
(1963) 02 AP CK 0002

In the Andhra Pradesh High Court

Case No : Writ Petition No. 589 of 1961

Pakanti Sudarshan Reddy and Others

APPELLANT

Vs

District Collector, Warangal and Others

RESPONDENT

Date of Decision : 13-02-1963

Acts Referred:

Constitution of India, 1950 — Article 226

Hyderabad District Municipalities Act, 1956 — Section 10, 11, 12, 13, 27(1)

Citation : AIR 1964 AP 421

Hon'ble Judges : P. Chandra Reddy, C.J;Gopal Rao Ekbote, J

Bench : Division Bench

Advocate : Sankara Sastry, for the Appellant; 3rd Government Pleader and K. Madhava Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Ekbote, J.—This is an application under Article 226 of the Constitution of India for the issue of a writ of Mandamus directing the respondents 1 and 2 not to give effect to the election held on 26-4-1961 in respect of the Municipality of Warangal.

2. The material facts lie within a narrow compass and are for the most part uncontroversial. The Government issued a Notification on 11th March, 1981 u/s 17 of the Hyderabad District Municipalities Act, 18 of 1956, hereinafter called the Act, calling upon all the constituencies of the City Municipality, Warangal, to elect members before 27th April, 1961. The District Collector, Warangal, in pursuance of the said Notification u/s 20 of the Act, appointed various dates for nomination etc., according to which the last date for making nominations was fixed as 20th March, 1981 and 26th April, 1961 was fixed as the date of poll. Accordingly, the elections were held on 26th April, 1961 under the supervision of the 2nd respondent, who is the Returning Officer for the purposes of the said elections. Respondents 3 to 36 were declared from various constituencies. The petitioners, who are either the tax payers or the voters residing in the Municipal area of

Warangal, filed this application questioning the validity of the election held on 26th April 1961 on various grounds.

3. Firstly, it was urged by the learned Advocate for the petitioners that respondents 3 to 12 being the sitting members of the City Municipality, Warangal, on the material dates of the election were holding office or place of profit under the City Municipality, Warangal, and were, therefore, disqualified in order to appreciate this contention, it becomes necessary to look into Section 27 (1) (c) of the Act Section 27, as far as at is relevant for our purpose, is as follows :

"27. (1) Subject to the provisions of this Act a person shall be disqualified for being elected as member of a Committee if such person at the date of election -

(a)

(b)

(c) holds any office or place of profit under the Government or under the Municipality or under any local authority."

The object of Section 27 clearly appears to be to ensure purity of Municipal Committee and secure independence of the members of the Committee; it is intended that the Municipal Committee should not contain persons who are under the obligation of the Government, Municipality or any local authority. In order to ensure free and fearless discussion, it becomes necessary to see that the persons who compose the Committee are not in any way under the influence of the Government, the Municipality, or any local authority. This is evidently to avoid conflict between a member's duty and his interest. Section 27 being of a disqualifying nature will have to be rigidly construed. It is true that the expression "office of profit" has not been defined in the Act. It does not seem possible to so define the expression, as it is likely to cover different kinds of offices or places, which now. exist under the said authorities. Section 27, however, is clear that before any person can be said to be suffering from any disqualification, the following three things must be satisfactorily proved :

(1) that he holds an office or any place,

(2) that it is an office or place of profit, and

(3) that it is an office under the Government, Municipality, or any local authority.

It is not the contention of the petitioners that respondents 3 to 12 hold office or place of profit under the Government, either the State or the Union, or under any local authority. The submission is that as they were sitting members of the City Municipality, Warangal, and as such were receiving Rs. 5 for every meeting which they attended, they would be deemed to have been holding office or place of profit under the Municipality on the date when they sought their re-election. It is unnecessary in our view to discuss elaborately what the word "Office" connotes. It is sufficient to say that "office" means a position or place to which certain

duties are attached more or less of a public character, and that it is a sort of permanent position held by successive incumbents. An office may be with or without remuneration and may or may not be under the said authorities. It is "a right to exercise a public or private employment" or to hold a position which has certain duties attached to it.

The connotation being very general it would not be correct to say that the membership of Municipal Committee is not an office. In fact, the Act itself describes it in some provisions as the office. The crucial question, however, is whether it is an office of profit. Now the only contention is that as every member gets Rs. 5 as sitting fees and as all the members reside in the City of Warangal, they do not spend Rs. 5 towards their conveyance charges, and the balance which is left with them should therefore be construed as a profit which is derived from attending the meeting of the Committee. We are unable to give any effect to this argument.

The learned Advocate called in aid a decision in *In the matter of, Vindhya Pradesh Legislative Assembly Members*⁴ Ele L R 422. In that case a question which was referred by the President to the Election Commission was whether the members of the Legislative Assembly, who were appointed members of the respective District Advisory Councils and who were getting travelling allowance and daily allowance, had become disqualified to be members of the Assembly. The Election Commission gave opinion that membership of the Vindhya Pradesh District Advisory Councils was an "office" and that the members held that office under the Government of Vindhya Pradesh. Members of the Assembly who had, therefore, actually attended any meeting of a Council must be said to have held such an office.

The Commission also gave opinion that where a member of a Council is merely entitled to a bona fide travelling allowance or daily allowance as distinguished from sitting fees or attendance fees which purports to cover and presumably covers only his actual out-of-pocket expenses and the amount of allowance is not fixed at such a high figure as to make it mere cloak for giving a profit, there is no "profit". Consequently, the payment of one and a half first class railway fare to the members of the Dist. Advisory Councils was not a source of profit to the members. It was also opined that the daily allowance at the rate of Rs. 5-0-0 per diem which was being credited to the members of the Legislative Assembly for the sessions of the Assembly was such a reasonable amount that it cannot be said to yield any profit to the members of the Councils who went to attend the meetings thereof. The Election Commission, however, was of the opinion that by making the daily allowance rate the same for resident and non-resident members the Govt. laid itself open to the charge of offering a certain amount of profit though a small profit, to the resident members, and as the quantum of profit is not the material consideration, members residing in the District Headquarters who had attended any of the meetings of the Advisory Councils, should be deemed to have held offices of profit under the Govt. and therefore incurred the

disqualification.

It is this last portion of the opinion which is relied upon by Mr. Sastry, who appears for the petitioners. His contention is that any member of the Municipality attending any meeting from any remote corner of Warangal, can so attend by spending not more than eight annas on conveyance. The member, therefore, makes a profit of Rs. 4-8-0 for every meeting which he attends. It is his contention, therefore, that we should hold that the members hold office of profit under the Municipality.

4. We do not think that we can accept the approach of the Election Commission to this question as correct. The consideration in all such cases, which ought to be borne in mind is, in our opinion, not whether the holder himself made profit out of the office, but whether the office was one which enables him to make profit. In other words, was it the intention of the Legislature, or the Government, which provided the daily allowance or travelling allowance for such members, that the office of members of Municipality should carry any profit or remuneration? If the intention in so providing the daily or travelling allowance is not to make the office remunerative, it is clear that it cannot be called as an office of profit. In other words, if the intention is only to provide such sum which will cover approximately the out-of-pocket expenses, which these members are likely to incur, it can by no stretch of imagination be culled as an office or place which provides profits or remuneration to the members. In this connection the following cases lend strength to the proposition that merely because some provision is made for daily allowance or travelling allowance, it cannot be said that the office is an office of profit. These cases generally hold that when the provision is made to meet the actual expenses incurred by the member in undertaking to attend the meeting and various other expenses connected with the duties of the Committee and when the amount paid is by no means generous, it can never be emoluments by way of profit or gain for any work done by such members. See:

Parasu Ram v. Chudamani Dev 13 Ele L R 66; Ramdayal Ayodhya Prasad Gupta v. K.R. Patil 18 Ele LR 378; Lachhman Singh v. Harparkash Kaur¹⁹ Ele L R 417; Karu Lall and Another Vs. Fida Hussain and Another, .

5. This question also was considered by the Supreme Court. In Ravanna Subanna Vs. G.S. Kaggeerappa, , their Lordships observed:

"The plain meaning of the expression (office of profit) seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word "profit" connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit. It appears from the rules that the Taluk Development Committee is constituted as a part of the scheme for re-organisation of rural development.

It is a sort of Advisory body consisting of 10 members and is presided over by a

non-official Chairman. The Chairman has no executive duties to perform which are left entirely to the Amildar of the Taluk who is the "ex officio" Secretary to the Committee while a Special Revenue Inspector is to act as Assistant Secretary. The Chairman is to preside over meetings which are to be convened by the Secretary in consultation with him and the rules provide that the Chairman will be entitled to a fee of Rs. 6 for each sitting he attends.

From the facts stated above, we think it can reasonably be inferred that the fee of Rs. 6 which the non-official Chairman is entitled to draw for each sitting of the Committee, he attends, is not meant to be a payment by way of remuneration or profit, but it is given to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the committee. We do not think that it was the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the members should carry any profit or remuneration."

In view of the said dicta of the Supreme Court, there can be little doubt that Rs. 5 which are paid to the members for attending the meetings of the Municipal Committee are given to them as a consolidated fee for the out-of-pocket expenses which they are to incur for attending the meetings of the Committee and that there is no intention of making the Municipal Member's office as an office or place which should carry any profit or remuneration. The conclusion, therefore, is irresistible that the Municipal membership is not an office of profit.

6. In this connection the contention of Mr. Sastry that these members hold office of profit under the Municipality cannot also be accepted as sound. It must be remembered that Municipal Committees are a body corporate and have perpetual succession and they can sue or be sued in their corporate capacity. This corporate capacity is lent to the Committee by the statute. The members who are elected to this Committee constitute the Committee. It is, therefore, meaningless to say that the members who constitute the Committee are subordinate to the Committee, or holding an office or place of profit under the Committee. No authority is shown to substantiate this proposition by the learned Advocate for the petitioners.

It is useful in this connection to refer to the, following two decisions: Yograj Singh Shanker Singh v. Sitaram Hirachand 3 Ele LR 439; Bhola Nath v. Krishnachandra Gupta 6 Ele L R 104. In both these cases, it was held that a member of the Legislative Assembly of a State drawing a fixed salary and daily allowance and travelling allowance does not hold an office of profit under the Government. Similarly in Ramnarain Ramgopal Chamediya Vs. Ramchandra Jagoba Kadu, it was decided by a Bench of the Bombay High Court that though a member of the Legislative Council of a State who receives a monthly salary holds an office of profit, he does not hold an office of profit "under the Government of India or the State Government", within the meaning of Article 191(1)(a) of the Constitution.

It cannot be forgotten that members of the Municipal Committee are elected by the voters on the basis of adult franchise. They are entitled to hold the office until their term of office expires. Nobody can remove them from this office before the end of their term of office. No disciplinary action can be taken against them by anybody. ;It is for the electors who have chosen them as their representatives to reconsider at the time of the next election, if they offer for re-election, whether their previous conduct had been such as to entitle them to be returned to the Municipal Committee. Except this limitation there does not seem to be any other limitation on their office.

The principal tests for deciding whether an office or place is under the Government, Municipality, or any local authority are firstly what authority has the power to make an appointment to the office concerned, and secondly what authority can take disciplinary action against, or remove or dismiss, the holder of office, and thirdly by whom and from what source his remuneration is paid. It is needless to point out that the first two tests are more important than the third one. It may be that the members are paid their sitting fees allowance from the Municipal fund. But it is not denied that the members are neither appointed by the Committee! nor the Committee is authorised to take any disciplinary action against the members, or remove or dismiss them. No provision of the Act was brought to our notice which creates such a position. We are, therefore, not persuaded to agree with the submission made by Mr. Sastry that members of Municipal Committee hold office of profit under the Municipality and as such they are disqualified.

7. Secondly, it was urged by the learned Advocate for the petitioners that respondent No. 21 is and has been a member of the Market Committee appointed under the provisions of the Hyderabad Agriculture Market Act, that he is also the Chairman of the same Committee and that he is, therefore, a person holding an office of profit under local authority within the meaning of Section 27 (1) (c) of the Act, as respondent No. 21 gets some allowance. The petition is not clear as to what allowance the Chairman gets. The Market Committee constituted under the Hyderabad Agriculture Market Act is said to be a local authority. Now the expression "local authority" is defined in the Act. Section 218 of the Act is in the following terms:

"Local authority includes a Municipal Corporation, Municipal and Town Committee, District Board and Cantonment Board,"

More or less the same definition occurs in the Hyderabad General Clauses Act. In view of this definition it is doubtful whether Market Committee can be called a local authority for the purposes of this Act. Assuming, without of course deciding however, that the Market Committee is a local authority, in the light of the abovesaid discussion, it is futile to contend that the Chairman of the Market Committee holds an office of profit under the Market Committee. Market Committee again is a statutory body and performs various functions under the Act. The Chairman is elected by the Committee. The office which he holds is not

remunerative in the sense in which it is generally understood. Nor it is the intention of the Legislature or the Government to make that office an office of gain or remuneration, We do not, therefore, think that the Chairman of a Market Committee holds any office or place of profit under the Market Committee and as such he is disqualified for being elected to the Municipal Committee, Warangal.

8. Thirdly, it was contended by Mr. Sastry that the electoral rolls on the basis of which elections to this Municipality were held were not finalised. There were number of persons whose names were omitted. Amendments to the electoral rolls were made even on 23rd April, 1961 and these amendments were adopted for the purposes of Municipal election on 25-4-1961. In these circumstances his submission is two-fold. Firstly he says that the electoral rolls which were adopted for the purposes of Municipal election before the programme of election was finalised, alone ought to have been used and as the subsequent amendments made to the electoral rolls which were published on 25th April, 1961 were also used, the election cannot be considered as having been validly held. Secondly, he contends that no opportunity was given to the petitioners or for that matter to others, to submit objections and as the amended list was published on 25th April, 1961 and the elections were held on 26th April, 1981, it could not be said that the voters according to the amended, list could vote in such elections.

9. What is, however, overlooked by Mr. Sastry is that according to Section 10 of the Act every person whose name is included in such part of the electoral roll for any Assembly constituency as relates to Municipality or any portion thereof shall be entitled to be included in the electoral roll for the Municipality prepared for the purposes of the Act and no person shall be entitled to be included in such roll.

According to Sub-section (2) of Section 10 the electoral rolls for the Assembly constituency which consist of or comprise the Municipality or any portion thereof as soon as they are published or revised or amended in pursuance of the Representation of the People Act, 1950 would be adopted as the electoral roll for the Municipality; such electoral roll shall remain in force until the publication of the fresh electoral roll for the Municipality under Sub-section (2). It is these persons whose names appear in the electoral roll for the Municipality who are entitled to vote. It is thus clear from the provisions of Section 10 that the electoral roll prepared for the purposes of Assembly constituencies is adopted for the purposes of Municipality. Such adoptions are made from time to time as and when the electoral rolls of the Assembly constituencies are published, revised or amended. Now, according to Section 11 of the Act the prescribed authority may after making such enquiry as he thinks fit, direct amendments to the electoral rolls for any Municipality for the purpose of bring" ing it in accord with the electoral roll for the relevant Assembly constituencies. From a combined reading of these two sections it follows that the Assembly electoral rolls are adopted for the purposes of Municipalities. The prescribed authority is authorised to amend the electoral rolls only with a purpose to bring it in accord with the Assembly-electoral rolls. How these electoral rolls should be published and how the

amendments carried out, u/s 11 again are to be published is being shown in detail in G. O. Ms. 192 dated 12th February, 1960.

It is not denied that before the election programme was announced the electoral rolls of the Assembly were adopted for the purposes of Municipal elections of Warangal. There can, therefore, be no objection as far as the adoption of those electoral rolls are concerned. In fact no objection was so taken to those rolls before us. It is admitted that the amendments to the Assembly electoral rolls which were in force were made by addition of certain names therein on 23rd April, 1961. These amended Assembly electoral rolls were adopted on 25th April, 1961 for the Municipality. We fail to see how can an objection be taken to such an adoption of the Assembly electoral rolls. No provision has been brought to our notice whereby the electoral rolls adopted before the filing of the nomination papers must alone form the basis for actual voting. Section 11 of the Act empowers the election authority to make amendments to the electoral roll for any Municipality for the purposes of bringing it in accord with the electoral rolls of the relevant Assembly constituencies.

In the present case there is no allegation that the constituencies of the Municipality have been altered, nor is there any allegation that the respective electoral rolls of the constituencies were defective in any material particular. There is no provision in the Act or the Rules that the electoral roll, as it stood when the date of the election was notified, should not be amended and brought upto date before the election. In fact even according to the Representation of the People Act there can be amendments to the electoral roll after the programme of the election is announced. It is true that u/s 26 of the Act only those whose names stand 2nd place in the electoral rolls as they stood on the date of the filing of the nomination papers can stand as candidates and those whose names appear thereafter in an electoral roll obviously cannot stand. But that does not mean that the electoral rolls cannot be subsequently amended in order to provide as wide a franchise as possible.

It cannot be disputed that the electors being generally lethargic woke up only when the elections are approaching when the interested candidates or political parties go round to find out whether the names of their supporters find place in the Municipal electoral rolls. When they find some omission or mistakes the electors are persuaded to get their names included or corrected. It is with that view that the Rules under the Representation of the People Act provide that any person can give an application to the Chief Electoral Officer for inclusion of his name in the electoral roll, in case the application is to be made at any time after the issue of the notification calling upon the constituency to elect a member or members and before the completion of that election. In other cases, the application will lie to the Electoral Registration Officer of the constituency. The difference in charges to get the amendment made also denotes that such amendments can be made before the completion of election.

There can thus be a finalised roll before the nominations are actually received.

This electoral roll can further be amended before the constituencies actually go to the poll. The persons whose names appear in the electoral roll can cast their votes. This procedure which is applicable to the general Elections of the Legislature appears to have been followed in respect of elections to the Municipalities also. That is why Sections 10 and 11 of the Act do not provide anything restricting such amendments. It is true that there should be some finality given to the electoral rolls before they are actually used either for the purposes of receiving nomination papers or for the purposes of casting votes. But these electoral rolls are finalised before the nomination papers are received, or before the actual voting takes place. Provisions of Sections 10 and 11 clearly point out that as and when the electoral rolls are revised or amended by the concerned authorities for the Assembly constituencies the duty is cast on the prescribed authority to adopt the same as soon as such amendments are made for the purposes of Municipality. The Officer concerned would have been guilty of omitting to adopt, if he had not adopted, the Assembly electoral rolls amended by the respective authorities on 23rd April 1961. We do not therefore find any reason for complaint when the Assembly electoral rolls were adopted on 25th April 1961.

10. The next contention in this regard that no opportunity was provided to the petitioners or others to file objections in regard to the electoral roll adopted on 25th April 1981 cannot be accepted as sound and correct. Reliance in this connection was placed on the decision of the Supreme Court in *Chief Commissioner, Ajmer Vs. Radhey Shyam Dani*, . It appears from the facts of that case that Sub-section (2) of Section 30 of the Ajmer-Merwara Municipalities Regulation, 1925 as amended provided that "every person who would be entitled under the Representation of the People Act, 1950 (XLIII of 1950) to be registered in the electoral roll for a Parliamentary Constituency if that Constituency had been co-extensive with the Municipality, and whose name is registered in the electoral roll for the Parliamentary Constituency composing the Municipality, shall be entitled to be enrolled as an elector of the Municipality" and Section 43 enabled the Chief Commissioner to make rules consistent with the Regulation for the preparation and revision of electoral rolls and the adjudication of claims to be enrolled and objections to enrolment. In exercise of these powers some rules were framed which inter alia provide that electoral roll for the particular Municipality shall be the same as the final printed roll for the Parliamentary constituency representing the area covered by the Municipality. The election programme was notified and the electoral rolls were published.

The validity of the notification and the electoral roll was challenged in that case. It was held that u/s 30 (2) of the Ajmer-Merwara Municipalities Regulation, 1925, the electoral roll for the Parliamentary constituency was only treated as the basis for the electoral roll of the Municipality and that the rules in so far as they made no provision for the revision of the electoral roll, for the adjudication of claims to be included therein or for entertaining objection? to such inclusion are defective and therefore the electoral roll of the Ajmer Municipality which was authenticated

and published by the appellant on 8th August 1955 was not in conformity with the provisions of Section 30 (2) and the relevant provisions of the Regulation and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee.

It will be noticed that in that case the point for consideration was with regard to making rules consistent with the Regulation for the preparation and revision of electoral rolls and the adjudication of claims to be enrolled and objections to enrolment. This case, therefore, is clearly distinguishable. Sections 10 and 11 of the Act provide that the Assembly electoral roll for the time being in force in such part of the constituency of the Assembly as is included for Municipality for the purposes of the Act be deemed to be the list of voters for such Municipality. The Act therefore makes the relevant part of the Assembly electoral roll as the electoral roll of the Municipality. The Act does not contain any provision similar to Section 43 of the Ajmer.Merwara Municipalities Regulation 1925 for making rules for the preparation and revision of electoral roll.

11. Consequently the petitioners are not entitled, to object to this electoral roll. It cannot be forgotten that the electoral rolls of the Assembly constituency are prepared under the provisions of the Representation of the People Act, 1950 and the Registration of Electors Rules, 1960. For raising objections in regard to the preparation, revision and amendment of such rules a machinery is provided under that Act and the Rules. If the petitioners or any others wanted their names to be included in the Assembly electoral rolls they had any amount of opportunity to do so. Even after the election programme was announced, they could have availed themselves of the opportunities provided under that Act and the Rules. No direct amendment can be made or objection entertained by the prescribed authority u/s 11 of the Act. What Section 11 enjoins is that the prescribed authority may make necessary amendments only for "the purpose of bringing the Municipal electoral roll in accord with the Assembly electoral roll. The purpose of Section 11, therefore, is very limited in its scope. The grievance, therefore, that the petitioners had no opportunity to object is not correct. The complaint that several hundred voters' names were not included cannot be accepted.

The Election Tribunal, or for that matter the High Court in Writ Petitions have no jurisdiction to enquire whether all persons qualified to vote were entered in the rolls. The jurisdiction to prepare the electoral rolls is vested in certain authorities under the Act and the Rules referred to above and the provisions of that Act and the Rules gave finality to the decision of those authorities. It would be, therefore, futile to challenge the validity of the election on the ground that some persons qualified to vote were not included in the electoral rolls. If the petitioners were not vigilant enough to see that the Assembly electoral roll is brought upto date and "that the adoption of the same is made by the Municipality, they have to blame themselves for their negligence. They cannot, however, make a grouse that the electoral roll omits to include several voters who are entitled to vote. If their contention is accepted that unless all the electors of the City Municipality

are not included in the electoral roll, there will be no final electoral roll on the basis of which elections can take place, then there will be no final electoral roll at any stage, nor there can be any election at all. Some names would always be found to be missing or incorrectly entered. It is too much to expect that such electoral rolls would be final in the sense that every person entitled to vote is entered in it accurately.

12. In this connection, it is useful to refer to a decision of this Court in *Venkateswara Rao v. State of Andhra Pradesh* A. I. R. 1958 AP 458 K. Subba Rao, C. J., as he then was, who spoke for the Bench observed;

"While we appreciate the contention of the learned counsel that the Government or the authority concerned should have made a provision by prescribing a reasonable time for filing objections before an election authority, we are satisfied, having regard to the qualifications prescribed for a person entitled to be placed on the Municipal electoral roll, the manner in which the electoral rolls of the Municipalities are prepared and the time, as a matter of fact available to the petitioners and others to raise objections if they choose, that the electorate, in the present case have not in any way been prejudiced."

In that case Sections 44 and 45 of the Madras District Municipalities Act which are identical to Sections 10 and 11 of the Act were under the consideration of the Court. Almost similar objections in regard to electoral rolls were raised, which were negatived. In that case this Court had occasion to consider elaborately the decision of the Supreme Court in *(S) Chief Commissioner, Ajmer Vs. Radhey Shyam Dani*, . It was similarly found therein that a deeper scrutiny of that decision of the Supreme Court would bring out the essential difference between the provisions of the Act under the review of the Supreme Court and those of the Madras District Municipalities Act. A decision to the same effect is that of *Subbayya v. The State* 1953 A L. T. 674. Mr. Shanker Sastry invited our attention to the two decisions of the Patna High Court in support of his contention that the electoral roll, which was not finalised according to him cannot validly form the basis of Municipal election.

The first case is *Parmeshwar Mahaseth v. The State of Bihar* A. I. R. 1953 Pat. 149. It is true that it was found in that case that electoral rolls have not been finalised and published properly and therefore the election held on such electoral rolls was declared to be invalid. That decision, however, has to be understood in relation to the facts of that particular case and the Municipal Election Law prevalent in the State of Bihar. As it is apparent from the decision that the relevant provisions of the Election Rules and the Bihar and Orissa Municipal Act elaborately set out in the judgment -- did not dispense with the preparation of a separate register of the voters ward by ward, of course, on the basis of the electoral roll of the Assembly constituency. Section 15 of that Act envisages a separate register of voters, and the Election Rules, their Lordships observe, do not and cannot over-ride that statutory provision. Rule 3 lays down the qualification for registration as electors. Rule 8 (b) describes the disqualifications.

Section 19 empowers the State Government to make rules inter alia to regulate and determine the authority which shall decide disputes arising under any rules made under that section.

Their Lordships drew the conclusion from the said provisions that the effect of those provisions is that the adoption of the Assembly electoral rolls did not entirely do away with the investigation of the claims to be enrolled therein and objections to such enrolments, otherwise the prescription of qualifications and disqualifications in the Act would be meaningless. As the abovesaid provisions of the Act and the Rules referred to were not followed and the electoral rolls were not prepared and published according to them, it was obvious that the decision of the Supreme Courts in (S) A. I. R. 1957 S. C. 301 applied to that case with full vigour.

For the reasons which we have given above while discussing the case of (S) Chief Commissioner, Ajmer Vs. Radhey Shyam Dani, , the case of Parmeshwar Mahaseth and Others Vs. State of Bihar and Others, would also be inapplicable to the facts of this case. There is marked difference between the scheme of the Bihar and Orissa Municipal Act and the Election Rules made thereunder and the Act and Rules which fall for our consideration here. The other cases relied upon by Mr. Sastry is Nawab Sabbir Ahmad and Others Vs. District Magistrate of Darbhanga and Another, . While we fully agree, with respect, with the dicta of the said decision that it is indisputable that an important document like electoral roll on which depends the exercise of civil rights of the people should be prepared after due publicity and after thorough examination of the claims and objections of the voters, it is obvious that when the very foundation of the election is imperfect, the election cannot stand. Therefore, the preparation of the electoral roll postulates that fair and full opportunity was given to the citizens to lay claims for enrolment as voters or to raise objections to the enrolment of other persons as voters," it is not possible for us to agree with the conclusions of that decision obviously because the Bihar and Orissa Municipal Act and the Rules made thereunder are substantially different from the Act and the Rules made thereunder.

13. We have already held that the petitioners and those who wanted to put in objections or claims had ample opportunity to do so before the electoral rolls were published, revised or amended by the competent authorities under the Registration of Electors Rules 1960 and even after the published, revised or amended Assembly electoral rolls were adopted for the purposes of Municipality, the petitioners and others could have raised objections to such adoption within the narrow scope available to them u/s 11 of the Act. As they have not availed of those opportunities, they have no reason to complain that the electoral rolls were not final or that they had no opportunity to put in their objections or claims.

14. Finally, it was argued that the counter-foils of ballot papers contain serial numbers and the names of the voters which violate the principles of secrecy of election and as such the entire election is invalid, We are not impressed with this

argument also. Rule 30 of the Rules under the Hyderabad District Municipalities Act enjoins that votes shall be given by ballot in the prescribed manner, Rule 31 prescribes the method of voting, Rule 33 provides for the arrangement for secrecy of voting. It provides that each polling station shall be so arranged that the voters can record their votes "screened from observation". Rule 35 says that the ballot paper shall be marked with such official mark as may be specified by the Government, which mark shall be kept secret. Rule 36 provides for ballot boxes to be locked and sealed before commencement of poll. Rule 38 is of materiality. While H. 38 (1) provides for the procedure before recording of votes. Rule 38 (2) specifically refers to the point under our consideration, Rule 38 (2) is in the following terms:

"38(2). The Polling Officer shall at the time of delivery of the ballot paper or papers to a voter, put against the serial number of that voter, in the constituency list, a mark to denote that such voter has received a ballot paper or ballot papers and shall also keep a record of the serial number or numbers of the ballot papers supplied to the voter in such manner as the Returning Officer may subject to the general or special instructions issued in that behalf by the Government, direct."

Rule 43 states that the ballot paper to be used for the purposes of voting at an election under these rules shall contain a serial number and such distinguishing marks as the Government may decide. Rule 47 provides that after the close of the poll in the presence of any candidates or their election or polling agents who may be present, the ballot boxes may be closed and sealed. The Presiding Officer also would make up into separate packets the unused ballot papers, the marked copy of the list of voters and any other paper directed by the Returning Officer to be kept in a sealed packet along with other papers mentioned in the said Rule. Rule 48 enjoins upon the Presiding Officer to keep an account of ballot papers. Rule 69 provides that the Returning Officer shall keep in his own custody the packets of ballot papers and all other papers relating to the election. Rule 70 says that the election papers as mentioned above, shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court or of a tribunal.

Finally Rule 71 provides the packets referred to in Sub-rule (1) of Rule 70 shall be retained for a period of one year and shall thereafter be destroyed subject to any direction to the contrary given by the Government or by a competent court or by a Tribunal, and all other papers relating to the election shall be retained until the termination of the general election for the constituency to which they relate and shall thereafter be destroyed.

Along with these Rules Section 298 of the Act must also be kept in view. It is in the following terms :

"298(1) Every Officer, Clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some

purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy."

Sub-section (2) of that Section provides for punishment for violation of Sub-section (1). These are the relevant provisions which provide for the secrecy of ballot. In the light of these provisions, it is clear that there is nothing like absolute secrecy of ballot. But the maintenance of secrecy is only subject to the various provisions mentioned in the Act or the Rules made thereunder. That is so even under the Representation of the People Act, 1951 and the Rules made thereunder.

While Section 128 of the Representation of the People Act, 1951, is identical with Section 298 of the Act, Rule 38 (2) extracted above is identical with Rule 38 (2) of the Conduct of Election Rules, 1961 made under the Representation of the People Act, 1951. Even under the Madras District Municipalities Act and the Rules made thereunder, substantially similar provisions appear therein. Section 56 of the Madras District Municipalities Act is similar to Section 298 of the Act and Rule 15 under the Madras District Municipalities Act is almost identical with Rule 38 under the Act. The only difference between Rule 15 (4) under the Madras District Municipalities Act and Rule 38 (2) under the Act is that whereas the Rule under the Madras Act specifically provides that the polling officer shall enter on the counterfoil or on the first of the counter-foils, as the case may be, the name and number of the elector in the electoral roll, Rule 38 (2) of the Act merely provides that the polling officer shall put a mark against the, serial number of that voter in the constituency list to denote that such voter has received the ballot paper and shall also make a record of serial number or numbers of the ballot papers.

It is evident that counter-foils of the ballot papers can be maintained under the said Rule. No serious objection, therefore, can be taken to the use and maintenance of the counterfoils to the ballot papers as is the case under the Madras District Municipalities Rules. We do not, therefore, see any violation of Rule 43 in the instant case. We have already stated that the practice followed in the instant case is identical with the one which provides in the other area of our State and is also prevalent in Madras as the Rules quoted above are similar.

It is useful to quote a passage from Halsbury's Laws of England, Vol. 12, page 297, para. 579 Hailsham Edition, which makes the position abundantly clear that exactly the same system is followed in the U. K. It is as follows :

""Immediately before a ballot paper is delivered to an elector it must be marked on both sides with the official mark, either stamped or perforated, and the number, name, and description of the elector as stated in the copy of the register must be called out, and the number of such elector, and the distinctive letter of the polling district in which the elector is registered, must be marked on the counter-foil, and a mark must be placed in the register against the number of the elector to denote that he has received a ballot paper, but without showing the particular ballot paper which he has received."

We are not therefore prepared to accept the argument that because counter-foils of the ballot papers are maintained in which serial number of the elector as appears in the electoral roll and his name are entered it violates in any manner the secrecy of voting. It is not denied that ballot papers, actually issued to the voters did not contain any distinct mark, which would disclose as to who the elector is. If that is so, then it is not possible to detect from the ballot papers as to whom the ballot paper was given or that any particular voter voted for a particular candidate. The secrecy which is required to be maintained is in reference to the ballot papers. It cannot be extended to either the counter-foils of the ballot papers which are validly maintained under the Rules, or to the particular electoral roll on which marks are maintained to denote that the ballot papers are issued to those electors. This record is necessary to check the personation of the elector or multiple issue of the ballot papers to the same person. It becomes also necessary to maintain and preserve such record in order to provide necessary evidence if any complaint is made regarding personation or any other such thing. The Act and the Rules provided for that and it cannot, therefore, be successfully contended that because of this record secrecy of ballot is violated. We have already pointed out in detail the various provisions which enjoin upon the authorities concerned to seal these counter-foils and the particular elector roll on which marks are made in the presence of the candidates or their agents and after the packets are sealed they are kept in the custody of the Returning Officer, and these packets can be opened only under the orders of a Court or a Tribunal, and can be destroyed only after their utility is over.

These provisions therefore take ample care to see that secrecy of ballot is not violated. It must be remembered that in this way the counter-foil and the electoral roll that is marked are kept finally under the supervision of the Court or the Tribunal. It is true that the Presiding and the Returning Officers at the moment are Government servants. The conduct of the Municipal elections under the direction and through the agency of the Government may be looked upon with some disfavour on the ground of its being contrary to the spirit of local autonomy. It is true that if an independent body like Election Commission which is in charge of the Legislative elections is established in every State and charged with the duty of superintendence, direction and control of preparation of the electoral rolls for the conduct of all elections to the Municipal Corporation, District Municipalities, Zilla Parishads and Samithis and Panchayats, it will inspire greater confidence and ensure free and fair elections to the various local bodies. But the absence of any such independent election machinery does not, in our opinion, mean that the present machinery through which the elections are held, cannot be trusted to ensure the secrecy of voting.

It is too much to argue that when the counterfoils and the electoral roll marked are in the custody of the Presiding or Returning Officer, they being Government servants, secrecy is likely to be violated. It cannot be forgotten while advancing such an argument that the counter-foils and the electoral rolls are sealed in packets in the presence of the candidates or their agents and can be opened only

in the presence of the Court or a Tribunal. Thus, the whole matter is entirely removed from the influence of party politics. We agree that free elections constitute the bedrock of democracy although it does not imply that the elections are necessarily pleasant or satisfactory to human intelligence. In the conflict of personality and the parties and principles which constitute an election, the intelligent and sensitive minds abhor what is vulgar and unreasonable. That cannot however be helped. Often times, an election is as painful as birth pangs, but it is a natural and constructive process. As we have adopted the same, we have to trust the machinery.

No allegation is made that in this particular instance the counter-foils or the electoral roll marked were not sealed as required by Rules, or they are tampered with in any manner. In the absence of any such allegation, we are not prepared to accept that the principle of secrecy is violated in the instant case or that the Rules are such that they violate the principle of secrecy of ballot.

15. Mr. Sastry relied upon Sabella Sahaba Reddy and Others Vs. Karri Venkata Reddy and Others, and Upadhyay Ambika Prasad v. Lakshmi Mohan Misra 1 D E C 330. In both these cases, the ballot papers were marked in such manner as to indicate the identity of the elector. In the light of the discussion as above, these decisions do not lend any strength to the argument of Mr. Sastry because in the present case it is conceded that ballot papers issued to the voters did not contain any distinguishing marks which enable the identity of voters. No decision was cited before us which says that the counter-foils or the elector roll marks under the Rules also violate the principle of secrecy. We do not therefore see that by maintenance of counter-foils or the marked electoral roll any provisions of the Act or Rules made thereunder is violated. This argument, therefore, also must be rejected.

16. Before we part with the case, we must make an observation that the petitioners do not seem to have been prompted with any bona fide desire to get any election dispute settled. They ought to have been vigilant if they want to be enlightened citizens who believe in the principle of local bodies' autonomy. They ought to have taken suitable steps to see that the electoral rolls are properly prepared and adopted and that various rules and the provisions of the Act are properly implemented. They do not seem to have participated at any stage in the process of election. They have not taken the advantage of Section 21 or Section 24 of the Act which provide appeals against the wrongful acceptance or rejection of nomination papers and for the decision of election disputes by a Tribunal. Instead, they have directly rushed to this Court with a petition under Article 226 of the Constitution. We have no doubt that it is the defeated candidates who must have set the petitioners to fight out their election disputes in this manner. As there is no ground to hold that Respondents 1 and 2 have not discharged the duties enjoined on them under the Act or the Rules made thereunder or that they purported to perform the duties contrary to the provisions of the Act or the Rules made thereunder, it follows that Writ of Mandamus cannot be issued. This

petition, in our opinion, is utterly devoid of any merit and deserves to be dismissed. The petition, therefore, is dismissed with costs, two sets. Advocate's fee Rs. 250/- each.