

(1962) 08 GAU CK 0002
In the Gauhati High Court
Case No : Civil Rule No"s. 216 to 218 of 1962

Ram Chandra Malpani and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-08-1962

Acts Referred:

Assam Municipal Act, 1956 — Section 14, 16, 18(1), 22, 23
Constitution of India, 1950 — Article 145, 225, 226, 32, 32
Municipalities Election Rules, 1955 — Rule 1, 1(1), 10, 11, 11(1)

Citation : (1962) 08 GAU CK 0002

Hon'ble Judges : G. Mehrotra, C.J;S.K. Dutta, J

Bench : Division Bench

Advocate : I.C. Medhi, B. Islam and B.M. Goswami, for the Appellant; H. Goswami, G.K. Talukdar and J.K. Baruah, for the Respondent

Final Decision : Dismissed

Judgement

G. Mehrotra, C.J.—These three petitions arise out of the general election held on the 24th May 1962 of the Jorhat Municipality. Common points have been raised in all these petitions.

2. Rule No. 216 of 1962 arises out of the petition filed by one Ram Chandra Malpani, whose name is entered in the voters list of Ward No. v. of the Jorhat Municipality. In the final electoral roll his name is numbered 494. His grievance is that Rule 11 of the Rules framed for the election of the Commissioners of the Municipal Boards under the Assam Municipal Act, 1956 which provides that any claim for the insertion of "the names in the electoral roll and any objection" to any entry in the preliminary electoral roll are to be preferred to the Magistrate within seven days of the publication of the preliminary electoral roll, was violated in the present case. The date of the election was fixed by the Magistrate on the 24th May 1962. This was published in the Assam Gazette on the 12th January 1962, with detailed programme of the various steps that had to be taken in the conduct of the election. The preliminary voters list was published on the 23rd

March 1962 and in the programme set out by the Magistrate the date for filing claims and objections under Rule 11 was fixed on the 29th March 1962 and 30th March 1962 was fixed for the hearing of the claims and objections under Rule 17. The date for publication of the final electoral roll was fixed on the 21st April 1962 and the last date for the submission of the nomination papers was fixed on the 25th April 1962.

The contention is that Rule 11 is mandatory. It requires that the claim has to be filed within seven days of the publication of the preliminary electoral roll and after the preliminary electoral roll was published on the 23rd March 1962, claims could be preferred till the 30th March 1962. The Magistrate by fixing 29th March 1962 as the last date for the filing of the claims cut down the mandatory period under Rule 11 and thus there was a violation of the mandatory provisions of Rule 11. The proper preparation of the electoral roll is the foundation for the election and as on account of the violation of the provisions of Rule 11 a large number of people were deprived of their right to file claims and objections, the electoral roll was not properly revised and consequently the election on the imperfect roll was illegal and should be quashed by this Court under Article 226 of the Constitution, it is further urged that it was wrongly published in the "Janmabhumi" - a weekly paper in Assamese language - that the objections to any entry would be accepted up to 5 P.M. of the 23rd March 1962. The further ground taken is that the date fixed for filing of the nomination was 25th April 1962 but the nomination papers of Respondents Nos. 3 to 14 and other contesting candidates were filed on the 26th April 1962 and were accepted. The Petitioner who was also an intending candidate, did not file his nomination as he was misled by the publication that the last date for the filing of the nomination was 25th April 1962.

3. In Rule No. 217 of 1962 the Petitioner is Narayari Chandra Bora who is a qualified voter of Ward No. IV of the Jorhat Municipality and his name is inserted in the final electoral roll as No. 528 of the Jorhat Municipality as published by the Magistrate. His grievance is also similar to that of Ram, Chandra Malpani - Petitioner in Civil Rule No. 216 of 1962. He has also based his petition mainly; on the ground that there was violation of the provisions of Rule 11 and that he was misled in not filing his nomination as the last date for filing of the nomination was fixed to be 25th April and that the nomination papers of some others filed on the 26th April 1962 were also accepted.

4. Rule No. 218 of 1962 arises out of the petition filed by Bahekhari Ram Sahu alias Bhikhari. He is not a registered voter. His grievance is that the provisions of Rule 11 were violated. He avers in paragraph 7 of his petition that he filed a petition in the prescribed form on the 30th March claiming that he fulfilled all the qualifications required for being a voter in Ward No. IV for the election of the Commissioner in that Ward and that his name should accordingly be inserted. In paragraph 8 states that his petition though otherwise perfect and in order was not accepted and returned to him on the ground that "the last date for preferring a claim had already elapsed.

5. It will thus be seen that the Petitioners in Rules Nos. 216 and 217 do not specifically allege that they made attempts) to file any objection on the 30th March 1962 and that their objections were not accepted as filed beyond time. They were qualified voters and it cannot be said that the fixing of the incorrect date for filing of objections in accordance with the provisions of Rule 11 has affected their right to offer themselves as candidates for the commissionership. Their main grievance is that the mandatory provisions of Rule 11 were violated which resulted in the preparation of imperfect electoral roll and the elections held on such imperfect electoral rolls were void and could be set aside by this Court under Article 226 of the Constitution.

6. The Petitioner in rule No. 218 of 1962 has besides contending that the elections were void on account of the imperfect preparation of the electoral roll has also urged that he was denied an opportunity to file his objection and when he on the 30th March 1962 filed an application for inserting his name in the electoral roll as otherwise he was qualified, the petition was returned to him for being filed beyond time.

7. Mainly the contention common to all the petitions is that there has been a violation of Rule 11 inasmuch as seven "days" clear time was not granted for filing objections and preferring claim, and the electoral roll prepared was imperfect so the election held on such an electoral roll was invalid. It is urged on behalf of the opposite parties that the elections have already taken place. On admitted facts In the two petitions giving rise to Rules Nos. 216 and 217 no attempt was made by the two Petitioners whose names are entered in the electoral roll to file any objection within seven days and not having filed any objection, they have got no right to get the election set aside. As regards rule No. 218 it is contended that the Petitioner has not been able to prove that he made an application on the 30th March 1962 which was returned to him on the ground that it was filed beyond time and even if it was refused he could have brought an application under Article 226 of the Constitution much earlier for enforcement of his right to file certain claim within time by means of mandamus. This Court in the exercise of its discretion under Article 226 of the " Constitution will not grant any relief to the Petitioner after the elections have been held.

8. On merits the contention is that there has been no violation of Rule 11 in the present case. In the exercise of the powers u/s 301 of the Assam Municipal Act the Government has been pleased to make certain rules (hereinafter called "the Rules"). Rule 4 provides that there shall be an" Electoral Roll for every Ward and every person who is for the time being included in the Electoral Roll for any such Ward shall be entitled to vote in that Ward. Rule 7 provides as follows:

7. (i) No person who does not fulfill the electoral qualifications as required by Section 14 of the Act on the prescribed date, shall be entitled to be a voter for any election held within the year.

(ii) The Magistrate shall, not less than five months before the date of expiry of

the fourth year of the term undertake the revision of the electoral rolls and the Board shall supply him all such particulars as he may require.

(iii) The Magistrate shall prepare in Form I appended to these Rules a preliminary Electoral Roll for the Municipality, containing the names of all persons qualified to vote under the Act and Sub-rule (i) above and after causing it to be printed shall publish the same as soon as may be and not less than sixty days before the date for the general election at the Municipal office and at such other places as he may think fit.

(iv) The name of each voter shall be entered in the Preliminary and Final Electoral Rolls in Form I appended to these Rules for the Ward of Municipal voters in which he ordinarily resides.

(v) In a Municipality where a separate arrangement is made for recording the votes of "female voters, separate Electoral Rolls, both Preliminary and Final, shall be prepared for both, male and female voters.

Rule 8 provides for the publication of the Preliminary Electoral Roll and giving a public notice calling upon the people to inspect the Preliminary Electoral Roll at the municipal office. Rule 11 reads as follows:

Any claim for the insertion of a name in the Electoral Roll or any objection to any entry in the Preliminary Electoral Roll shall be preferred to the Magistrate in respect of the Preliminary Electoral Roll within seven days of its publication. The Magistrate shall not entertain any claim or objection received after 5 P.M. on the seventh day.

Provided that if the seventh day is a public holiday, claims and objection may be filed till 5 P.M. on the day immediately following the public holiday.

Rule 12 provides for the forms for claims and objections. Rule 13 lays down the manner of making and lodging claims and objections. Rule 16 provides for an inquiry into claims and objections and Rule 17 provides for the final publication of electoral rolls. Rule 18 (1) provides that final electoral rolls shall be revised by the Magistrate in the month of January each year, and as amended from time to time, shall remain valid for all elections held at any time till the next general election held u/s 26 (1) of the Act. Rule 19 provides for the fixation of the election day and Rule 20 provides for the publication of the date of election.

9. It is clear from the perusal of these rules that they lay down elaborate procedure for the preparation of the electoral rolls and it is nowhere provided that the date for filing objection to the preliminary electoral roll is to be notified. It can also not be said that the rules do not provide for elaborate procedure enabling the objectors to file their objections or the claimants to file their claims and thus no proper electoral roll could be prepared under the rules framed in the exercise of the powers conferred by Section 301 of the Assam, Municipal Act, 1956. Rule 11. in effect only gives a right to a claimant to prefer a claim, with in a certain period. If that right has been denied to that individual, he may have a

right to approach this Court for a mandamus directing the opposite parties to carry out the provisions of Rule 11 and thus the Petitioner may ask for the enforcement of his right. But before such a mandamus can be granted, this Court will take into consideration whether the mandamus will be of any practical use. After the final electoral roll has been published and the elections have taken place, any mandamus directing the public officer to perform his duty enjoined under Rule 11 will be of no practical use.

10. In two of the petitions the Petitioners have never filed any objections and thus the question of even effecting their personal right does not arise. In the last petition the question is disputed that the Petitioner ever applied for the entry of his name and this Court will not issue mandamus when the question is disputed as to whether the Petitioner ever applied for the entry of his name even on the 30th March 1962.

11. Mainly the contention of the Petitioners is that as rights of a large number of people have been affected, the Petitioners were entitled to ask for relief quashing the entire election under Article 226 of the Constitution. In the case of *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, it has been laid down as follows:

Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the High Court seeking a relief there.

Article 226 in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The existence of the right is the foundation of the exercise of jurisdiction of the High Court under Article 226. The legal right that can be enforced under Article 226, like Article 32, must ordinarily be the right of the Petitioner himself who complains of infringement of such right and approaches the Court for relief. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the Petitioner himself, though in the case of some of its like habeas corpus or quo warranto this rule may have to be relaxed or modified.

It is the infringement of an individual and personal right which gives him a right to approach the High Court under Article 226 of the Constitution. The Petitioner thus in the absence of any personal legal right which has been infringed, cannot come to this Court under Article 226 of the Constitution.

In the present case it is admitted that the individual right has not been infringed, nor can the Petitioner be granted a mandamus after the elections are complete, even if we hold that the individual right of the Petitioner to apply under Rule 11 within seven days of the publication was infringed.

12. The contention is that as Rule 11 is mandatory, the violation of the rule will vitiate the entire election. It is not necessary to examine whether Rule 11 is mandatory or directory. Even assuming that the provisions of Rule 11 are mandatory, its effect will be that any act done in violation of this rule would be illegal and ultra vires. If the application had been filed beyond seven days the acceptance of such an application would have been illegal. If the Petitioner had a right to apply within a certain period which was denied to him, he may claim mandamus directing the officer to carry out the terms of Rule 11. But merely because in publication the time was wrongly mentioned, even if the provisions of Rule 11 are mandatory, the entire election will not be set aside. Reliance is placed on the following passage in Craies on Statute Law, fifth edition, page 240:

Absolute enactments: If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not.

As I have already pointed out, the effect of a provision being mandatory is that any act done in contravention of that will be invalid and if the applications had been received beyond seven days, the act would have been invalid. But the passage referred to above in Craies On Statute Law does not show that the subsequent elections will be invalid. In that view of the matter it is not necessary to examine the respective contentions of the parties with regard to the violation of the provisions of Rule 11 in the present case. The contention of the Petitioners is that in counting seven days, the date on which the preliminary electoral roll is published should be excluded and thus the objections could be filed by the 30th March. On the other hand the contention of the opposite parties is that 23rd March 1962 - the date of publication - is not to be excluded. In the view which we have taken it is not necessary to examine the contention in detail.

13. It will be convenient at this stage to refer to some of the authorities cited at the Bar.

14. Strong reliance has been placed on the case of Chief Commissioner, Ajmer Vs. Radhey Shyam Dani, by the Petitioners. To appreciate the points decided in this case it is necessary to give briefly the facts. By an order dated March 12, 1953, the Ajmer Municipal Committee had been suspended. The suspension was to be over by the 11th September, 1955. As after the suspension period was over fresh elections were to take place, the Chief Commissioner framed the Ajmer State Municipalities Election Rules, 1955, in exercise of the powers conferred by Section 43 of the Ajmer-Merwara Municipalities Regulation 1925. These rules were published in the Government Gazette on the 4th August 1955 and on the 8th August 1955 he notified an election programme and also authenticated and published an electoral roll. Prior to the 8th August 1955 - the date of the publication - the electoral roll had been corrected and altered by the orders of the Sub-Divisional Officer. In that electoral roll the name of the Respondent before the Supreme Court had been incorrectly described. On 10th August 1955

he applied for the correction of his father's name in the Parliamentary Electoral Roll and on August 16 he filed his nomination paper. His nomination was rejected on August 17 by the returning officer on account of the mistake in the electoral roll. On the 18th August 1955 his application for rectification of the mistake in the Parliamentary Electoral Roll was also rejected on the ground that the Municipal electoral roll had already been published on the 8th August 1955.

On these facts the Respondent filed a petition in the Court of the Judicial Commissioner at Ajmer for a mandamus against the Chief Commissioner, Ajmer who was the Appellant before the Supreme Court, to reconstitute the Ajmer Municipal Committee by a properly made and published notification u/s 8(1) of the Regulation and an order against the District Magistrate restraining him from holding the elections and poll to the Ajmer Municipal Committee on September 9, 1955. The Judicial Commissioner upheld the contention of the Respondent Radhey Shyam Dani as regards the reconstitution of the Committee. But as the Chief Commissioner had already issued a notification u/s 8(1) of the Regulation to reconstitute the Committee, no direction was issued against the Chief-Commissioner. He however held that the elections which were going to be held on 9th September 1955 were not lawful and directed the District Magistrate, Ajmer to refrain from holding the elections and poll to the Ajmer Municipal Committee on September 9, 1955. Against this order an appeal was filed in the Supreme Court by the Chief Commissioner, Ajmer. Before the Supreme Court the Respondent did not put in any appearance, as the date on which the elections were to be held and which were restrained by the Judicial Commissioner had already expired and thus the question which came up for decision before the Supreme Court was only of academic interest. As the Judicial Commissioner had held that Rule 7 of the Election Rules was not, in consonance with and was in contradiction to Section 30 Sub-section (2) of the Regulation, the authorities were not in a position to hold even on other dates the election on the electoral rolls published on August 8, 1955, and thus it was necessary for them to get a decision by the Supreme Court on this question. Section 30 (1) of the Regulation read as follows:

A person shall not be deemed to be an elector for any purpose of this Regulation or of any rule unless he is enrolled as an elector.

By an amendment of 1950 it was provided in Section 30(2) of the Regulation 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 comprising the Municipality shall be entitled to be enrolled as an elector of the Municipality. Section 43 provided as follows:

Section 43: The Chief Commissioner may, by notification, make rules consistent with this Regulation for the purpose of regulating all or any of the following matters namely:

(c) the preparation and revision of electoral rolls, and ; the adjudication of claims to be enrolled and objections to enrolment.

The Chief Commissioner made Rules and the relevant Rule 7 is as follows:

Electoral rolls: In accordance with the provisions of Sub-section (2) of Section 30 of the Ajmer-Merwara Municipalities Regulation, 1925 (VI of 1925) the electoral roll of the particular Municipality shall be the same as the final printed roll for a Parliamentary Constituency representing the area covered by that Municipality.

Rule 9 provided that no person shall be deemed to be an elector for the purposes of these rules unless his name appears in the electoral rolls mentioned above. The Supreme Court held that the amendment of Section 30 (2) of the Regulation prescribes the qualification for the purpose of enrolment and the object of the amendment was to adopt the electoral roll for the Parliamentary Constituency as the basis for the electoral roll of the municipality. It did not eliminate the further steps in the matter of the revision of such electoral roll as also the adjudication of claims to be enrolled therein and objections to such enrolment. The amendment did not obviate the necessity of taking these further steps in spite of the electoral roll for the Parliamentary Constituency being treated as the electoral roll of the Municipality. By thus treating the electoral roll for the Parliamentary constituency as the basis for the electoral roll of the Municipality, the trouble and expenses involved in the preparation of the electoral roll for the Municipality were saved "but the Municipality was not absolved from the obligation of providing for the revision of such electoral roll as well as the adjudication of claims to be enrolled therein and objections to such enrolment. The Supreme Court further was of opinion that by making the Parliamentary Electoral Roll as the basis the Regulation did not obviate the necessity of revising the Parliamentary electoral roll. The Supreme Court held that

If Rules 7 and 9 above referred to were intended to form a complete code for the finalisation of the electoral roll of the Municipality they did not serve the intended purpose and were either inconsistent with the provisions of Section 30, Sub-section (2) of the Regulation or were defective in so far as they failed to provide the proper procedure for taking of the steps hereinabove indicated for finalising the electoral roll of the Municipality. If that was the true position the electoral roll of the Municipality which had been authenticated and published by the Chief Commissioner on August 8, 1955, was certainly not an electoral roll prepared in accordance with law on the basis of which the elections and poll to the Ajmer Municipal Committee could be held either on September 9, 1955, or at any time thereafter.

14a. The Supreme Court decision rests on the interpretation of the provisions of Section 30 of the Ajmer Mer-wara Municipalities Regulation and on the principle that though the Parliamentary electoral roll prepared earlier could be taken as the basis for the preparation of the electoral roll, it could not bodily be taken to be the final electoral roll and unless the rules provide for a procedure for revision

of the Parliamentary electoral roll, the rules which do not provide for such revision will be inconsistent with the purpose of the Regulation and any electoral roll published without making rules for the revision of the electoral roll and without giving opportunity to the qualified voters to file objections and prefer claims is no electoral roll in the eye of law and no elections can be held on such an electoral roll. It was in those circumstances that the Supreme Court upheld the decision of the Chief Commissioner, Ajmer, It was not a case where the elections had already taken place and the effect of the order of the Supreme Court was to set aside the election. Before the elections are held, if the court finds that there is no electoral roll in the eye of law at all, the court can always issue mandamus directing the authorities not to hold the election at all. But after the elections have been held, such a mandamus will be of no use and whether the election itself can be set aside without asking for a mandamus not to hold election on such an electoral roll earlier was not the question before the Supreme Court in this case.

Moreover as I have already indicated, the ratio decidendi of the case was that in the eye of law there was no electoral roll at all. In the case before us there is an elaborate provision made for the revision of the electoral roll. All steps were followed according to the provisions of the rules and the only illegality pointed out by the Petitioners is that in the programme published the date for filing claims was given as 29th March and not as 30th March 1962. It was not even the case of the Petitioners in Rules 216 and 217 that the Petitioners approached the authorities on the 30th March 1971 and their applications were rejected. " Utmost it is a case of the violation of some of the provisions of the rules for the carrying out of which a mandamus could be issued but even if it is held that the Petitioners and others were misled by the notification, it cannot be said that the electoral roll prepared was no electoral roll in the eye of law. Before the Supreme Court the rules which provided for taking the Parliamentary electoral roll as the only and final electoral roll and not merely the basis on which the electoral roll could be completed after inviting claims, were held to be invalid. No such question arises in the present case.

15. Reliance is placed on the case of *Kanglu Baula Kotwal v. Chief Executive Officer, Janpad Sabha, Durg*, (S) AIR 1955 Nag 49 (FB). This matter arose out of application under Article 226 of the Constitution challenging the elections to various constituencies of Janpad Sabha. One of the petitions was on behalf of the Janpad Sabha itself. As there was some conflict between the two Division Benches of the Nagpur Court, some of the points raised in the petition were referred to a Full Bench. In exercise of powers conferred by Section 3A of the C. P. and Berar Local Government Act as substituted on 29-5-53, the boundaries of a number of Janapadas in different districts of Madhya Pradesh were altered. The Government had taken away some of the villages from their limits and transferred them to other Janapadas and some of the villages in the other area were incorporated into different constituencies. It was contended by the Petitioners that the result of these alterations was that the roll originally

prepared became obsolete and no election could be properly held on that basis. As the election was held on the basis of the obsolete roll, a large number of electors have been deprived of the right to vote in the election as their names could not find place in the electoral roll, because the villages in which they reside were not within the limits of a particular Janapadas when the rolls were prepared or because they had not attained the age of 21 on 1-1-1952, though they had attained that age on 1-1-53. It was held by the Full Bench that the election was held without any proper electoral rolls and thus it was set aside, it was observed at page 60 of the report as follows

The roll prepared under the Act must be a roll prepared for a particular division. If the division has been altered how can the roll prepared for the original division be regarded as the roll for the altered division? It must be remembered that there cannot be an electoral roll apart from an electoral division, that is to say, the roll must appertain to an electoral division. Therefore, the moment a division is formed an obligation arises under Rule 1 to have a roll prepared. Where the Chief Executive Officer adds the name of some voters in the roll or removes some names from the roll there is in fact a revision of the electoral roll. Where such revision is in contravention of Rule 7 it is wholly void. It follows, therefore, that elections held on the basis of the rolls so revised are also void.

Chief Justice Sinha in his judgment has held that u/s 7(1) read with Rule 1 (1) made under that section, the preparation of an electoral roll should have been with reference to the date 31-3-1954. But he did not agree with the other two judges that the effect of rules made u/s 7 (1) is to provide that for every general election a fresh electoral roll has to be prepared and that a revision of the rolls was meant only for the purpose of a by-election to a Sabha. However he agreed with the other two learned Judges on the ground that there was no revision as contemplated by the rules and thus the elections were held on no electoral roll. This case therefore on facts is distinguishable from the present case, it was a case of the complete absence of any roll as required by the rules, both on the ground that a fresh roll had to be prepared and that the old roll was not revised at all.

16. Dr. Medhi relies upon the above case in support of this contention that the existence of an alternative remedy is no bar to the grant of relief under Article 226 of the Constitution by this Court and particularly in a case where the election is void. He has referred to the following observation at page 58 of the report.

It cannot be disputed that the powers of this Court under Article 225 are untrammelled by a law made by the Legislature and even though Section 22 of the Local Government Act says that elections can be challenged only by way of an election petition before a Tribunal created by the Act, the jurisdiction of this Court which is derived from the Constitution can in no way be affected. The proposition is so obvious that no authority is needed to support it....

No doubt, this Court has held in several cases that where another remedy which

is equally convenient is open to a person it would not ordinarily interfere. But, neither this Court nor the Supreme Court has held that the existence of another remedy is, in every case, a bar to the exercise of the powers of a High Court under Article 226. On the other hand, the view is well settled that there is no such bar and that the Court can interfere if the circumstances of the case demand interference. In the present cases there are substantial grounds for interference. In the first place, the point which has been raised is of a fundamental character and affects a large number of election disputes. In such a case it would avoid conflict of decisions and consequent uncertainty of law or the legal position if an authoritative decision is given by the highest tribunal in this State. Secondly, these very questions were argued before this Court at least on two previous occasions on which two different views were taken and it is necessary for this Court to express itself again and say finally which of the two views is correct. Finally I may point out that though the Respondents had raised a preliminary objection as to the tenability of the petitions we heard counsel on the merits of the petitions for several days. The time spent on this case will have been wholly wasted if we were to say now, in all solemnity, that another remedy being open to the Petitioners we would not interfere though we are in fact satisfied that their grievance is correct.

17. It was held in the case of Venkateswaran v. Ram- chand Sobhraj, AIR 1951 SC 1506 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.

The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Article 226 of the Constitution unless (1) 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 and could, therefore, be treated as void or honest and that in all other cases, Courts should not entertain petitions under Article 226, or in any event not grant any relief to such Petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy 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. The broad lines of the general principles on which the Court should act having been clearly laid down, their applications to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules

which should be applied with rigidity in every case which comes up before the court.

The grant of relief being discretionary, the facts of each case will have to be examined before relief can be granted and in the Nagpur case I have already quoted the passage which indicates the special circumstances of that case under which the court considered it desirable to issue a writ under Article 226 of the Constitution even on the assumption that alternative remedy was available.

18. It is contended that the Petitioners had no other alternative remedy. Section 16 of the Assam Municipal Act provides, follows:

16. If the validity of an election of a Commissioner is brought in question by an unsuccessful candidate or person qualified to vote at the election to which such question refers, such person may, at any time within twenty-one days after the date of the declaration of the result of the election file a petition in the prescribed manner before the District Judge.

Provided further that the validity of such election shall not be questioned in any such petition -

(a) on the ground that the name of any person qualified to vote has been omitted from the electoral roll, or

(b) on the ground that the name of any person not qualified to vote has been inserted in the electoral roll; or

(c) on the ground of acceptance or refusal of nomination of candidates provided further that an appeal in the manner prescribed shall lie to the District Judge against such acceptance or refusal of nomination.

Section 16 thus gives a right to an unsuccessful candidate or a person qualified to vote to challenge the election of a commissioner, but the election cannot be challenged on the ground that the name of any person qualified to vote has been omitted, or that the name of any person not qualified to vote has been inserted or on the ground of acceptance or refusal of nomination. Section 18 (1) (c) provides as follows:

If the Judge after holding an enquiry is satisfied that the result of the election has been materially affected by non-compliance with the provisions of this Act or the rules made there under or by any mistake in the use of any form prescribed for an election or by any error, irregularity or informality on the part of any officer charged with or carrying out any duty under this Act or rules made there under, he shall declare the election of such candidate to be void and if the election is set aside for any cause which is the result of acts of a candidate or his agent may declare that candidate to be disqualified for the purpose of such fresh election as may be held u/s 22.

Section 18 (1) (c) thus gives a right to the District Judge to set aside an election if he finds that the result of the election has been materially affected by any non-

compliance with the provisions of this Act or the rules made there under. This Sub-section gives power to the District Judge to set aside an election at the instance of the voters provided that he finds that there has been non-compliance with the provisions of any rules. Two of the Petitioners in the present case are voters and it cannot therefore, be said that they had no right to apply for setting aside the election. . The allegation by the Petitioners is that there has been non-compliance with the provisions of Rule 11, inasmuch as the time provided for under the said rule was not granted to the persons to prefer claim or to file objection. If the Petitioners thus could succeed in showing that the result of the election has been materially affected by the aforesaid non-compliance with Rule 11, they could challenge the election. Section 23 provides that no election of a. Commissions shall be called in question in any Court except under the procedure provided by this Act. The Petitioners in Civil Rules Nos. 216 and 217 of 1962 thus had another remedy open to them and merely because they had to prove further that the result has been materially affected, It cannot be said that they had no other alternative remedy available to them; nor can it be said that the circumstances of the present case justify the issue of prerogative writs under Article 226 of the Constitution, even though the Petitioners have an alternative remedy.

19. In the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, it was held by their Lordships of the Supreme Court that -

Article 329 (b) of the Constitution of India provides that "no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for, by or under any law made by the appropriate Legislature". The Representation of, the People Act, 1951, which made detailed" provisions for election to the various Legislatures of the Country also contains a provision (Section 80) that no election shall be called in question except by an election petition presented in accordance with the provisions of the Act.

In view of the provisions of Article 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.

In the case before their Lordships of the Supreme Court the matter came up on an appeal from the decision of the Madras High Court dismissing the petition of the Appellant praying for a writ of certiorari. The Appellant had filed his nomination paper for election to the Madras Legislative Assembly. His nomination paper on scrutiny was rejected by the Returning Officer, Thereafter an application was moved under Article 226 of the Constitution by the Appellant for a writ of certiorari quashing the order of the Returning Officer on the ground that it was an order passed by a quasi-judicial body and a writ of certiorari was available to the Petitioner. Article 329 (b) of the Constitution provides that notwithstanding anything in this Constitution no election to either House of Parliament or to the

House or either House of the Legislature of a State shall be called in "question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Section 80 of the Representation of the People Act similarly provided that the election could be called in question only by means of an election petition. It was contended in that case that by challenging the order of the Returning Officer rejecting the nomination, the election was not called in question. The Supreme Court repelled this contention and held that the word "election" in Article 329 (b) of the Constitution and Section 80 of the Representation of the People Act should be given a wide meaning so as to cover the case of nomination also. After having held that challenging the order of the Returning Officer rejecting nomination amounts to calling the election in question, the Supreme Court held that the special remedy provided for under the Act has to be resorted to. The following passage at page 231 may be quoted"-

It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

Fazl Ali, J. again at page 234 of the report (SCR) (at p. 70 of AIR), summed up his conclusions as follows:

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election" and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

Summarising again the decision of their Lordships of the Privy Council in *Theberge v. Laudry*, (1876) 2 AC 102, it was observed as follows:

The points which emerge from this decision may be stated as follows:

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the Legislature to examine and

determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special Jurisdiction should be exercised in accordance with the law which creates it.

In conclusion the Supreme Court observed as follows:

We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is in my opinion correct and must be affirmed.

This case is clearly an authority for the proposition that the right of franchise is a creature of a statute and if that right is infringed the remedy of the person is to challenge the election by the procedure provided under that special statute.

20. In the case of Dr. N.B. Khare v. Election Commission of India, AIR 1958 SC 135, the election of the President was challenged by means of a petition under Article 71 (1) of the Constitution of India. Article 71 (1) says that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final. Clause (3) of Article 71 provides that subject to the provisions of the Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President. The Parliament passed an Act called "The Presidential and Vice-Presidential Elections Act, 1952 (31 of 1952). The Registrar of the Supreme Court rejected the petition on the ground that it did not comply with the provisions of the Presidential and Vice-Presidential Elections Act, 1952 and the Rules of the Supreme Court contained in O. 37-A.

Section 14 of the Presidential and Vice-Presidential Elections Act, 1952 provided that no election shall be called in question except by an election petition presented to the Supreme Court in accordance with the provisions of the Act and of the Rules made by the Supreme Court under Article 145 of the Constitution; and further it provided that it should be presented by any candidate at such election or by ten or more electors. The Supreme Court was thus given power to entertain a petition in respect of the Presidential election and frame rules. It was not disputed in that case that the application was not in conformity with the rules made by the Supreme Court for election petitions challenging the Presidential and Vice-Presidential election. The argument was that under Article 71 the Supreme Court had power to entertain the application and give the Petitioner proper relief. It was held that as the Presidential and Vice-Presidential Act, 1952 which was properly enacted, provided that the election could only be challenged by means of a petition, no other method is permissible to challenge the election. The following passage in the judgment is apposite:

It is firstly contended by Mr. Mani that the present petition is outside the purview of Act 31 of 1952 and of O. 37-A of the Supreme Court Rules. It is argued that

the Supreme Court is invested with jurisdiction to enquire into and decide all doubts and disputes arising out of or in connection with the election of the President, that Act 31 of 1952 and O. 37-A apply only when there is a dispute as to the election, but where the petition is founded upon doubts as to the validity of the election, it is not covered either by the Act or the Rules. We are unable to accept this contention. When once an election has been held, any doubt concerning its validity is material only, as a ground for setting aside the election and that in fact is the prayer in the petition itself. In substance the petition is one calling the election in question and it must satisfy the requirements of Act 31 of 1952 and of the Rules in O. 37-A.

21. In the present case the Petitioners in effect called in Question the election. Rule 101 of the Rules also provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Section 16 of the Act.

22. As regards Civil Rule No. 218 of 1962, it should be further noted that the Petitioner has averred in para graph 7 of the petition that he filed a petition in the prescribed form on 30th March claiming that he had fulfilled all the qualifications required for being a voter and that his name should be accordingly inserted. In paragraph 8 he has averred that his petition though otherwise perfect and in order was not accepted and returned to him on the ground that the last date for preferring a claim had already elapsed. The statement in paragraph 8 is sworn on the information derived from records. From the records nothing appears to show that the application was presented. The allegation that the application was presented and was re turned has been denied. Before us an application has been filed. It does not show any endorsement that the application was presented and returned. It is not the case of the Petitioner that any such endorsement was made on that application. He only makes a statement that ho wanted to file tile application but he was not allowed to do so on the ground that the application is being filed beyond time.

it is contended by the Petitioner that there was a clear allegation that the returning officer did not accept his application and the best person to deny this allegation was the officer concerned. But no counter-affidavit has been filed on his behalf. If this allegation had been made on personal knowledge it could have been reasonably argued that the officer himself should come forward and deny the election. But when the Petitioner within whose personal knowledge the matter is alleged to be has not sworn it by personal knowledge but on information received from re-" cords, he cannot now make grievance ot the fact that the officer concerned has not denied the allegation on his personal knowledge. Anyway when the question itself is disputed as to whether any attempt was made on his part to file the application, this Court under Article 226 of the Constitution will not enter into evidence and in the light of other circumstances will not grant any relief to the Petitioner under Article 226 of the Constitution.

23. Thus in view of the fact that the Petitioners waited till the elections were over and did not come at the earliest opportunity under Article 226 of the Constitution for a writ of mandamus directing the opposite parties not to hold the election and further in view of the fact that the Petitioners are in effect challenging the elections which could only be done by means of the procedure prescribed under the Act and the Rules made there under, the Petitioners in our opinion are not entitled to any relief. We have already dealt with the two cases on which reliance was placed by the Petitioners and in our judgment the principles laid down in those cases do not support the contention of the Petitioners. They were cases where there was in the eye of law no electoral roll prepared and the elections either were going to be held or were actually held on no electoral roll. In the result therefore, all the three petitions are dismissed with costs. As one common argument was advanced, we assess the cost in each case to be Rs. 50/-

S.K. Dutta, J.

24. I have had the opportunity of going through the judgment of my lord the Chief Justice and I entirely agree with his views. I, however, add a few words. In Civil Rule No. 216 of 1962 there are three allegations. The last date for lodging objections and claims under Rule 11 of the rules made under the Assam Municipal Act was fixed to be 29-3-1962 but it was advertised in a weekly paper known as "Janmabhumi" as 23-3-1962. Secondly the last date for accepting claims and objections should have been 30-3-1962 and not 29-3-1962. Thirdly the last date for filing nomination papers was fixed on 25-4-1962 but the nomination papers of Respondents 3 to 14 and other contesting candidates were filed on 26-4-1962. Similar allegations are made in Civil Rule 217 of 1962. But in neither of these two petitions it is stated how any personal or individual right of the Petitioners was violated. It is stated that they could not file their nomination papers on or before 25-4-1962 which was fixed as the last date for filing nominations. Had they known that nomination papers would be accepted even on 26-4-1962, they would have filed the same on that date. Such an averment does not disclose the right for the enforcement of which a mandamus is prayed for by the Petitioners, for the issuance of a writ of mandamus, the Petitioner must have a clear personal legal right to the performance of the particular duty sought to be enforced. In this connection the observations made by the Supreme Court in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, have already been quoted by my lord the Chief Justice.

25. Similarly in *Damodar Goswami Vs. Narnarayan Goswami and Others*, a Division Bench of this Court held that a mandamus would not be granted where the right was doubtful and where the applicant had not been directly and substantially affected by the act or conduct of the public body or the officer on whom the law enjoined the performance of some duty with reference to "the individual concerned. As I have said already it is not at all clear what individual or personal right of the Petitioners in the above two petitions had been violated.

Only in petition No. 218 of 1962 the Petitioner alleges that his claim to be enrolled as a voter was filed on 30-3-1962 but it was not accepted. If this was a fact, the Petitioner could move this Court for a writ to compel the officer to entertain his claim. This was not done. Moreover, as pointed out by my lord the Chief Justice, this allegation is true only to, the information of the Petitioner derived from the record. There is nothing in the record to show that such a claim was made but not accepted on 30-3-62. Hence this matter will involve detailed inquiry into facts and no such inquiry can be made in a writ petition.

26. In the present case the elections have already been held. It is true that where an election is merely colourable, a mandamus should be granted to hold a fresh-election according to law. In *Barnes Corporation. In re Hutter, Ex parte*, 1933 1 KB 668, Lord Hewart C. J. quoted the observations of Coleridge, J. made in the case of *Reg v. Chester Corporation*, (1855) 25 LJQB 61, which were as follows:

A mandamus will only go upon the supposition that there is nobody holding the office in question, and it is an inflexible rule of corporation law that where an officer has been de facto elected, and has accepted office and acted, this constitutes a case of plenarty, unless the election be merely colourable.

In the aforesaid case of the *Barnes Corporation*, although the law provided for open voting, there was only a secret voting by ballot. Thus the election of aldermen was conducted not in the manner provided by the Act but by a method of an altogether different character. Again the whole election to a corporate body may be void if the electoral rolls are defective as was held by the Nagpur High Court in (S) AIR 1955 Nag 49 (FB), \n that case some electoral divisions were altered by addition of some villages and transferring them to some other divisions. No electoral roll was prepared for these altered divisions and the election was held on the original electoral rolls. The Court observed that an electoral roll must appertain to an electoral -division and in this case this was not so. In the above cases the elections were apparently colourable.

In the cases before us there is the allegation that the last date for filing claims and objections was fixed to be 29-3-1962 whereas according to the Petitioners, it should have been 30-3-1962. We do not know if any claim and objection was actually filed on 30-3-1962. Only in Civil Rule 218 of 1962 the Petitioner says that he filed his claim on 30-3-1962 and that this was not accepted. There is nothing in the record to show this. There is nothing also to show that anybody was misled simply because the last date for filing claims and objections appeared in a weekly paper as 23-3-1962. I have already said that it is not clear what right of the Petitioners was violated in allowing nominations to be filed on 26-3-1962. In such circumstances it cannot be said that the election to the Jorhat Municipal Board, held on 24-5-1962 was merely colorable. These petitions must therefore be dismissed.