

(1948) 04 BOM CK 0010

In the Bombay High Court

Case No : O.C.J. Appeal No. 38 of 1947 and Miscellaneous No. 162 of 1946

Mahomed Yasin Nurie

APPELLANT

Vs

Shripat Amrit Dange

RESPONDENT

Date of Decision : 07-04-1948

Acts Referred:

Government of India Act, 1935 — Section 291, 59(1)

Citation : AIR 1949 Bom 19 : (1948) 50 BOMLR 471

Hon'ble Judges : M.C. Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.C. Chagla, C.J.—This is an appeal from a judgment of Bhagwati J. by which he directed a writ of certiorari to issue against the Election Tribunal appointed by the Government of Bombay. There was an election for the seat allotted to the Bombay City and Suburban Textile Unions Constituency in the Bombay Legislative Assembly and the election was held in 1946. As a result of that election Mr. Dange was declared successful. Mr. Nurie then presented an election petition to His Excellency the Governor against the said election praying that it may be declared that he, the said Mr. Nurie, had been duly elected a member of the Bombay Legislative Assembly from that constituency and not Mr. Dange. On that petition being presented the Government of Bombay issued a notification dated July 8, 1946," by which they appointed Sir H.V. Divatia, Mr. D.V. Vyas and Mr. M.S. Noronha Commissioners, with Sir H.V. Divatia as the President of the Tribunal, for the trial of that petition, and it is the validity of this Tribunal that was challenged by Mr. Dange and a petition was filed by him before Bhagwati J. for a writ of certiorari and Bhagwati J. accepted that petition. Before Bhagwati J. various questions were argued as to the maintainability of the application. To Mr. Dange's petition the Commissioners were made party respondents. Mr. Nurie was respondent No. 4. Respondents 5, 6 and 7 were the other contesting candidates; the name of respondent No. 8 was struck off; the returning officer

was joined as respondent No. 9. The Commissioners challenged the maintainability of the petition on various grounds and various preliminary issues were tried and decided by the learned Judge all against the contesting respondents, and the learned Judge ultimately came to the conclusion that the notification issued by the Government of Bombay was not a valid notification and that the three members of the Election Tribunal were not duly and properly appointed members. In this appeal we have not gone into the various interesting questions discussed by the learned Judge in his judgment. We have heard Mr. Banaji on the merits of the question, and as we have come to the conclusion that the learned Judge was not right in coming to the conclusion that the notification was not valid and the members of the Tribunal were not validly appointed, it is unnecessary to consider other questions as to the maintainability of the petition.

2. Now the position with regard to the notification is this : u/s 291 of the Government of India Act, 1935, in so far as provision with respect to the matters therein mentioned is not made by that Act His Majesty-in-Council may from time to time make provision with respect to those matters or any of them, and one of those matters is referred to in Clause (g) of that section, viz. corrupt practices and other offences at or in connection with elections under the Act. Pursuant to this section an Order in Council was issued by His Majesty which is known as the Government of India (Provincial Elections)(Corrupt Practices and Election Petitions) Order, 1936, and under Clause 4 of Part III of that Order it was provided that unless the Governor, exercising his individual judgment dismissed a petition for non-compliance with the prescribed requirements, he should, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are or have been or are eligible to be appointed Judges of a High Court and should appoint one of them to be the President. It was under the provision of this clause that the notification dated July 3, 1946, was issued. Now the notification is challenged on two grounds : It is urged that whereas the Commissioners have to be appointed by the Governor himself exercising his individual judgment, the notification in terms states that the appointment has been made not by the Governor exercising his individual judgment but by the Government of Bombay. The notification is also challenged on the ground that the appointment must be expressed in the notification itself to be by the Governor of Bombay, and inasmuch as that expression is not used, the notification is bad.

3. Now it is necessary to understand what is the constitutional position of the Governor of a Province under the Government of India Act, 1935. The executive authority of the Province is to be exercised on behalf of His Majesty by the Governor, and the scheme of the Act is that the Governor may act according to the advice of his ministers, or he may act according to his discretion, or he may act exercising his individual judgment. Unless he acts in his discretion a statutory duty is cast upon him to consult his ministers, although when he is acting exercising his individual judgment, he may not agree with the advice tendered to him by his ministers. Section 59(1) of the Government of India Act provides that

all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor, and Sub-clause (2) of that section provides that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the authority of the order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Now under Sub-clause (2) Business Rules have been framed and Rule 12 provides that all orders and instruments made or executed by or on behalf of the Government of Bombay shall be expressed to be made by or by order of the Governor of Bombay. Rule 13 provides that save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Bombay, every such order or instrument shall be signed by either the Secretary, the Joint Secretary, the Deputy Secretary, the Under-Secretary or the Assistant Secretary to the Government of Bombay and such signature shall be deemed to be the proper authentication of such order or instrument. In this case there is no difficulty about the signing of the order because it is signed by the order of the Governor of Bombay by the Secretary Mr. P.N. Moos. Section 59(2) and Rule 12 are not complied with inasmuch as the notification is not expressed to be made by or by order of the Governor of Bombay. It is in fact expressed to be by the Government of Bombay.

4. I shall first consider the question which is the real question of substance, whether on the face of this notification it can be stated that the provision of Clause 4 of Part III of the Corrupt Practices and Election Petitions Order of 1936 has not been complied with, or, in other words, that the appointment has not been made by the Governor exercising his individual judgment as it has to be made under the provision of that clause. Now Mr. Jhaveri appearing for Mr. Dange has sought to make a distinction between the Government of Bombay and the Governor exercising his individual judgment, and his contention is that when the Government of Bombay makes the appointment, an entirely different entity is making the appointment from the entity contemplated by Clause 4, which is the Governor exercising his individual judgment. In my opinion that contention is entirely fallacious. Constitutionally Government of Bombay is the Governor and his Ministers. Governor is not an authority or a person outside the Government of Bombay, but forms part of the Government of Bombay, and, as I have pointed out earlier, whether he acts in his discretion or exercising his individual judgment, he is a part and parcel of the constitutional machinery that constitutes the Provincial Government or the Government of Bombay. Further, it has to be noted that the notification itself states that the Government of Bombay has appointed the three persons as members of the Tribunal in pursuance of the provisions of paragraph 4 of Part III of the Government of India (Provincial Elections)(Corrupt Practices and Election Petitions) Order, 1936. Therefore, by reference these provisions are incorporated in the notification itself, and when we turn to these provisions it is clear that the appointment has to be made by the

Governor exercising his individual judgment, and there is no reason to presume that an official act was done otherwise than properly and in accordance with the law.

5. Apart from the constitutional position, according to the rules of interpretation to which I shall now refer, it is clear that the Government of Bombay means Governor exercising his individual judgment. An Order in Council was passed called (Adaptation of Indian Laws) Order, 1937, and various Acts were adapted and a list is given of those Acts in the schedule appended to that Order. One of the Acts that were so adapted was the General Clauses Act. This Order brought about two important changes as far as we are concerned in the General Clauses Act. One was to enact Section 4A which provided that the definitions in Section 3 of the various expressions including the one with which we are concerned?"Provincial Government"?shall apply, unless there was anything repugnant in the subject or context, to all Indian laws. It also enacted Clause (27a) to Section 3 which defines "Indian Law" as?including any law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent Legislature, authority, or person in India. It is important to note that by another Order which was also passed by His Majesty in-Council under the Government of India Act, 1935, it was provided that the Interpretation Act, 1889, which corresponds to our General Clauses Act, and which is usually resorted to in order to interpret expressions appearing in Parliamentary Statutes, shall not be applicable to interpret the Government of India Act, 1935, or the Government of Burma Act, 1935, nor, save as therein mentioned, for the interpretation of any Order in Council made under either of those Acts, notwithstanding that that Order may provide generally that the Interpretation Act, 1889, shall apply for the interpretation thereof, as it applies for the interpretation of the Acts of Parliament. Therefore, although the Order of 1936 did provide that the Interpretation Act of 1889 was to apply for the interpretation of that Order, by reason of this Order of 1937 the effect of that provision was nullified and it is the General Clauses Act which has to be looked to in order to interpret expressions occurring in the Order in Council of 1936. Now u/s 4(a) of the General Clauses Act the definition of "Provincial Government" is to apply to all Indian laws and "Indian Law" is defined in the newly added Clause (27a) and the question is whether the Order in Council of 1936 is an Indian law within the meaning of that sub-clause. The question we have to consider is whether any competent Legislature, authority, or person in India refers to a Legislature, authority or person situated in British India, or a Legislature, authority or person which is competent in British India. I must frankly confess that the interpretation is not free from doubt, but, considering the fact that the Interpretation Act is no longer to apply to this Order in Council the better view seems to be that "Indian Law" includes the Order in Council of 1936. The same view as to the meaning of Indian law has been taken by the Madras High Court in Venkataratnam v. Secretary of State for India ILR (1929) Mad. 979 where at p. 997 Venkatasubba Rao J. took the view that there was no reason to confine the meaning of

"authority in British India" to an authority situate in British India only. Now under the General Clauses Act "Provincial Government" is defined as meaning : "in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the Government of India Act, 1935"

6. Mr. Jhaveri has attempted to argue that, although the expressions used in the Order of 1936 may be interpreted under the General Clauses Act, it would not be proper to do so with regard to the expressions used in the notification. Now the notification has been issued pursuant to the provisions of the Order of 1936 and it has the same legal effect as the Order itself. It really forms part of the Order and therefore I see no reason why, if in interpreting the expressions in the Order of 1936 itself we may turn to the General Clauses Act, when construing the notification issued under the Order we are prevented from doing so. In my opinion when the notification states that the Government made the appointment it means the same thing as if it had stated that the Governor made the appointment exercising his individual judgment.

7. The next question is a question of form and there can be no doubt that as far as the expression "Government of Bombay" is concerned it is not the expression which is required by Section 59(1) or by the rules of business framed u/s 59(2) of the Government of India Act. Consistent with these provisions the notification ought to have used the expression "Governor of Bombay" and not "Government of Bombay." A question then arises for determination whether the use of any incorrect expression or the use of an expression contrary to what is provided under the business rules makes the notification invalid. We may approach the subject from a different point of view and the question we will have to consider is whether the provision with regard to the use of a particular expression is a mandatory provision or merely a directory provision. If it is a mandatory provision, then, undoubtedly, the notification is bad, but if it is merely a directory provision and procedural in character, then the non-compliance with such a direction would not render the notification invalid. There is a decision of our own Court, which was confirmed by the Federal Court in appeal, dealing with this very point. In fairness to Bhagwati J., I must say that the Federal Court decision was not before him when he decided this case although the decision of this Court was before him which he attempted to distinguish on the facts of the case. This Court's judgment in the case *Emperor v. J.K. Gas Plant & Co., Ltd.* (1946) 49 Bom. L.R. 352 and the Orders which Stone C.J. and Lokur J. were considering were Orders issued under the Defence of India Rules. The Orders under Rule 81(2) of the Defence of India Rules had to be made by the Central Government or the Provincial Government. In that particular case the Orders were issued by the Central Government. Stone C.J. in his judgment referred to the definition of "Central Government" in the General Clauses Act which in the context meant "Governor-General-in-Council." It was contended that u/s 40(1) of the Ninth Schedule to the Government of India Act, 1935, "all orders and other proceedings of the Governor-General-in-Council shall be expressed to be made

by the Governor-General-in-Council, and shall be signed by a Secretary to the Government of India, or otherwise as the Governor-General-in-Council may direct, and, when so signed, shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General-in-Council." The argument there advanced was identical with the one advanced before us that inasmuch as the statute provides for all orders issued by the Governor-General-in-Council to be expressed as made by him, non-compliance with that provision rendered the Orders invalid. Stone C.J. came to the conclusion that Section 40(1) of the Ninth Schedule was a procedural section, and he, therefore, took the view that there was no scope in that section for a construction which would vitiate Orders actually made by the Governor-General-in-Council but not expressed to be made according to the letter of the sub-section. That is exactly the position here. If this order is actually made by the Governor exercising his individual judgment but if it is not expressed to be so made in the order itself, that does not vitiate the notification. The Federal Court's judgment in the same case is reported in the same volume at page 591. Spence C.J. in his judgment on this point at first sounds a very salutary note of warning that the Constitution Act should be given a liberal construction. He then points out that when you find a direction in a provision of a statute and it is not suggested what the result would be of non-compliance with such a direction, then the proper canon of construction is to treat that provision as merely directory and not mandatory. The Federal Court, therefore, agreed with the view taken by the Bombay High Court that the provision with regard to the manner in which the Orders issued under the Defence of India Rules ought to be expressed were merely directory and not mandatory. In my opinion, and with respect to the learned Judge below, it is not possible to distinguish the judgments in this case from the facts before us. In no two cases can we have identical facts. The facts must differ but what we have to deduce is the principle underlying the decision and the ratio on which the decision was based, and it is impossible for me to say that the ratio in the two judgments does not apply to the case before us.

8. I may also point out that Dixit J. had considered this very question in *The Empire of India Life Insurance Co., Ltd. v. Sir Harsidhbhai Divatia* (1947) Misc. No. 69 of 1947, where a notification issued under the Defence of India Act appointing Sir H.V. Divatia to try an industrial dispute was unsuccessfully challenged on the identical ground. Therefore, in my opinion the notification of July 3, 1946, was a valid notification and the Tribunal appointed under it was validly appointed. The learned Judge was not right in coming to the conclusion that a writ of certiorari should issue in order to quash the proceedings pending before that Tribunal.

9. There is one more thing which I should like to refer to and that is with regard to certain remarks which the learned Judge made in the course of his judgment and to which strong exception is taken by the learned Advocate General who appears on behalf of the Commissioners. This is the passage in the learned Judge's judgment:

They, however, for reasons best known to themselves, not only appeared by counsel but took up partisan attitude trying to substantiate their appointment by arguing the various points which I have dealt with above and by submitting for my consideration the various preliminary objections which I have dealt with in my judgment.

Then he proceeds to make an order of costs against them and says that if these respondents had taken up a non-contentious attitude he should not have made any order of costs against them. Now a little earlier in his judgment the learned Judge very clearly says:

There is not the slightest aspersion which can be cast against the honesty, integrity or the status of respondents Nos. 1, 2 and 3, who have been appointed Commissioners in the matter of the election petition.

The learned Judge pays a compliment to the Governor by saying:

No better choice could have been made by the Governor exercising his individual judgment in the matter of the appointment of Commissioners.

It is difficult for us to understand what made the learned Judge to accuse these respondents of partisanship. It is true that they did take up in one sense of the term contentious attitude, and when their appointment was challenged and when it was suggested that the notification was invalid they did try to support both the notification and their appointment, and as it now turns out they did so rightly. But from that it does not follow that they were in any sense of the term partisan. Partisan implies a wrong motive. It implies an improper bias in favour of one party to the prejudice of another, and we are sure that the learned Judge could not have possibly meant that the Commissioners were biassed either in favour of Mr. Nurie or in favour of Mr. Dange. No worse accusation can be made against a Judge or a person exercising judicial authority than to say that he is partisan. A man is incapable to act as a judge if he cannot maintain judicial detachment in any case which comes before him and which he tries and we can quite understand the resentment felt by these Commissioners which has been voiced by the Advocate General. We see nothing on the record whatever to justify this charge and, as I stated before, we are certain that the learned Judge did not intend to use the expression in the sense in which it is normally understood.

10. The result will be that the appeal will be allowed. The order of the learned Judge issuing the writ of certiorari will be set aside and the proceedings will be restored to that Tribunal. Mr. Dange to pay the costs of this appeal as also of the hearing of the petition in the lower Court. The order made by the learned Judge against respondents Nos. 1, 2 and 3 for costs of the petition also vacated. Mr. Dange should also pay the costs of respondents Nos. 1, 2 and 3 of this appeal and also of the hearing of the petition in the lower Court. Separate sets of costs allowed.