified in the notice issued under S. 31, a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer.

It is, therefore, necessary under the section that the nomination paper should be signed by an elector of a constituency as proposer. That Sabdul Sheikh was an elector in the constituency is not disputed; but the only question is whether he had signed the nomination paper as a proposer.

What is meant by the word "sign" in relation to a person, who is unable to write his name, has been defined in S. 2(1)(i) of the Act, which says that the signature or mark of such a person should be authenticated in such manner as may be prescribed. The manner of authenticating such a signature has been prescribed by subrule (2) of rule 2, which requires that for the purposes of the Act or the rules, a person who is unable to write his name, shall unless otherwise expressly provided under the rules, be deemed to have signed an instrument or other paper, if he has placed a mark on such instrument or other paper, in the presence of the Returning Officer or the Presiding Officer or such other officer as may be specified in this behalf by the Election Commission and such officer on being satisfied as to the identity has attested the mark as being the mark of that person.

Attestation, therefore, by the Returning Officer in the circumstances was a necessary requirement of the rule, and this the Returning Officer had to do on

his being satisfied as to the identity of the mark being the mark of the person concerned. Here, the only evidence is that the mark was put inside the Court room and further that at the time of acceptance of the nomination paper as required by S. 33(4) of the Act. the Returning Officer, in order to satisfy himself that the names and electoral roll numbers of the candidate and the proposer were correctly inserted, made some enquiries from the candidate and the proposed Sabdul Sheikh; but there is no evidence that at the time when Sabdul Sheikh is alleged to have put his mark on the nomination paper the attention of the Returning Officer was drawn to this fact.

There was, therefore, nothing to indicate that the thumb mark of the proposer had been so put j on the document as to satisfy the Returning Officer that it was his thumb mark in order to enable him to attest the thumb mark in question.

Unless, therefore, his attention had been drawn to the matter, the mere fact that the thumb mark of the proposer as alleged was put in the Court room, i where the officer may have been preoccupied in various official businesses, would not place any obligation on him to attest the thumb mark on the document. It has not been even stated that at the time of presentation of the nomination paper, the fact was stated to him that the thumb mark had been put by the proposer in his presence and that he should attest it. In the absence of this material circumstance, it is not permissible to argue that the law placed an obligation on the Returning Officer to attest the document and his failure to do the same , would not visit the candidate with the consequence " of the rejection of the nomination paper.

Section 36 of the Act requires that on the date of scrutiny of the nomination papers the Returning " Officer had to examine them and decide all objections, which may be made to any such nomination. He could reject any nomination paper on the ground that there had been a failure to comply amongst others with any of the provisions of S. 33 of the Act. I have already said that under S. 33, the nomination paper had to be completed in the prescribed form and signed by the candidate and his proposer.

Inasmuch as the nomination paper of Joshimuddin Ahmed in the present case was not properly signed by the proposer as required by S. 33, subsec. (1) of the Act. read with rule 2(2) of the rules, the Returning Officer had complete Jurisdiction to ! reject the nomination paper on that ground.

(9) In Rattan Anmol Singh v. Atma Ham, 10 Els LR 41: (AIR 1954 SC 510) (I), the Supreme Court laid down that the definition of "sign" in S. 3(l)(i) of the Act shows that the Legislature attached special importance to the fact that in the case of illiterate persons unable to write their names, it was necessary to guard against misrepresentation and fraud by requiring that their signatures should be formally authenticated in the manner prescribed in the rules and the Court was bound to give full effect to this policy of the Legislature.

Where, therefore, a nomination paper is proposed or seconded by "a person, who

is illiterate and is unable to write his name, the mark which he puts instead of his signature must be duly attested by an officer in the manner prescribed by rule 2(2) and want of due attestation in such a case is not merely a technical defect of an unsubstantial nature within the meaning of S. 36(4) of the Act.

It was further laid down that the substance of the matter of attestation was the satisfaction of the Returning Officer at the time of putting the mark about the identity of the person making the mark in place of writing his signature and this satisfaction could not be dispensed with altogether. The defect of want of attestation could not be remedied by adding it at the time of scrutiny and no such rectification of defects in the nomination paper was permissible at that stage.

If the defects are substantial, the nomination paper has to be rejected; if not, they are venial and negligible. Mr. Bhattacharjee for the petitioner has, however, drawn our attention to a passage in the judgment where their Lordships observed that if the Returning Officer was satisfied at the proper time about the identity, but by some slip on his part he omitted to record his satisfaction, the omission could probably in a case like that be regarded as an unsubstantial technicality.

I have already shown from the evidence that it is not the petitioner's case that at the time when the mark was put by the proposer, the attention of the Returning Officer was drawn to this fact or that he was satisfied about the mark having been made by Sabdul Sheikh in his presence.

Therefore, the want of attestation could not be attributed to the fault of the Returning Officer, but was a vital defect in the nomination paper. The mere presence of the Returning Officer at the time when the candidate's nomination papers were signed by the proposer or the seconder is not enough. His conscious presence at the time is necessary for complying with the requirements of the rule.

He can attest only if he is satisfied and this satisfaction must relate to the point of time when the thumb mark is put. In these circumstances, we concur in the finding of the Tribunal that the lack of proper attestation of the proposer's thumb mark in the nomination paper filed by Joshimuddin Ahmed was a defect of a substantial nature and the Returning Officer was, therefore, justified in rejecting the same at the stage of the scrutiny under S. 36 of the Act.

(10) I now turn to examine two other allegations, which relate to corrupt practices. They are covered by Issues Nos. 5 and 6 and have been separately dealt with in the order under appeal. The corrupt practice, which is the subject of Issue No. 6 is of the kind specified in subsec. (5) of S. 123, which relates to the hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person, for the conveyance of any elector to or from any polling station.

The allegations in the election petition were confined in particular to three polling centres, namely Kothalkuti, Karbala and Bhoishkuli. It was stated that bus No. ASK. 2416 belonging to one Bholaram Sarkar, President of the Primary Congress Committee of Dhupdhara, carried voters from Dhupdhara to Kothalkuti centre of Dhupdhara zone. Trucks No. ASK. 1934 and ASK. 1474 carried voters to Karbala L. P. School centre from Pancharatna Natun Basti and Karbala villages; and Truck No. ASG, 667 carried voters from Goaltuli to Bhoishkuli centre.

The evidence in regard to Kothalkuti centre shows that on the day of the poll, the Subdivisional Police Officer (P. W. 1) received a complaint from one Hazarika, the polling agent of the Communist candidate, that voters were being carried by the bus "Kalpana" belonging to Bholaram Sarkar from Dhupdhara to Kothalkuti. The officer on receipt of the information proceeded towards Dhupdhara, when he came across bus No. ASK. 2416 bearing the name "Kalpana" on the 49th mile post at about 1030 a. m. and found some 40 persons, both male and female, in the bus, who on being questioned gave out that they were voters.

He then asked them to get down and proceed on foot. The evidence further shows that the bus in question was a bazar bus and was not meant or licensed for the purpose of carrying regular passengers. A general diary entry in regard to the incident was made at the Dudnoi police station and this officer further instructed the Police Officer in charge of that Police Station to make a regular complaint to the Magistrate. The diary entry makes

a further recital that on being challenged, Nurul Islam, the driver of the bus confessed that he was carrying those voters under orders of his proprietor Sri Bholaram Sarkar of Dhupdhara.

It is further in evidence that the Police Officer in charge of Dudnoi (P. W. 2) registered two cases as directed by his superior against Bholaram Sarkar and his driver Nurul Islam under the provisions of the Motor Vehicles Act for violation of the relevant provisions of the Act and the terms of the licence. A case was also registered under S. 133 of the Representation of the People Act, 1951. The learned Judge has commented on the act that none of the passengers in the bus has been examined except two witnesses, Ridhe and Phute Revani on whom he could not place much reliance because their names did not appear in the list of witnesses originally tiled by the petitioner.

The Tribunal has, however, found that the bus "Kalpana" was actually plying on the day of the polling with some voters on behalf of the appellants. In regard to Bhoishkuli centre, no argument has been advanced in particular for the obvious reason that the petitioner was not very sure of his case in that respect; but the point about the Karbala centre has been pressed by the respondents before us. In regard to that centre some evidence has been given by a labourer Nadibi Sangma, who was working for one Taran Singh; that on the day of the poll, Taran Singh went to their village and told them that they should vote for Khagendranath Nath and that his truck would be in attendance for them to go to

the polling station.

Afsaruddin (P. W. 19), the polling agent of the appellants in that centre, has also been examined in this connection. The appellants also examined a few witnesses on their behalf. On the evidence as found by the Tribunal it is established that some voters were in fact carried by the truck belonging to Taran Singh to this polling centre. We are, however, inclined to agree with the Tribunal that there was hardly any reliable evidence to show that the trucks in question were so used with the knowledge and consent of any of the respondents.

The contention of the learned counsel for the respondents rests) largely upon the assertion that the trucks in question were specifically requisitioned for Congress work by Birendra Kumar Nath, who was in charge of the electioneering campaign on behalf of the Congress, and as such on behalf of the Congress candidates. It has also been proved that Bholaram Sarkar himself was the President of the Dhupdhara Congress Committee and was a member of the Goalpara Local Board and as such was clearly working as an agent of the appellants in the election run by the Congress.

There is, therefore, no doubt that both Birendra Kumar Nath and Bholaram Sarkar would be deemed to be the agents of the appellants for the purposes of the election and as such, the hiring or procuring of the motor vehicles by the candidates' agents for the conveyance of any elector to a polling station would constitute corrupt practice within the meaning of S. 123(5) of the Act; but this, however, would not be enough to declare the election void within the meaning of S. 100 of the Act.

(11) The expression "agent" has been defined in Explanation (1) to S. 123 of the Act as including an election agent, a polling agent and any person, who is held to have acted as an agent in connection with the election with the consent of the candidate. This consent may be express or implied and no written document is necessary. The fact that a man is working as an agent of a person with his consent may be inferred from circumstances of the case.

Therefore, the Explanation contemplates three kinds of agents; (i) an election agent; (ii) a polling agent; and (iii) any person acting as an agent in connection with the election with the consent of the candidate. An election agent is appointed as , required by S. 40 of the Act. Now S. 100(I)(b) requires that if the Tribunal is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the Tribunal shall declare the election of the returned candidate to be void.

The law, therefore, makes a distinction between a corrupt practice committed by a returned candidate or his election agent or by any other person. In the case of corrupt practice by the candidate or his election agent, of course, the election of the returned candidate shall be declared to be void; but, where the corrupt practice is alleged to have been committed by any other person, unless it is

committed with the consent of the returned candidate or his election agent, the candidate cannot be held responsible and visited with the consequence of his election being declared void.

In this case, we agree with the Tribunal that there is no definite evidence of such consent on the part of the appellants in the commission of those acts. The corrupt practices alleged were not committed by the candidates themselves or by the election agents, but by other persons like Birendra Kumar Nath and Bholaram Sarkar. It is admitted in this case that there were no election agents appointed by the appellants as under S. 40 of the Act. That being so in the absence of any consent on the part of the appellants, the election could not be declared void as against them. The circumstances proved in the case do not convincingly lead to an inference that the corrupt practices in question were committed with their knowledge and consent.

(12) The other corrupt practice covered by Issue No. 5 relates to the obtaining or procuring by the candidates or their agent's assistance for the furtherance of the prospects of their election from persons in the service of the Government and belonging to the class of persons mentioned in subsec. (7)(f) of S. 123. Here, the allegation is that certain printed leaflets like Exhibit 9 were published by Sri Birendra Kumar Nath, Secretary of the Election branch of the Goalpara District Congress Committee for the purposes of the election and distributed in the constituency appealing to the voters to vote for the appellants Khagendranath Nath and Hakim Chandra Rabha, who were the Congress nominees.

These leaflets, it is alleged, were signed by a number of persons including Government servants some of whom were Revenue Officers, as mentioned in clause (f) of subsection (7) of S. 123. It is not necessary to go into details of the evidence on the point, because some of the findings of the Tribunal in this connection have not been challenged by the respondents. The Tribunal has found that Birendra Kumar Nath (R. W. 6) admitted that he published leaflets like Exhibit 9.

It may be, therefore, taken as proved that the leaflets were so published by Birendra Kumar Nath as the Secretary of the Election Branch of the Goalpara District Congress Committee at the relevant time with a view to further the prospects of the appellants' election. The leaflets in question appear to have been signed by Yasin Ali Mulla, a collecting member of the Panchayat and Nar Mohan Das (P. W. 16), an accountant working in the Bijni Raj Estate.

Much argument has been advanced whether Yasin Ali Mulla, who was merely a collecting member under the Chowkidari Act was a Revenue Officer within the meaning of the Act and whether Nar Mohan Das was a Government servant, he being an accountant in the Bijni Raj Estate, which was subsequently taken over by the Government. The Tribunal has found that a collecting member under the Chowkidari Act cannot be regarded as a Revenue Officer in the strict sense of the term. His duties are confined merely to the work of collection of the chowkidari

tax, which is earmarked for distribution among the chowkidars.

The chowkidari tax is a tax of a special nature and is confined merely to the administration of rural Police duties, which the chowkidars have to perform. The member collects chowkidari tax from the local residents for payment to these chowkidars and he gets some commission for his work of collection. In regard to the accountant, the Tribunal says that this officer, though he continued to work for the Bijni Raj Estate even after the vesting of the Estate in the Government, was not absorbed in Government service until July, 1957. Therefore, when the election was held in February, 1957, the position of this officer was uncertain as it was not known whether he would be finally absorbed in Government service.

The findings of the Tribunal on both these points appear to us to be on the whole quite correct. The Assam State Acquisition of Estates Act came into force in June, 1954, but there was no notification directing the vesting of the Bijni Raj Estate until April, 1956, though in fact the Government appear to have taken over charge of the Estate sometime later. Here again, even if it is assumed that Yasin Ali Mulla was a Revenue Officer or that Nar Mohan Das, the accountant, was also a Government servant, still it had to be shown whether the publication of the leaflets and the obtaining of the signatures of these persons were with the consent of the appellants.

Here again, the evidence on the point is not very convincing and we are unable to hold that the signatures of these officers on the publications in question, which were of course at the instance of Birendra Kumar Nath, were taken with the knowledge and consent of the appellants. On the whole, therefore, we are inclined to affirm the decision of the Tribunal on those points.

(13) It would thus appear that the other objections taken by the petitioner in the election petition have not been substantiated and therefore, the order of the Tribunal declaring the election void, cannot be sustained on those grounds.

(14) The result, therefore, is that the appeal must be allowed and the decision of the Tribunal must be set aside. We hold that the election of the appellants was valid and the objections raised by the petitioner in the election petition have not been substantiated so as to enable the Tribunal to declare the election void.

(15) The appellants are entitled to their costs in this appeal from the contesting respondents: hearing fee Rs. 250.

(16) H. DEKA J. : I agree. V.R.B. Appeal allowed.