

(1935) 07 CAL CK 0052
In the Calcutta High Court

Nasiruddin Ahmed

APPELLANT

Vs

Haji Mahammad Yusuf

RESPONDENT

Date of Decision : 02-07-1935

Acts Referred:

Citation : (1935) 07 CAL CK 0052

Final Decision : Dismissed

Judgement

McNair, J.—In February, 1935, there was a bye-election to fill a vacancy in the Beniapukur Constituency, Ward No. 20, of the Calcutta Corporation. There were three candidates,

Haji Mahammad Yusuf pollod 601 votes,

Dr. Wahab " 252 ",

and Nasiruddin Ahmed " 173 ".

2. Haji Mahammad Yusuf was declared duly elected. The two unsuccessful candidates have brought this petition under secs. 46 and 47 of the Calcutta Municipal Act, 1923, to have the election set aside.

3. They allege corrupt practices within, the meaning of Schedule II, part I of the Act, viz.:

(1) Obtaining votes of persons who were either dead or out of Calcutta on polling day;

(2) Obtaining more than one vote from the same person;

(3) Publishing false and defamatory statements;

(4) Bribery; and

(5) Interference with the free exercise of the franchise of electors by means of threats and fraud.

4. Polling took place on the 14th February, 1935. The result was published in the Gazette on the 21st February, and the petition was filed on the 27th February, 1935. The petition contained most of the above charges and a schedule set out in six parts the particular voters in regard to whom the charges had been framed. Affidavits in opposition were affirmed on the 2nd March, 1935, and affidavits in reply were filed on the 8th March.

5. The latter contained further details in regard to voters already mentioned and set out a further item of personation regarding a man who appears on the electoral roll as Ghulam. Mohiuddin.

6. At the outset an objection was taken by Mr. C. C. Biswas on behalf of the Respondent to the inclusion of the charge relating to Mohiuddin. He contended that any application under sec. 46 must be made within 8 days of the publication of the result of the election in the Gazette, and that the effect of admitting this charge would be to defeat the statutory provision requiring the application to be made within a prescribed period. The Petitioners, he argued, must be confined to the instances raised in the petition and to the material therein contained. Subsequent to the filing of the affidavits in reply there was an application for the matter to be heard on oral evidence, and the hearing before me commenced on June 17th. It cannot be said therefore that the Mohiuddin incident was sprung upon the Respondent, or that he was prejudiced by not having time to rebut the charge. Mr. Biswas admitted that he did not base his objection on this ground but relied on the wording of the Act. Mohiuddin has actually given evidence and has taken a leading part in the conduct of the Respondent's case.

7. In my view, all that is intended by sec. 46 of the Act is that the application should be filed at an early date (i.e., within 8 days), so that the person charged should be in a position to meet the charge at once, and to enable the matter to be enquired into so that if the charges are upheld there may be a fresh election without delay. The application should set out the grounds on which the validity of the election is challenged, but I can find nothing in the words of the section to prevent the applicant after 8 days from giving further particulars. The charge of personation had been laid in the petition and it is admitted that the Respondent was not prejudiced in his defence owing to the addition of another incident. The guiding principle in ordinary particulars is to prevent the defence from being embarrassed and to insure a fair and effectual trial and there is nothing in the Calcutta Municipal Act to show a departure from that principle. I note that a similar argument was put forward by Mr. Dickens, K.C., in *The Borough of West Bromwich case (Alfred Ernest William Hazel v. William Legge Viscount Lewisham)* 6 O'm. & II, 257 (1911) and was rejected by Ridley and Bucknill, JJ. I have accordingly admitted evidence relating to Mohiuddin. Before examining the allegations in detail I will consider some legal aspects of the case.

8. Mr. B. C. Ghose on behalf of the Respondent argued that the allegations were in the nature of criminal charges and must be proved with the same strictness. He contends that a "corrupt mind" in an agent is not sufficient to justify such a

finding against a candidate. I am not satisfied that that is a correct statement of the law.

9. In the first place, every one of the corrupt practices referred to in schedule II, part I of the Act is specifically made an offence if done " by a candidate or his agent or by any other person with the connivance of a candidate or his agent," and " connivance " has been held by this Court to involve some degree of knowledge on the part of the candidate or his agent [I. J. Cohen v. Bepin Behary Sadhukhan 32 C. W.N. 1155 (1927)].

10. Secondly--the Courts in England have decided in many instances that the trial of an election petition is not governed by the rules applicable to a criminal case.

If I were sitting here trying an indictment or trying an action for penalty ",

said Baron Martin in *The Norwich case* 1 O'm. & 11. 8 at p. 10 (1869) (*Tillet v. Strachey*)

before the candidate could be made responsible for another, for a crime or penalty, you would have to give evidence of direct bribery, but I am not trying a criminal case, I am trying a civil case, and the rules applicable to a civil case are, I apprehend, the rules applicable to this."

"The law of agency which would vitiate an election is utterly different from that which would subject a candidate to a penalty, or an indictment, and the question of his right to sit in Parliament"?

or as here in the Corporation--

has to be settled upon an entirely different principle.

11. The learned Judge further stated that the relationship was more that of master and servant than of principal and agent, the master being responsible for the acts of his servant notwithstanding the directions he may have given him; and in company with Willes, J., and Blackburn, J., he decided that any person authorised to canvass was an agent.

The doctrines of election agency are much wider than those of common law agency and evidence which would be inadequate to establish agency at common law has often been held sufficient in election cases to make a candidate responsible for acts committed by other persons." [This quotation is from *Parker on Election agency and Returning officer* (4th Edition) p 378.--Reporter]

12. There can be no doubt that the candidate is responsible for all the misdeeds of his agent committed within the scope of his authority but the difficulty that frequently arises, and which has arisen in this case, is to determine whether the wrong-doer did or did not stand in the relation of agent to the candidate in respect to the particular matter of complaint. The question must always depend on the particular circumstances of each case but there are certain guiding

principles which have been laid down for consideration in arriving at the conclusion. A man may become the agent of another either by actual employment or by recognition and acceptance, and to establish agency it is not necessary to show that the candidate himself knew of and accepted voluntary services. Knowledge and acceptance by other persons in control is sufficient.

I think it must be made out

said Baron Fitzgerald, in *Borough of Dungannon* 3 O'm. & H. 101 (1889)

that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some material part of the business of the election which ordinarily is performed, or is supposed to be performed, by the candidate himself.

13. The entrustment may be by implication, but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election.

14. With these preliminary remarks I will now deal with the individual instances alleged.

15. The first charge set out in para. 6 of the petition relates to personation of voters who were not present in Calcutta on polling day. A list of such persons is contained in Schedule A, part I of the petition.

16. [His Lordship considered the various instances mentioned and after stating that the charges in respect of a few had not been proved to his satisfaction, proceeded.]

17. Shaikh Ismail Mistry is an old gentleman said to be aged 125 and quite incapable of going to the poll, but there is no evidence to show that the Respondent or his agent were in any way responsible for the recording of a vote in his name in their favour. Two of the four persons mentioned in schedule A, part II of the petition are found to have voted for Dr. Wahab, and the charges in regard to the other two are abandoned.

18. Paragraph 8 of the petition and part 3 of the schedule relate to plural voting.

19. Only 3 instances were pressed:--

1. Haji Mahammad Yusuf;
2. Secunder Mia; and
3. Hamoo.

20. Haji Md. Yusuf is entered thrice in the electoral roll, once as mutwalli, a second time as executor, and thirdly in his personal capacity. These entries are as I have stated --although there is a foot-note to the electoral roll stating that only those voters marked with an asterisk are voters in a representative capacity,

and there is no asterisk against any of the three names.

21. Hamoo is entered as Sk. Hamoo, Md. Syed Hamoo and Md. Sayid Hamoo. It appears that he recorded two votes in booth No. 2, one for the Respondent and one for Dr. Wahab, and a third vote in booth No. 3 for the Respondent.

22. Secunder Mia was said to have voted twice being entered in two places in the roll.

23. It is admitted by the Respondent that Hamoo and Secunder Mia were both working for him, but Counsel on his behalf contends that no offence has been committed. He refers to the proviso to sec. 24 (3) of the Calcutta Municipal Act which provides that a person who is registered as the representative of any Company, body corporate, firm, joint family or other association of individuals, or as manager of a lunatic, or guardian of a minor shall not therefore be ineligible for registration in his individual capacity on the same electoral roll; and to sec. 26 which provides that every person registered on the electoral roll shall be entitled to vote. In this connection it is noteworthy that none of the three persons referred to comes within the exceptions in the proviso to sec. 24 (3), and none of them is therefore entitled to be entered on the roll under more than one number. The entry having been made, the question arises whether the same elector is entitled to exercise a vote in respect of such entry.

24. It is contended on behalf of the Respondent that the number and name are both intrinsic parts of the entry in the electoral roll, and reference is made to Rule 29 which contains the questions to be put to an elector whose identity is in doubt;

(1) Are you the person enrolled as follows (reading the whole entry from the roll), and (2) Have you already voted at the present election in this constituency as such voter ?

24. In my view each entry does suggest a different entity, for otherwise the proviso to sec. 24 (3) would be inoperative, and if an elector has been entered more than once in the electoral roll under different numbers it appears to me impossible to say that he is committing an offence in exercising the right to which he has become entitled under sec. 26. Furthermore, I am by no means certain that proviso (b) to sec. 46 does not justify the exercise of a second vote even though it is wrongly recorded in the electoral roll.

25. Even if I am wrong in my interpretation it is quite possible that the electors now accused of personation have come to the same conclusion, and it is impossible to say that in acting as they have done they were actuated by a corrupt mind and intention. In the absence of such criminal intention no offence has been committed, (see Parker's Election Agent, 3rd Edition, page 594), and I hold that the charges in paragraph 8 do not constitute an offence.

26. The charges in paragraph 9 are extremely vague.

27. [His Lordship after dealing with the instances of interference with the free exercise of the franchise of electors concluded as follows.]

28. At the conclusion of the evidence Mr. Bose informed me in answer to my question that the " means " specified in Schedule II, Part 1 (2) of the Act on which he relied was fraud.

29. Fraud was never suggested in the petition and there is no evidence to show the nature of the fraud.

30. These charges have not been substantiated.

31. I now come to the two main charges of personation to which the greater part of the evidence has been directed. The first of these has been referred to as the " Shafi incident," and the other relates to the recording of a vote in the name of Ghulam Mohiuddin. The electoral roll contained the name of Md. Shafi, No. 880 of Jannagar Road.

32. [His Lordship after stating who the polling agents were in booth 2, proceeded as follows.]

33. Shafi is said to be an absconder and to have been out of Calcutta on that day; nevertheless someone came in and recorded his vote.

34. Sometime later in the day another person came and wanted to vote as Mohamed Shafi. Dr. Wahab's agent A. S. M. K. Rahaman objected on the ground that Shafi had already voted, but as the main persisted, Rahaman challenged, and a challenge paper was issued in conformity with rule 32. The elector was then asked to sign and instead of signing " Md. Shafi" he signed "Mohamed Yusuf " in Urdu. The presiding officer was unable to read Urdu, but the signature was translated to him and the police were then called and the elector to whom I shall refer as " Yusuf" was given into custody.

35. There is no doubt that " Yusuf " signed as stated, but no challenged vote list is forthcoming.

36. [His Lordship discussed the evidence and concluded.]

37. There can be no doubt that the incident took place very much as related by the Petitioner's witnesses and I accept their story that the Respondent was present and expressed the desire that the incident should be hushed up and no proceedings taken against " Yusuf."

38. It is contended that the evidence is not sufficient to connect the Respondent with the incident so as to show that " Yusuf" was acting with his knowledge or connivance.

39. It is necessary, therefore, to see whether there is any other evidence which shows a connection.

40. [His Lordship discussed the evidence and after stating that Atoo Khalifa

introduced and identified Yusuf to the polling booth, proceeded as follows.]

41. We find, therefore, that in a leaflet printed (in connection with the election) under instructions from the Respondent, Atoo Khalifa has been named as one of the persons soliciting votes for the Respondent. In my opinion this alone is sufficient to constitute him an agent as that term has been construed in election cases.

42. But, apart from this, there is a considerable body of evidence which I find no reason to doubt that Atoo Khalifa canvassed for the Respondent, and was actually engaged during polling day in fetching electors to the poll and he was seen in the polling booth.

43. I find that the charge is established and in respect to the Shafi incident a corrupt practice was committed by the Respondent's agent within the meaning of sec. 3 of Part I of Schedule II of the Calcutta Municipal Act.

44. The next charge for investigation relates to Gholam Mohiuddin. It with be remembered that this was the further charge of personation raised in the affidavit in reply. It is charged that Mohiuddin Ahmad, a supporter, worker, and agent for the Respondent wrongly personated Ghulam Mohiuddin, Voter No. 1181, on the electoral roll.

45. There is no question as to the person who voted. He has given evidence in Court, and the main question is whether he was in fact the person entered in the electoral roll as Ghulam Mohiuddin.

46. [His Lordship considered the evidence and concluded as follows.]

47. In my opinion it is clearly established that the Mohiuddin who was challenged was not the person entitled to vote under the entry Ghulam Mohiuddin No. 1181 in the electoral roll.

48. [His Lordship after stating the reasons for not accepting Golam Mohiuddin's evidence proceeded.]

49. I am satisfied on the evidence that Mohiuddin acted as agent for the Respondent, that he knew he was not entitled to vote as Ghulam Mohiuddin, voter No. 1181, and that the offence of personation has been established in this instance also.

50. The remaining charges refer to an attempt to bribe Dr. "Wahab as alleged in paragraph 14 of the petition and a threat to Nasiruddin unless he withdrew from his candidature.

51. The corrupt practice, if any, in the case of Nasiruddin must come under cl. 2 of part I of schedule II. The offence consists in interference with the right of any person to stand or not to stand or to withdraw from standing as a candidate by means of violence, injury, restraint, or fraud and any threat thereof.

52. It is urged on behalf of the Respondent that the " means," whereby Nasiruddin's right to stand as a candidate were interfered with, have never been alleged or specified.

53. [His Lordship after mentioning that a deputation had waited upon Nasiruddin in which Jan Mahommed exercised threats proceeded.]

54. There is nothing that leads me to believe that the Respondent had any connection with the deputation of that he was accessory to any threats that may have been made by Jan Mahomed.

55. Jan Mahomed is obviously a firebrand and his sympathies are undoubtedly with the Respondent but there is no evidence that he was an agent of the Respondent or that he acted with the connivance of the Respondent or his agent.

56. After the meeting at Nasiruddin's house the deputation went on to Dr. Wahab and I have no doubt that they offered Dr. Wahab a sum of Rs. 200 to withdraw, which Dr. Wahab refused. Again there is no evidence that the Respondent or his agents were in any way connected with the offer and these two charges must be dismissed.

57. The suggestion that undue influence was brought to bear on Dr. Wahab by his landlord Sharafat Hussain, though not abandoned, has not been pressed and I hold that it has not been established.

58. The Petitioners have proved corrupt practices in regard to the Shafi incident and Mohiuddin, and I am of opinion that these corrupt practices were committed with the connivance and sanction of the candidate and his agents and the election of the Respondent is void. The greater part of the evidence has been directed to the proof of the charges which have been established and the Respondent must pay to the Petitioners two thirds of their costs to be taxed as of a hearing.