

(1953) 08 CAL CK 0012
In the Calcutta High Court
Case No : Civil Revision No. 316 of 1953

Narayan Chandra Mukherjee and Another	APPELLANT
Vs	
District Magistrate, Hooghly and Others	RESPONDENT

Date of Decision : 13-08-1953

Acts Referred:

Bengal Municipal Act, 1932 — Section 36, 37, 38, 39B, 44
Constitution of India, 1950 — Article 226

Citation : AIR 1954 Cal 32

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Ranjit Kumar Banerjee and Bimal Kumar Banerjee, for the Appellant; Santosh Kumar Basu and Ajit Kumar Mukherjee, (for No. 2), Jagneswar Majumdar and Mihir Kumar Sarkar, Avds. (for Nos. 1 and 3), Chandra Narain Laik and Tathagata Mukherjee, for the Respondent

Judgement

Sinha, J.—This is a rule issued upon the respondents to show cause why a writ in the nature of mandamus should not issue directing the opposite parties Nos. 1, 2 and 3 from further proceeding with the erection complained of in the petition, and/or directing the opposite parties Nos. 1 and 4 2 to hold a fresh election according to law or why such other or further directions and/or orders should not be issued or made as to this Court seems fit and proper. This is an unfortunate instance of a case where the petitioners have made out a case on the merits but have followed an entirely wrong procedure. The facts are shortly as follows :

The petitioners are residents of Uttarpara in the district of Hooghly. They are ratepayers of the Uttarpara Municipality, The said Municipality was divided into four wards, each having two elected Commissioners. On or about 4-4-1952, an order was passed by the District Magistrate, Hooghly, fixing the General election of the Commissioners of the Uttarpara Municipality on 9-11- 1952. On 15-4-1952, the Chairman, Uttarpara Municipality published the same in conformity with Rule 2(2) of the Election rules.

2. Thereafter the Electoral rolls were duly prepared and finally published under the provisions of Rule 15(2) of the Election rules. The petitioners axe voters whose names appear in the Final electoral roll. They being (belong?) to Ward Nos. I and IV. In respect of the general election, the last day for receiving nomination papers was fixed on 4-10-1952 and the scrutiny of nominations was fixed on 13-10-1952. The preliminary electoral roll having disclosed a large increase in the number of voters, the total number of seats was recommended to be increased to nine and accordingly, the State Government by its Notification No. MT/M-58/52 da"ed 13-6-1952, published in the Calcutta Gazette on 19-6-1952, (under Section 6. Bengal Municipal Act 1932, hereinafter referred to as the "Act") declared its intention of altering the number of Commissioners from eight to nine. Nomination papers were received in accordance with the previous orders, and on 14-10-1952, a list was published under Rule 17(5) of the Ejection rules framed under the Act, of such candidates whose nomination papers were found valid and who were registered under Rule 4(a). The list shows that 8 candidates were nominated for election in Ward I, 4 for Word II. 7 for Ward III and 7 for Ward IV. Ten candidates withdrew from the election, 3 having withdrawn from Ward I and 3 from Ward III.

3. Meanwhile, objections were preferred u/s 7 of the Act. On 16-10-1952 the District Magistrate, Hooghly, made an order suspending further proceedings. This order was published by the Chairman on 22nd October. Finally, the Government by Notification No. 1-M-58/52/1 dated 11-10-1952, decided to have ten seats. On 7-11-1952 a Notification No. 1804M. was published, determining the number of Commissioners to be elected from each ward. The result will appear at a glance from tne following table :

Ward. Previous number of seats. Seats as altered by Notification dated 7.11.52.

I 2 3

II 2 2

III 2 2

IV 2

3

Total 8 10

On 14-11-1952 the District Magistrate modified his previous order of 4-4-1952 and fixed 8-2-1953 as the date of the general election in all the wards. On that day, the general election was held and 10 Commissioners elected.

4. It will be observed that nominations were originally invited upon the footing that eight Commissioners were to be elected, two from each Ward. When however the number of Commissioners were increased to ten and the Wards reconstituted, no further nominations were invited. The candidates who had already been nominated for the eight seats were put up for election. This

procedure gave rise to great dissatisfaction among the electorate, who felt that the reconstitution of the number of Commissioners to be elected from each Ward, made it incumbent upon the authorities to permit further nominations to be made. Resolutions were passed at public meeting in which the petitioners were present to the effect that many intending candidates did not offer themselves for election because there were two seats in a Ward, but they were willing to stand for election, where the seats have been increased.

This resolution was forwarded to the District Magistrate but no steps have been taken to remedy it. The present rule was issued on 5-2-1953. Originally, the ten elected Commissioners were not made parties to this application. As they were directly interested in the result of the application, they have been made parties and have been represented before me.

5. The argument on behalf of the petitioners is as follows. They say that the nomination of a candidate has a direct relation to the number of seats in a constituency. The more there are seats, the more number of people are likely to offer themselves for election. If the number of seats in a Ward is increased, people who would otherwise have held back from contesting an election were likely to come forward because of the increased chances in getting elected to a seat.

6. Therefore, the invitation to file nomination papers at a given point of time is on the basis of the existing number of seats, prescribed by the authorities for the particular Municipality and/or the particular Ward of a Municipality, where it is divided into Wards. Where nomination papers have been filed and registered, and the number of seats is thereafter increased, the basis of the election has altered, and the voters must be given a further chance to nominate, and/or be nominated. I should have thought that this proposition was so clear that it could not be disputed.

Mr. Bose however argues, that there is no provision in the Act or the rules which requires the nomination to be thus reopened. I must therefore examine the Act and the rules. u/s 6 read with Section 8 of the Act the State Government may constitute a Municipality. u/s 6(i) read with Section 8(g) of the Act, the Government may alter the number of Commissioners of a Municipality in consideration inter alia of the increase or decrease in the population, income, number of voters and commercial and general importance of the place :

Under Section 15 of the Act, every Municipality is to have a body of Commissioners which must not be more than thirty or less than nine, as the State Government may specify in the notification constituting the Municipality. u/s 16, Commissioners are to be elected in the manner prescribed. u/s 20, the Government has power to divide the Municipality into Wards and to fix the number of Commissioners for each Ward. Section 27 lays down that the manner of holding elections shall be prescribed by rules made under the Act. Section 44 confers upon the Government the power to make rules to regulate and determine

the elections, including the alteration of the number of Commissioners apportioned to any Ward of a Municipality.

Rules have been framed by Government in exercise of the powers conferred by Section 44, Clauses (b), (d), (e) and (h). Rules 3 to 16, deal with the preparation of the preliminary and final electoral rolls. Rules 17 to 21 deal with the nomination and registration of candidates. Under Rule 17(1), the Commissioners are to fix a date for nomination of candidates, not less than 45 days before the election day. The nomination paper is to be in form "B". The form of course requires the Ward in which election is sought, to be mentioned. Under Rule 17(3) the Chairman has to publish a notice in Form "C" fixing the time and date of the scrutiny and registration of the nomination papers which must be not less than 32 days before the election day. Rule 17(4) deals with the scrutiny and registration of nomination papers and Rule 17(5) deals with the publication of the same.

7. Rule 22 onwards deals with the conduct of Elections. Under Rule 25, each voter shall be entitled to vote for the ward and for the special ward, If any, in respect of which his name has been registered and for no other, and to give as many votes as there are vacancies for each ward for which he is thus entitled to vote.

8. There is thus no specific rule which deals with the case of alteration of the number of Commissioners apportioned to each ward. This is not surprising because the rules purport to be u/s 44, Clauses (b) to (h). Clause (a) which deals with the alteration of the number of Commissioners is left out. In other words, no rules have been made to provide for such a situation. It is certainly high time that such rules were made. But what is the effect of the absence of such rules? Although there is no specific rule as to the alteration of the number of Commissioners in a ward, once the alteration is made, the election of the new Commissioners will be subject to the general rules.

Now, take the case of Ward No. I or IV. Originally, there were two seats in each ward. Candidates were nominated for one of the two seats. When an additional seat was created what is the result? Either it may be said that no one has been nominated for that extra seat, or else it may be said that the election which was then going to take place is not the same election as originally contemplated. Or to put it in another form--the voters of these two wards have had no opportunity to nominate any one for that extra seat and that a general election for two seats in a ward is not the same general election for three seats in a ward. If either the boundaries of a ward are altered or the number of seats are altered, I cannot see how it can be said that it is the same general election as the one which was notified originally. If the alteration in the number of seats does not make it a different election then alteration of boundaries will also not affect it, since it is equally unprovided for in the rules.

Let us visualise then an election in a ward which consists of a hundred voters. On

that footing, let us say 3 people have been nominated. Then the area is increased to consist of a thousand voters. These extra 900 voters will then get no opportunity of putting forward any candidates, because no specific rules have been made u/s 44(a). This to my mind is an absurd position to contemplate. It is equally absurd to say that the Government can go on increasing seats and hold an election without anyone being nominated for the increased seats. I hold therefore that the general election dated 8-2-1953, at least in Wards Nos. I and IV was held without properly following the provisions of the Act and the rules. The voters in these Wards should have been given a further opportunity to nominate candidates and/or to file nomination papers. So far as these two wards are concerned, the nomination papers filed for the general election to be held on 9-11-1952 were no longer valid or sufficient, for the general election held on 8-2-1953. There was therefore a non-compliance with the provisions of the Act and the rules made thereunder.

9. But the more difficult question is as to whether the petitioners have pursued the right course in coming to this Court and making an application under Article 226 of the Constitution, instead of proceeding in the manner laid down by the Act. The procedure to challenge an election is contained in Sections 36 to 39B of the Act. u/s 36, any person qualified to vote at an election may at any time within ten days after the date of the declaration of the result of the election file a petition before the District Judge of the district within which the election has been or should have been held. One of the grounds on which an election can be set aside is that

"the election has been materially affected by any non-compliance with this Act or any rule made under this Act or by any mistake in the forms required thereby or by any error, irregularity or informality on the part of any officer charged with or carrying out any duty under this Act or rule made under this Act (Section 38(c))."

10. In this respect, the law in India differs from the law in England. The grounds upon which a Municipal election can be challenged under the Municipal Corporation Act 1882 (45.46 Vict. Ch. 50) is contained in Section 87 of that Act. If an election is not carried out according to the scheme of the charter or statute, the remedy is by an application for a writ of mandamus. ("In re Barnes Corporation; Exp. Hutter (1933) 1 K.B. 668 (A)). Under the Indian Act however, an election petition lies under such circumstances. But even under the English law, where an election petition does lie, a high prerogative writ is not issued unless there are special circumstances: -- "Reg v. Chester Corporation (1856) 25 LJQB 61 (B); --"Reg v. Welchpool Corporation (1876) 35 L T 594 (C & D); -- "R. v. Dublin Town Clerk (1909) 43 ILT 169 (sic). Halstaury, Volume 9 at page 774.

I shall now proceed to deal with some Indian case-law on the point. N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, (E), dealt an application for a writ of certiorari under Article 226 of the Constitution. The appellant was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal constituency in Salem

District. The Returning Officer rejected his nomination paper. The appellant moved the High Court of Madras under Article 226; praying for a writ of certiorari to quash the order of the returning officer rejecting his nomination paper and to direct him to accept the same. The High Court dismissed the application on the ground that it had no jurisdiction to interfere with the order at Returning Officer by reason of the provisions of Article 329(b) of the Constitution. This view was up-held by the Supreme Court. I am however not concerned with this aspect of the matter.

Fazl Ali J., however, enunciated certain principles applicable to election cases in general, which are relevant to be considered. The learned Judge said as follows :

"The Representation of the People Act 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provision in regard to all matters and all stages connected with elections to the various legislatures in this country..... obviously the Act is a self-contained enactment so far as elections are concerned, which means that whenever, we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are SECTIONS 80, 100, 105 and 170 and the provisions of Ch. II of Part IV dealing with the form of election petitions, their contents and the reliefs which maybe sought in them. Section 80 which is drafted: in almost the same language as Article 329(b) provides that "no election shall be called in question. except by an election petition presented in accordance with the provisions of this part".....Section 105 says that "every order of the Tribunal made under this Act shall be final and conclusive. Section 170 provides that "no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this. Act in connection with an election".....It is now well recognised that where a right or liability is created by a Statute which gives a special remedy for enforcing it, the remedy provided by that Statute only must be availed of. This rule was stated with great clarity by Willes J. in -- "Wolverhampton New Water Works Co. v. Hawkesford" (1859) 6 C. B. (N. S.) 336 at p. 356 (F), In the following passage.

"There are three classes of cases in which a liability may be established founded upon Statute, one is, where there was a liability existing at common law, and that liability is affirmed by a Statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the Statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the Statutory remedy. The second class of cases is, where the Statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a Statute which at the same time gives a special and particular remedy for enforcing it.....The remedy

provided by the Statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by Statute must be adopted and adhered to"

"The rule laid down in this passage was approved by the House of Lords in -- "Neville v. London Express Newspaper Ltd. (1919) AC 368 (G) and has been reaffirmed by the Privy Council in -- "Attorney General Trinidad and Tabago V. Gordon Grant & Co. (1935) AC 532 (H)...."

11. In -- AIR 1940 105 (Privy Council) , the Judicial Committee was dealing with Section 188, Sea Customs Act. Lord Thankerton said as follows :

"The question is whether the present case falls under the third class stated by Willes J. viz., "Where the Statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it....." With respect to that class it has always been held, that the party must adopt the form of remedy given by the Statute."

12. The right to vote at an election, the right to nominate candidates or be nominated as a candidate in a Municipal election, are all rights which have been created by the Act and do not exist apart from it. It therefore follows that where a specific remedy is provided for by the Act for the violation of a provision of the I Statute, that remedy should be followed. (Sections 36, 37, 38, 39A, 39B and 43). I must not however be taken to hold that so far as a Municipal election is concerned, precisely the same principles apply as in an election to a legislature under the Representation of the People Act 1951, which brings into operation Article 329(b) of the Constitution, or that the High Court's power under Article 226 is taken away by Section 39B or 43 of the Act.

13. In -- "Sawday v. Singha Roy AIR 1946 Cal 206 (J), Das J. has pointed out that the provincial legislature by enacting the Calcutta Municipal Act, 1923 had not taken away the power of the High Court under the Charter to issue high prerogative writs. Such an alternative remedy does not absolutely debar the High Court from exercising its jurisdiction under Article 226. It is however a rule of expediency that where the right itself (Here, the right to vote at an election or to stand at an election, or to nominate candidates or to get nominated) is created by a Statute, and where there is a specific remedy provided for in that Statute for a particular violation of it, that remedy, and not the extraordinary remedy under Article 226 of the Constitution should be allowed.

The Act contains a complete remedy for the particular breach complained of. There is no satisfactory explanation as to why that remedy by way of an election petition was not followed. It is submitted that the particular grievance of the public was brought to the notice of the district Magistrate, who delayed the matter until it was too late. It is not of course argued that forwarding a resolution passed at a public meeting to the district Magistrate is due compliance with Section 36 of the Act. No demand of justice or denial thereof is a condition precedent to the filing of an election petition. There is therefore no excuse for the

petitioners allowing time to pass by until it became too late to file an election petition. Ab-sence of diligence in pursuing a legal remedy can never be a justification for issuing a high prerogative writ.

14. The result is that, however much I regret it, I must refuse to interfere under Article 226 of the Constitution. The rule must be discharged. There will however be no order as to costs.