

(1962) 07 CAL CK 0006
In the Calcutta High Court
Case No : C.R. No. 4047 of 1960

Nitya Gopal De

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 26-07-1962

Acts Referred:

Constitution of India, 1950 — Article 226
Foreigners Act, 1946 — Section 3
West Bengal Panchayat Act, 1957 — Section 117, 27, 55, 7
West Bengal Panchayat Rules, 1958 — Rule 30

Citation : AIR 1964 Cal 340

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : A.K. Dutta Jr. and Nanda Lal Pal, for the Appellant; N.C. Chakraborty, D.N. Basu and S.K. Banerjee, (for Nos. 1-5) and D.N. Das and B.N. Bajpayee, (for No. 8), for the Respondent

Judgement

P.B. Mukharji, J.—This is an application under Article 226 of the Constitution by Nitya Gopal De, a voter of Madhya Narayanpur Gram Panchayat, P. S. Karimpur, Union Nara-yanpur in the district of Nadia. The petition is directed against the election of Pradhan under the West Bengal Panchayat Act of 1956.

2. In the petition it is alleged that the petitioner Is a voter and his name is included in the Electoral Roll of the West Bengal Legislative Assembly in Part 35 at page 3 of village Narayanpur (Purbapara), Union Narayanpur, P. O. Amiya Narayanpur, Police Station Karimpur, district Nadia pertaining to the constituency in which Gram Panchayat Madhya Narayanpur is situate. The Electoral Roll is prepared by the prescribed authority u/s 7 of the West Bengal Panchayat Act, 1956. That Electoral Roll is the only register of voters which determines and governs the election of members of Gram Panchayats, members of Anchal Panchayats, election of Adhyaksa, Upa-Adhyaksha of Gram Panchayats and Pra-dhin and Upa-pradhan of Anchal Panchayats. The petitioner is an elected member of the Anchal Panchayat of Narayanpur on the result of the election, held on 25th

of July, 1960, on the votes of the members of the Gram Sabha, Madhya Narayanpur.

3. It is the petitioner's case that the 3th respondent Abdul Rahaman is a foreigner and was therefore disqualified to be elected as a Pradhan. Abdul Rahaman was elected Pradhan of Anchal Panchayat, Narayanpur, district Nadia on the 10th August, 1960. It is alleged by the petitioner that he is a Pakistan citizen and was served with a Quit notice order bearing date 1st August, 1960 by the Superintendent of Police and Civil Authority, Nadia under the Foreigners Act, 1946 and Foreigners Order, 1948. Such Superintendent is the 11th respondent to this application, Abdul Rahaman who was elected Anchal Panchayats was served on the 1st of August, 1960 by an Order No. P-5993 under the Foreigners Act, 1946 and Foreigners Order, 1948 by the 11th respondent asking him to leave India within seven days from the receipt of that order. His wife Jahanara Khatun was also similarly served with order No. P-5994 by the respondent No. 11 to leave India within a week from the receipt of the order.

4. It is on this ground mainly that the election of the 8th respondent, Abdul Rahaman, is challenged in this petition. The petitioner obtained a Rule as early as 16th September, 1960 and in fact there was also an interim injunction restraining: publication of the result of the election pending the disposal of the Rule. The Rule was at first made returnable on the 16th of November, 1960. After a chequered history extending over two years the matter has now come up for hearing.

5. Mr. Dutta, learned Advocate for the petitioner, has confined his argument to grounds (III) and (IV) of the petition. Those grounds are that Abdul Rahaman cannot remain a Pradhan of Anchal Panchayat as he is not an Indian citizen but a Pakistan citizen and a Pakistan National as appears from order No. P-5993 dated 1st August 1960 and also Order No. P-5994 of the same date by the Superintendent of Police, Nadia and the Civil Authority under the Foreigners Act and the Foreigners Order as mentioned above. The ground further is that the Pradhan so elected is disqualified to be a Pradhan of the Anchal Panchayat concerned.

6. So far as the facts are concerned it is admitted that Abdul Rahaman has been served with Quit Order on the ground that he is a foreigner. Abdul Rahaman himself has filed an affidavit-in-opposition to the petition. He admits that there is an order under the Foreigners Act and the Foreigners Order against him. He however states that by an order of the Secretary, Home Department of the Government of West Bengal dated September 16, 1950 further action on the order of deportation has been stayed. According to Abdul Rahaman's affidavit, he disputes the fact that he is a Pakistan National or Pakistan citizen. He claims to be an Indian citizen by birth and by domicile and says that his name was recorded as a voter in the Electoral Rolls of the year 1957-58 and also in the current Electoral Roll.

7. The affidavit of the 11th respondent, the Superintendent of Police and Civil Authority in Nadla is made by Sri Nihar Ranjan Bose. There also it is admitted by the Government that -

"Abdul Rahaman was detected to be a Pak National and he was served with Quit Notice for quitting India as he is residing in the Indian Union without a valid and legal Passport and visa. The matter has been referred to the Government of India and it has been ordered that further proceedings should be kept in abeyance till the decision, of the Union Government. So the matter has been kept in abeyance pending final instructions from the Government of India."

8. What is unfortunate about the matter is that although as long a time as about two years have passed the Union Government has not yet finally decided the matter. It is a strange commentary that the matter, where a person who was ordered by the "Civil Authority" under the State Government to be deported on the ground that he was a foreigner under the Foreigners Act and on whom actual Quit Notice was served to leave India within a week, has been kept pending by the Government of India authorities for such a length of time. It is all the more unfortunate on the facts of this case when the person against whom the order was made is purporting to fulfil the function of a public office such as Pradhan of an Anchal Panchayat in a frontier district like Nadia. Two years should have been long enough time for any responsible Government, however busy it may be, to come to a decision in this matter. Unfortunately, however, this is not so in the present case.

What is worse still is that neither the Quit notice has been produced by the Pradhan Abdur Rahaman on whom it was served nor has the copy of that order been produced by the State of West Bengal which is a party appearing in this petition, nor even the order of the Home Secretary of the State of West Bengal is produced by the Government here. I gave the Government an opportunity as well as the Pradhan to produce the two orders Nos. P-5993 dated 1-8-1960 and P-5994 of the same/ date as well as the order staying further proceedings on the Quit notice but not one of the orders has been produced by either the State of West Bengal or by the Pradhan Abdur Rahaman. But for the fact that the order of deportation under the Foreigners Act and Foreigners Order is admitted in this case, it would have been impossible to decide and dispose of this matter. Fortunately, however, they are admitted facts.

9. The order under the Foreigners Act has not been revoked. That order could only be made u/s 3 of the Foreigners' Act. It provides -

"The Central Government may by order make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein."

Thereafter in Sub-section (2) of Section 3 of the Foreigners Act particular powers

are given to make orders upon foreigners not to remain in India or in any prescribed area therein.

Under this section the Foreigners Order 1948 was promulgated. By clause (2) of the Foreigners Act, 1948 Civil Authority is defined to mean such authority as may be appointed by the Central Government in this behalf for such area as it thinks fit. The Superintendent of Police is such an authority within the meaning of the definition of "Civil Authority". It is the Civil Authority under the Foreigners Orders who issues orders for deportation or for leaving India. That was done in this case as will appear from his affidavit. This proves that prima facie a highly responsible Civil Authority under the Foreigners Act and Foreigners Order has found Abdur Rahaman to be a foreigner. That finding remains and is the main obstacle on the way of Abdur Rahaman. If it stated that re-presentations by him have been made to the Government of India against the order to quit and such representations are pending. But all that has happened uptill now on such representations, as I have stated before, is that further action, namely, the actual deportation, has not been carried out but has been stayed. But that does not mean that the declaration that he is a foreigner has been removed.

10. The question then is can such a person be elected as a Pradhan and continue to act as such. I have no hesitation in holding that a Pradhan has to be an Indian citizen. A foreigner cannot be a Pradhan under the West Bengal Panchayat Act, 1956. Section 7 of the West Bengal Panchayat Act states that every Gram Sabha shall consist of all persons whose names are included in the electoral roll of the West Bengal Legislative Assembly for the time being in force pertaining to the area for which the Gram Sabha has been constituted. Now the facts in this case are simple on the point. The election of the Pradhan took place on the 16th August, 1960 but the order under the Foreigners Act and the Quit notice under the Foreigners Order were made previously and served on the Pradhan, Abdur Rahaman, on the 1st August, 1960. So at the time when he was getting elected as a Pradhan of the Anchal Panchayat there was an order by a responsible State Government and the Civil Authority acting thereunder declaring him to be a foreigner and having served upon him an order to quit India on that ground. The electoral roll mentioned in Section 7 of the West Bengal Panchayat Act, 1956 must be read with Article 326 of the Constitution of India whereby it is said that every person who is a citizen of India etc. shall be entitled to be registered as a voter at the elections to the House of the People and to the Legislative Assembly of every State. Reading Section 7 (1) of the West Bengal Panchayat Act, 1956 with Article 326 of the Indian Constitution it is plain that only Indian citizens alone are entitled to be on the electoral roll. It must follow that the Pradhan must also be an Indian citizen, reference may be made to Section 27 of the West Bengal Panchayat Act, 1956 which provides that every Anchal Panchayat shall at its first meeting at which a quorum is present elect in the manner prescribed one of its members to be its Pradhan. Therefore, only a member and who must be an Indian citizen can be a Pradhan.

11. That being so, it is clear that the 8th respondent, Abdur Rahaman, was disqualified from being elected as Pradhan and continuing as such on the ground that an order had already been made against him as a foreigner. No doubt that order is pending revision before the Government of India. But until that order is set aside, I do not think it is possible for this Court to hold on the materials presented here, that he is qualified to act as a Pradhan.

12. It has been argued on behalf of Abdur Rahaman that mere allegation against a person as a foreigner will not prove him to be a foreigner. No doubt it is true. But here it is not a mere allegation that he is a foreigner. Here there is a good valid and prima facie order from the responsible legal authority under the Foreigners Act and the Foreigners Order saying that he is a foreigner. This is not a mere allegation. It is an order by the "Civil Authority" a lawfully constituted authority under the Foreigners Act and Foreigners Order. That Order had not been challenged in this Court by any writ proceeding and cannot in the facts here be collaterally attacked in defence of the Office of Pradhan held by Abdur Rahaman.

13. It is argued on behalf of Abdur Rahaman on the basis of affidavit used by him that this order was made in collusion with the petitioner. It is difficult to take notice of that allegation because if that was so he should have applied or taken legal steps to have that order set aside. This Court will not hold that Government order was passed in collusion simply because somebody has made an allegation of collusion. No proof is given, no particulars of alleged collusion are given and I do not see anything on the record to hold that the petitioner, of all persons, would be so powerful and influential as to pervert legal and official authority to make an order of this nature. I have no hesitation in rejecting the bald and unsupported allegation of collusion without any particulars, against the Government order.

14. There is also another aspect of the case. It is this:

A candidate for Pradhanship under the Act has to prove in the first instance that he is not a foreigner and an Indian citizen. It is no doubt true that Abdur Rahaman's name appears in the electoral rolls of 1952 and 1957 as has been stated in his affidavit. But the fact remains that the order declaring him to be a foreigner asking him to quit India was made in 1960; that is subsequent to the electoral roll. Therefore, the prima facie proof contained in the electoral roll is now displaced by the subsequent order declaring him to be a foreigner and asking him to quit. It is, therefore, now for him to establish that he is not a foreigner either by taking legal steps to set aside that order or by asking the Govt, of India to revoke that order. That order, however, has not yet been revoked as I have stated and therefore he has not established his qualification to become a Pradhan that at the time he was elected he was an Indian citizen.

15. On this ground alone the Rule on the merits should succeed.

16. But it is contended on behalf of Abdur Rahaman that the petitioner has no right to a writ under Article 226 of the Constitution and that this petition is not

maintainable. It is also stated on behalf of Abdur Rahaman that there was an alternative remedy by way of election petition and as he has not adopted that alternative remedy the writ under Article 226 should be denied to him. Before discussing the law on the subject the relevant facts appearing on the affidavit must be emphasised on this point.

17. It is said by Abdur Rahaman In paragraph 19 of his affidavit that he was elected uncontested and unanimously and no question of any nomination paper can arise in the facts and circumstances of the case. He also contends in his affidavit that the petitioner has no locus standi to raise any election dispute. Such dispute can be raised by a competent person which the petitioner is not and before an appropriate forum in the manner as prescribed by law. If that be so, then the petitioner has no right to present an election petition and there is no remedy by way of election petition, on the admission of Abdur Rahman himself. But I shall not pin down Abdur Rahaman to his admission in the affidavit but shall endeavour to deal with the point of maintainability on its merits.

18. The petitioner, as already stated, is a voter. He has a right of franchise which he can exercise to elect a Pradhan. That is a legal right. He has, therefore, a right to contest the election" of a Pradhan and dispute the validity or legality of such election. Besides, a Pradhan Is a public officer in charge of the custody of the Anchal Panchayat funds. Indeed the account and audit rules of Gram and Anchal Panchayats make that abundantly clear. By Rule 3 of such rules the Pradhan of an Anchal Panchayat shall deposit all receipts of the Anchal Panchayat fund in the Savings Bank of the nearest Post Office and such Savings Bank again shall be maintained by the Anchal Panchayat and the Postal Pass Book shall remain in the custody of the Pradhan who shall operate the accounts. Section 55 of the Wsst Bangal Panchayat Act, 1956 creates the Anchal Panchayat fund and indicates how shall it be set apart and applied annually. See in this connection, Municipal Corporation for the city of Bombay v, Govind laxman, AIR 1949 Bom 229. In this context of facts and law it seems to me clear that the petitioner has a legal right both as a voter and as member of Anchal Panchayat interested to see that the public funds of Anchal Panchayat are properly administered by a lawful person, on which to found his claim to contest the validity of the election of Pradhan.

19. The next question then is whether the existence of a remedy by way of an election petition prevents the petitioner from asking for a Constitutional writ under Article 226 of the Constitution. It is argued that u/s 117 of the West Bengal Panchayat Act, 1956 the election of a person as a Pradhan shall not be called in question in any Court provided that an application questioning the election should be presented to such authority within such time and in such manner as may be prescribed. By Rule 30 of the West Bengal Panchayat Rules 1958 it is also provided that no election of a Pradhan shall be called in question except by an election petition to be presented to the District Magistrate by the candidate who was duly nominated. Such petition shall relate only to the election

for which that petitioner was a candidate and shall be presented within 15 days from the date of the declaration of the result of the election. This rule only empowers a candidate to the office of the Pradhan to file an election petition and no one else. But the petitioner himself was not a candidate for the office of the Pradhan. Therefore), the petitioner has no alternative remedy by way of an election petition in the present case.

20. In that view of the matter the argument advanced on behalf of Abdur Rahaman on the maintainability of the petition loses much, if not all, its force. It may be stated here that the Supreme Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, , observed that in view of the provisions of Art. 329(b) of the Constitution and Section 80 of the Representation of the People Act, 1951, the High Court had no jurisdiction to interfere with the order of the Returning Officer. That was a case where there was an appeal from an order of the Madras High Court dismissing the petition of the appellant praying for a writ of certiorari under Article 226 of the Constitution. Naturally Article 226 of the Constitution was read in the light of Article 329(b) of the Constitution. Different articles of the Constitution have to be read together and wherever possible reconciled. Article 329(b) of the Constitution definitely provides a constitutional bar to the interference by Courts in electoral matters so far as election to either House of Parliament or State Legislature is concerned. But what can be done by the Constitution to affect the Constitution cannot be done) by an ordinary statute like the West Bengal Panchayat Act, 1956 even with the assent of the President. A statutory provision such as Section 117 of the West Bengal Panchayat Act cannot override the Constitution.

Again, it is necessary to recall the recent observation of the Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, , that the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which Courts have laid down for the exercise of their discretion. See the observation of Rajagopala Ayyangar, J. in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, . It was further observed there that the two exceptions engrafted on the rule that the existence of an alternative remedy was a bar to the entertainment of a petition under Article 226 of the Constitution namely (1) that there was a complete lack of jurisdiction in the officer or authority to take the action impugned or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice are by no means exhaustive and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy.

21. But it is unnecessary to pursue this argument about alternative remedy as a bar in the facts of this case because . the petitioner had no alternative remedy as

I have pointed out. In dealing with Article 226 of the constitution the Courts in India still think consciously and unconsciously in terms of "high prerogative writs". Article 226 of the Constitution of India is neither high nor prerogative. It is a plain constitutional right and an inexpensive, efficacious and quick constitutional remedy given by the Constitution of India to her High Courts. It is not a "prerogative" of the Crown nor is it "high" but it is a constitutional remedy and a constitutional right granted by the Constitution. It is a power of a High Court under the Constitution. Naturally in England with the Crown as the fountain head of Justice, the high prerogative writs like Habeas Corpus, Mandamus, Prohibition or Certiorari or Quo Warranto depend on the course of favour of the Crown and it is in that light that the British Courts administer such a "high prerogative". This concept of Constitutional jurisprudence will be dangerous to adopt here in the Indian Constitution. Article 226 of the Constitution provides that the High Court shall have power to issue these writs. It is a constitutional obligation upon the High Court. The counter-part of that obligation is that a person aggrieved may move the Court for the exercise of that power. The discretion which the High Court may have in granting or refusing such writ is as much a discretion as a solemn obligation cast by the Constitution upon it. Here if it is at all a prerogative, it is the prerogative of the people in a democratic republican Constitution.

22. The learned Government Pleader appearing for the State has supported the petition and his arguments are for making the Rule absolute.

23. For the reasons stated above and on the grounds mentioned I make the Rule absolute and set aside the election of the 8th respondent, Abdur Rahaman, as Pradhan of the Anchal Panchayat. In the facts and circumstances of the case there will be no order as to costs.