

(1954) 02 CAL CK 0030
In the Calcutta High Court
Case No : Civil Rule No. 153 of 1954

Provat Chandra Sircar

APPELLANT

Vs

R.C. Sen, Administrator of the Budge Budge Municipality and
Others

RESPONDENT

Date of Decision : 26-02-1954

Acts Referred:

Bengal Municipal Act, 1932 — Section 26, 554(2)
Constitution of India, 1950 — Article 226

Citation : AIR 1955 Cal 83 : 58 CWN 443

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Ajit Kumar Dutt and Nani Coomar Chakravarty, for the Appellant;
Hemendra Kumar Das, D.N. Basu for the State and Opposite Party Nos. 1 and 2,
Purnendu Sekhar Basu and Smriti Kumar Rai Choudhuri for added Opposite
parties, for the Respondent

Judgement

1. The facts in this case are as follows:

2. The Budge Budge Municipality consists of five wards. It began to function with 10 Commissioners on and from 4-2-1948 for a term of 4 years. As the term of 4 years for which the Commissioners were to function was about to expire, it was directed that a fresh election of the Commissioners of the Municipality (12 seats) would be held on 8-3-1952. I am informed that about 37 nominations were filed of which only 8 were found valid. The result was that these 8 candidates were returned unopposed under Rule 22(2) of the Election Rules. On 1-4-1952, it was notified u/s 26, Bengal Municipal Act (hereinafter called the Act) that the election of the remaining 4 members would be held on 31-5-1952.

In the first week of April, 1952, eight out of the ten members of the old Municipality which was then functioning resigned, and these eight members ceased to attend any further meetings or to take any interest in the affairs of the Municipality. One of the remaining two was the Chairman and it appears that the

remaining member also ceased to take any interest in the affairs of the Municipality. On 1-4-1952, the District Magistrate, 24-Parganas, issued a notice, fixing 31-5-1952 as the date for election for filling up the remaining 4 seats. On 28-4-1952, two ratepayers of the Municipality (Pannalal Mondal and another) moved this Court under Article 226 of the Constitution for the issue of an appropriate Writ to the effect that the election of the four remaining members could not be held on the basis of the then existing electoral roll and that a revision of the electoral roll was necessary.

This Rule was made absolute on 22-7-1952. On 24-7-1952, the State Government u/s 553 of the Act, made an order superseding the Municipality on the ground of incompetency of the Commissioners, and an Administrator was appointed to take charge of the affairs of the Municipality. This order was published in the official Gazette on 29-7-1952. Thereafter, one Surendra Nath Mondal made an application to this Court under Article 226 of the Constitution complaining that the order of supersession was incompetent. That Rule" was heard by Bose J., on 2-12-1952 and the Rule was discharged. This was upheld by the Court of Appeal by its order dated 24-6-1953.

The eight persons who were previously elected as aforesaid had neither taken oath, nor were their names notified and nothing further could be done because the Municipality had been superseded. The order of supersession, appears to have been extended from time to time and upto 31-3-1954.

The State decided to reconstitute the Commissioners of the Municipality u/s 554(2) (ii) of the Act. Accordingly some time in June 1953, the District Magistrate of 24-Parganas at Alipore, fixed the holding of the general election of all the Wards on 27-12-1953.

Thereupon, 6 out of the 8 Commissioners who had been elected on 26-2-1952 brought a Title Suit No. 44 of 1953 in the third Court of the Munsif at Alipore, impleading therein the State of West Bengal, the District Magistrate, 24-Parganas, and the Administrator of the Budge Budge Municipality, for a declaration that as 8 Commissioners have already been validly elected on 26-2-1952, only the four remaining seats were to be "filled up by election. The remaining two Commissioners who had been elected were made pro forma defendants. The learned Munsif dismissed the suit holding that the general election which had to be held under the provisions of Section 554(2) (ii) was to be entirely a fresh general election and not a mutilated election u/s 26.

There was an appeal against the judgment of the Munsif before the fourth Additional Subordinate Judge of Alipore. The learned Subordinate Judge by his judgment dated 18-11-1953 allowed the appeal. The judgment and decree of the learned Munsif was set aside and it was declared that the rights of the plaintiffs and the pro forma defendants Nos. 4 and 5 were not affected by the order of supersession on 26-7-1952. A permanent injunction was issued against the State of West Bengal, the District Magistrate and the Administrator restraining them

from notifying any date for electing 12 fresh members for all the five Wards of the Municipality.

They were further restrained from holding election of 12 members on 27-12-1953 as notified. A mandatory injunction was issued on the principal defendants to hold an election u/s 26 of the Bengal Municipal Act for filling up the four remaining seats. It was further ordered that the names of the plaintiffs and the pro forma defendants were to be published u/s 50 of the Act. It appears that no appeal has been preferred against this Judgment and decree of the learned Subordinate Judge. The District Magistrate has now notified that the election u/s 26 of the remaining four seats will be held on 27-2-1954.

3. The petitioner herein is a rate-payer of the Municipality entitled to vote in the election. He was not a party to the Title Suit No. 44 of 1953. He has made this application under Article 226 of the Constitution stating that a partial election u/s 26 of the Act is no longer permissible but there should be a fresh general election of all the five Wards and 12 seats. Originally only the Administrator of the Municipality and the District Magistrate had been made a party. Now, however, the eight elected Commissioners have upon their own application been added as parties to this application and the petitioner has also added the State of West Bengal as a party.

The question that is agitated herein and which I shall have to decide is as to whether it is permissible to hold a restricted election u/s 23 of the remaining four seats or it is incumbent upon the Government, if it chooses to proceed u/s 554 (2) (ii), to hold a fresh general election of all the five Wards and 12 seats. That has been the substantial question which was decided in the suit both by the learned Munsif and the Subordinate Judge. The learned Munsif pointed out that upon the order of supersession having been made, the rights of the elected Commissioners (parties to the title suit) had been wiped out and that Section 554 required a fresh general election and not a mutilated one u/s 26.

He proceeded to point out that the Legislature used the words "fresh general election" as well as provided for "re-constitution of the Commissioners of the Municipality" in clear and unambiguous terms so that it would be doing violence to the language to hold that a fresh general election is not going to be held but a mutilated election. The learned Subordinate Judge however disagreed with this finding. The reasoning given by the learned Subordinate Judge is somewhat difficult to follow. The relevant part of the judgment on this particular point is as follows:

"It was argued by the learned lawyer for the appellants that Clause (ii) in its proper context provides for two circumstances, viz., when there are sitting Commissioners only and no subsequent election has been held as in the present case where there are some non-sitting members; and also where there are both sitting and non-sitting Commissioners like the plaintiffs and pro forma defendants 4 and 5 of this suit. He argued that in case where there is no non-

sitting Commissioners a general election may be held for all the Commissioners, but whereas in the present case there are also non-sitting Commissioners an election u/s 26 can be held for the remaining 4 seats after the order of supersession terminates.

He contended that word "and" should be read in a disjunctive manner, and the use of the words "under Section 26" at the end of this clause would indicate the intention of the legislature. I may mention here that in the previous Act these words "under Section 26" were not there. The learned lawyer for the respondents, on the other hand, contended that the words "fresh general election" would indicate the intention of the legislature. I have given the matter anxious consideration. In my opinion the interpretation of the learned lawyer for the appellants should be accepted in this particular case."

4. As the petitioner here is not a party to the title suit, he is of course not bound by the judgment and decree passed therein. If the State or the Public Officers concerned are going to hold an election contrary to the law he has a right to come to this Court for the issue of a Writ in order to stop the same. No argument has been advanced before me that this application does not lie. In fact, the relief asked for herein is not one of those reliefs for which a special procedure has been laid down in the Act itself, in which case it would be argued that the petitioner should have proceeded with the particular remedy as prescribed.

Mr. Das appearing on behalf of the respondents has pointed out that so far as the original respondents are concerned there is a valid decree of Court and they have been compelled to act in accordance with it. That is certainly true so far as it goes. I do not think however that it is an adequate reason for not proceeding to decide this application and to consider what was the proper legal position. I shall revert to this aspect of the matter at a later stage. In order to decide the point that I have mentioned, it is necessary to consider several sections of the Act and the Rules. The word "Commissioners" was defined in the Act of 1884 but there is no definition in the present Act.

Section 15 however lays down that there shall be established for each Municipality a body of Commissioners having authority over the Municipality and consisting of such number of Commissioners, not being more than thirty nor less than nine, as the State Government might specify. Such Commissioners are to be a body corporate by the name of the Municipal-Commissioners of the place by reference to which the Municipality is known, having perpetual succession and a common seal. Section 16 lays down the manner in which the Commissioners are to be elected. Rules have been prescribed under the Act including the mode of election of Commissioners. u/s 24 (3) of the Act it has been held that the general election of Commissioners shall take place every fourth year on such days as the District Magistrate may fix. Section 26 is important and should be set out:

"If the electorate in any Municipality fails within the prescribed time to elect the

number of Commissioners to be elected in accordance with the provisions of Section 16, or Section 18 a date shall be fixed by the District Magistrate for another election, and in case the electorate still fails to elect the number of Commissioners at such second election the State Government may appoint Commissioners to complete that number. Any person so appointed shall be deemed to be duly elected Commissioner."

Under Section 50, the names of all persons elected or appointed as Commissioners are to be published in the Official Gazette. Under Rule 44 of the Rules, the names of duly elected Commissioners for the whole Municipality are to be forwarded by the Chairman through the District Magistrate and the Commissioner of the Division to Government for publication, and these names are to be published in the official gazette. It follows that until the Commissioners for the whole Municipality are elected, the names are not gazetted.

Under Section 57(7), where all the Commissioners of a Municipality have failed to make the oath or affirmation which is required by Section 57 of the Act or where the number of Commissioners who have made the oath or affirmation was insufficient to allow of a quorum being formed u/s 82, and the State Government was not satisfied that the failure of the Commissioners who have failed to make the oath or affirmation was due to inadvertence or misapprehension, the State Government might supersede the Commissioners of the Municipality for a period to be specified in the order. u/s 552 of the Act, if in the opinion of the State Government the Commissioners have shown their incompetency to perform or have persistently made defaults in the performance of the duties imposed upon them by or under the Act or by any other law, or have exceeded or abused their powers, the State Government has been empowered to order a fresh general election. u/s 553, under similar circumstances the State Government has been given the power to declare such Commissioners to be incompetent etc., and supersede them for a period to be specified in the order.

There is a proviso which says that ordinarily, action u/s 553 should not be taken until the powers u/s 552 had been exercised. Section 554 deals with the consequences of supersession. One of the consequences is that all the Commissioners must, as from the date of the order, vacate their offices as such Commissioners. Sub-section ,(2) is of great importance and must be set out:

"(2). On the expiration of the period of supersession specified in the order, the State Government may: (i) extend the period of supersession for such further term as it may consider necessary or (ii) reconstitute the Commissioners of the Municipality by a fresh general election and the persons who vacated their offices under Clause (a) of Sub-section (1) shall not be deemed disqualified for election or appointment u/s 26, or (iii) reconstitute the Commissioners of the Municipality by appointment only for such period as it may consider necessary and the persons who vacated their offices under Clause (a) of Sub-section (1) shall not be deemed disqualified for appointment:

Provided that the State Government may, if circumstances permit, at any time before the expiration of the period of supersession take action either under Clause (ii) or Clause (iii) of this sub-section."

5. The argument on behalf of the added respondents is that the words "fresh general election" means any general election other than that under which the Commissioners who have vacated offices were elected. If therefore a general election had taken place previous to the order reconstituting the Commissioners, then a fresh general election is not necessary but the results of the previous general election must be accepted and where Section 26 is applicable, it shall be applied by proceeding to fill up the remaining seats.

6. I regret that I am unable to accept this interpretation. The right to hold an election, to stand in an election and to be elected thereto as Commissioner, are all rights which spring up under the Statute. Apart from the Statute there is no common law right which is involved. It follows therefore that the provisions of the Act and the Rules made thereunder must be strictly followed in constituting the Municipality and in, regulating the functioning thereof; and this includes the question of the election of Commissioners constituting the Municipality.

In this case, the four years" term of the previous Municipality having expired, a general election was notified and was actually held. Thereupon Section 26 came into operation inasmuch as the electorate failed within the prescribed time to elect the total number of Commissioners. For some reason, the remaining seats could not be filled up, but before these new Commissioners could take office, or the new seats could be filled up, the Municipality was superseded. Upon the supersession order coming into operation, the Municipality did not become defunct but went into a state of suspended animation.

When therefore it comes to the stage of reconstituting the Municipality, one must look into the Act to see what are the provisions for reconstituting the same, and that provision is to be found in Section 554. The provisions of Section 554 (2) (ii) have been set out above, and it lays down in clear terms that reconstitution of the Commissioners can only be by "a fresh general election". The words are unambiguous and must be taken to mean what they express. I do not think any other meaning can be given to these words save and except that there has to be a general election and it to be a fresh or new general election. A general election means an election in all the Wards of the Municipality for all the seats, and one in which all the voters eligible to vote in the Municipality are given an opportunity of exercising their franchise.

The interpretation which is being put upon it by the added respondents would not only give it a tortured meaning but it adds to the wordings of the Statute. What is said is that under the circumstances what should be held is not a "fresh general election" but only a partially fresh general election. This is clearly against the express words of the section, and the intendment thereof. It also adds to the wordings of the section. The matter has been argued from another point of view.

It is said that u/s 554 (1) (a) what happens upon the supersession of the Municipality is that the Commissioners vacate their offices and that could only refer to the Commissioners who are actually holding office.

It is not disputed that the tenure of office of a Commissioner is to be calculated from the date of the first effective meeting of the new Commissioners, which of course can only be done after all the names have been gazetted and all have taken the oath of office. I think this is correct so far as it goes. Since the added respondents never went through these formalities, there is no question of their vacating their office. It is then said that if they have not vacated their office, then upon the reconstitution of the Commissioners, their election cannot have vanished in the air.

Supersession is of course an abnormal circumstance. In considering as to when a general election should be held in the normal way, one does not think of supersession. But supersession is also one of the things that might happen under the Act and when that happens, certain consequences follow. If there has been a general election immediately prior to the supersession but the elected Commissioners have not taken office, the question is, what will happen to them when the Commissioners are reconstituted?

Since there is an express provision that the Commissioners can be reconstituted (either before the expiration of supersession or after) only by a fresh general election, the result must be that the Commissioners who had been elected but could not take office have by reason of the supersession lost all the advantage of their election, or as the learned Munsif has pointed out, their election must be considered as washed out. In other words, whereas u/s 554 (a) it has been expressly provided that the Commissioners who were in office would have to vacate their offices, it follows impliedly that the Commissioners who had not taken office can no longer take office inasmuch as upon reconstitution (whether before the supersession period is over or afterwards) there must be a fresh general election.

The learned Subordinate Judge has been at pains to point out that this would result in injustice being perpetrated on those Commissioners who had not been the cause of the supersession. In my opinion, it is unprofitable to look at it from the point of view of justice or injustice. Since these are the express provisions of the Act, it is not permissible to bring into the question of interpretation such extraneous considerations. It is only when the wordings of a Statute are capable of two interpretations, that interpretation should be accepted which will do justice to all parties.

Here, however, in my opinion, the wordings are clear and unambiguous and not capable of two interpretations. It is impossible, in my view, to construe the words "fresh general election" as an election which is neither general nor fresh which would be the inevitable result of giving effect to the contention put forward by the added respondents. In my opinion, the intention of the Legislature is quite

clear. Let me test it in another way. There is no time limit for the period of supersession. It might be for one year, it might be for 10 years. Suppose it is for a term longer than 4 years. In that event, it is easy to see that a growing Municipality like Budge Budge would change its electorate to a great extent.

Would it then be in conformity with either justice or expediency that Commissioners who had been elected a long time ago be thrust upon the electorate at any time? The scheme of the Act is such that it does not always do justice to all concerned. For example, u/s 57 (7), if a certain number of Commissioners fail to make the oath or affirmation or fail to form a quorum, the whole Municipality is superseded and it may well be that a particular Commissioner is not at fault at all and yet he is to suffer for the omissions and commissions of his colleagues. I do not think that it would be a proper reason for interpreting the Act otherwise than in conformity with its express provisions and its clear intend-ment.

I have not been able to appreciate what the learned Subordinate Judge means by holding that; the wordings in the section should be read disjunctively. The meaning of the last part of 6, 554 (2) (ii) seems to me quite clear. It is in similar terms to what appears in Section 552. As a matter of fact, the learned Advocate for the added respondents did not argue before me that the two parts of Section 554 (2) (ii) should be read disjunctively or that because the words "under Section 26" appear at the end, that it means that the election must be held u/s 26 and under no other section.

All that this part of the section lays down is that if a fresh general election is held, the persons who had vacated their offices by virtue of Section 554 (1) (a) would not be deemed disqualified for offering themselves for election at such a general election. If in such a fresh general election the contingencies u/s 26 occurred, the rule laid down therein would be followed and the persons who had vacated office would not be disqualified either from offering themselves for election, or being appointed under it. In my opinion, that throws no light on whether the general election that has to take place should be a fresh general election or not.

The proviso on the other hand, throws some light upon the interpretation. If the reconstitution can be made even before the expiration of the period of supersession, how could it be said that at that point of time the Commissioners who had been elected but had not taken office were entitled to come in as a matter of right, remembering the fact that the Municipality is still in a state of suspended animation? Reconstitution therefore really means reconstitution, and whatever has preceded it, ceases to have any effect.

7. For these reasons I am of the opinion that if the State Government wishes to reconstitute the Commissioners under Sub-section 2 (ii) of Section 554 of the Act, it must proceed to hold a fresh general election of all the Wards and of all the seats and not hold a partial election under the provisions of Section 26. It is

of course open to the State to proceed under the other provisions of Section 554 but that is a matter with which I am not concerned in this application.

Lastly, I must consider a point made by the learned Government Pleader appearing on behalf of the respondents. He says that there being an order of injunction including a mandatory injunction against the respondents, an embarrassing position arises by virtue of the opinion that I have come to in this matter. He argued that there would be two conflicting decisions. In my opinion, that does not offer any difficulty at all. This is not the first time that there has been two conflicting decisions of two Courts. The rule is that the order of the higher court must prevail. The petitioner was not a party to the title Suit and as I have already stated, he is within his rights to come to this Court to ask for a high prerogative Writ.

Neither the Government, nor a public officer, can be allowed to exercise statutory duties, in excess of or not in accordance with, the law, and if it is brought to the notice of the Court that a public body was going to be constituted wrongly and in violation of the provisions of law, the Court is bound to intervene and put the matter right. I cannot conceive that the learned Subordinate Judge would enforce his orders after it is brought to his notice that this High Court has directed otherwise.

8. The order therefore" will be that a Writ in the nature of Mandamus will issue directing the respondents to forbear from holding a partial election u/s 26 of four seats, but that they are directed to proceed u/s 554 in accordance with law in the light of the observations made herein. If it is decided to reconstitute the Commissioners under Sub-section 2 (ii), the State and the Other respondents are directed to proceed to hold a fresh general election in all the wards of the Municipality and for all the seats. The added respondents are restrained by an injunction from functioning or attempting to function as Commissioners by virtue of their election as mentioned herein. This of course does not in any way prevent them from standing at any future election of the Municipality.

9. Inasmuch as a point has been raised about the respondents being embarrassed by the existence of the decree in Title Suit No. 44 of 1953; I think that I will restrain the added respondents from executing the decree, inasmuch as all the parties to the Title Suit are also before me. Therefore, I order that the added respondents be restrained from taking any steps in execution of the decree in Title Suit No. 44 of 1953 in so far as it relates to the holding of an election u/s 26, and or in so far as it prohibits or orders an election to be held contrary to the directions given by me.

10. The petitioner must pay the costs of the respondent State and of the respondents 1 and 2. Hearing fee is assessed at 2 (two) gold mohurs. There will be no other order for costs.