

(1953) 06 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No. 307 of 1953

Samsherkhan Mohamadkhan

APPELLANT

Vs

Jafarali Ahmedalli Saiyad and Others

RESPONDENT

Date of Decision : 22-06-1953

Acts Referred:

Bombay District Municipal Act, 1901 — Section 22, 22(2), 22(5)

Citation : AIR 1954 Bom 133 : (1953) 55 BOMLR 853 : (1954) ILR (Bom) 237

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : M.V. Paranjpe, for the Appellant; D.V. Patel, for the Respondent

Judgement

Chagla, C.J.—This petition raises an interesting and important question as to the proper construction of Section 22, Bombay District Municipal Act, 1901, which deals with the jurisdiction of the District judge in election petitions.

2. The petitioner stood for the general election of ward No. 4 of the Borsad Municipality which was held on 10-7-1952. Respondent 1 was also a candidate. There were four seats in all, the fourth seat being a reserved seat, and when the results were declared one Hiralal was found to have obtained 656, one Amritlal was found to have obtained 598 votes, and respondent 1 Jafarali was found to have obtained 433 votes. The petitioner was declared to have secured 428 votes. Therefore, Hiralal, Amritlal and Jafarali, respondent 1 were declared to be duly elected. The petitioner then presented an election petition before the District Judge of Kaira challenging the election on the ground that if a proper scrutiny was held of the votes cast in favour of the petitioner and respondent 1, the petitioner would be found to have been elected. He alleged that valid votes cast in favour of the petitioner were rejected and invalid votes cast in favour of respondent 1 were admitted. When the matter came before the learned District Judge he referred it to the Commissioner to recount the votes, and on a recount it was found that the petitioner had obtained 429 instead of 428 votes, and respondent 1 had obtained 434 instead of 433 votes. When the matter came

back before the District Judge, the petitioner wanted the District Judge to scrutinize the voting paper and to permit him to establish his allegation that valid votes which were cast in his favour had been rejected and invalid votes in favour of respondent 1 had been admitted. On that the District Judge raised an issue which is to the following effect:

"Whether this Court has jurisdiction to entertain this application in the absence of specific allegations of corrupt practices on the part of or by opponent No. 1?"

and he decided that issue in the negative. Therefore, the view taken by the District Judge was that in the absence of any allegation of corrupt practice he had no jurisdiction to amend the result of the election. As in this particular case no corrupt practice was alleged, the learned Judge came to the conclusion that he could not entertain the petition.

3. The question that arises before us is whether the view taken by the learned District Judge is the right view, in view of the provisions of the Bombay District Municipal Act, 1901. The powers of the District Judge to hold an election inquiry are to be found in Sub-section (2) of Section 22 and the order that the learned Judge can pass on an election petition is confirming or amending the declared result of the election or setting the election aside. These powers are made subject to the provisions of Sub-section (3), and when we turn to Sub-section (3), it deals with two matters, one Under Clause (a) and the other Under Clause (b) Under Clause (a) the Judge, if satisfied that a candidate has committed any corrupt practice, he shall declare the candidate disqualified both for the purpose of that election and of such fresh election as may be held under Sub-section (2) and shall set aside the election of such candidate if he has been elected. Therefore, this case specifically deals with the case of corrupt practice and the power of the Judge is to set aside the election.

When we turn to Clause (b), it deals with a different case altogether because it specifically provides that if in any case to which Clause (a) does not apply, the validity of the election is in dispute between two or more candidates, the Judge shall, after a scrutiny and computation of votes recorded in favour of each such candidate, declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. Therefore, it will be observed that whereas in the case of Sub-section (3) (a) the dispute may be either between a candidate and a candidate or between a voter and a candidate, the dispute under Sub-section 3(b) is confined to a dispute between candidates "inter se". Whereas Under Clause (a) the power of the Judge is to set aside the election, in cases falling Under Clause (b) the only power that the Judge has is to amend the result of the election by" declaring a particular candidate to have been elected instead of another candidate who was elected by the returning officer. Thirdly, whereas Under Clause (a) in order to exercise his power the Judge must be satisfied that a corrupt practice has been committed, in the cases falling Under Clause (b) what the Judge has got to do is" to scrutinise and compute the votes recorded and come to a conclusion from that scrutiny and

computation as to which candidate was duly elected.

4. Now, it is difficult to understand how the learned Judge came to the conclusion that in exercising his jurisdiction under Sub-section (3)(b) of Section 22 it was necessary for him to be satisfied that a corrupt practice had been committed. It is also clear that Under Clause (b) the power of the Judge is not confined to mere computation of the votes. Mr. Patel has argued on behalf of respondent 1 that once the Commissioner on computation of votes found that respondent 1 had received a larger number of votes than the petitioner, it was incumbent upon the District Judge to dismiss the petition. If the intention of the Legislature was that the only power of the Judge was to recount the votes and to perform a purely mechanical and clerical function, it is difficult to understand why the Legislature has provided not only for computation but also a scrutiny of the votes. Further, what the District Judge has got to declare is that a particular candidate is found to have the greatest number of valid votes. His function is not merely to declare that a candidate has received the greatest number of votes, but he must be satisfied that the votes that he has received are valid votes. Therefore, in our opinion, it is clear that Under Clause (b) the jurisdiction of the Judge is not confined to cases of corrupt practices, but as a wide jurisdiction where he has been given the power to compute and scrutinize the votes, to decide the validity of votes, and after deciding the validity of the votes cast to declare which candidate has been elected. It may also be noticed that there is another important distinction between clauses (a) and (b) of Sub-section (3). In the case of Clause (a) the election of the candidate who is guilty of corrupt practice is to be set aside and the result is that a by-election follows. In the case of Clause (b) the election is not set aside; the election as held stands; all that the District Judge does is that he computes and scrutinizes the votes, and if he finds that there has been a mistake in the counting of votes or if he finds that valid votes have not been admitted or invalid votes have been admitted, he corrects the mistake made and gives the decision on the votes actually cast. Under Clause (b) no question arises of setting aside the election of a candidate and no question arises of a by-election following upon the decision of the District Judge.

5. Mr. Patel has strongly relied on the provisions of Sub-section (5) of Section 22. When we turn to that Sub-section, it provides:

"If the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under clause (c) of Sub-section (1) of Section 11, or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election."

Mr. Patel says that this Sub-section applies both to Sub-sections (3)(a) and (3)(b). In our opinion that contention is clearly erroneous. Sub-section (5) contains a direction to the District Judge not to set aside the election in cases mentioned in that Sub-section. Therefore, Sub-section (5) only applies to those cases where the Judge would have the power and the jurisdiction to set aside the election. As already pointed out the jurisdiction of the Judge to set aside an election only

arises Under Clause (a) of Sub-section (3). Under Clause (b) the Judge cannot set aside the election and therefore the direction in Sub-section (5) can have no application when the Judge is dealing with a case which falls Under Clause (b) of Section 22(3). It is impossible to argue that although an invalid vote has been cast the learned Judge should not interfere with the action of the returning officer because it may have been due to an irregularity or an informality or a failure to carry out the rules if the irregularity or informality was not corruptly caused. Once a vote is invalid, it is the duty of the District Judge under Sub-section (3) (b) to reject that vote in computing the votes cast in favour of a particular candidate.

6. Mr. Patel has then argued that under the Election Rules the power to scrutinize is given to the scrutineers and the Chairman under R. 35. Rule 35(1) provides that the Chairman of the special general meeting of the Municipality shall appoint scrutineers. Sub-rule (2) provides that the scrutineers shall separate clearly valid papers from invalid and doubtful ones and shall submit the invalid and doubtful papers to the Chairman for decision; and Sub-rule (3) gives the power to the Chairman to reject voting papers which in his opinion are invalid. Neither this rule nor any section of the Municipal Boroughs Act provide that the decision of the Chairman is final and conclusive and cannot be challenged in an election petition filed before the District Judge. On the contrary, Section 22(3) (b) gives revising powers to the District Judge, when an election petition is filed challenging the election of a particular candidate on the ground that if a proper scrutiny was held he could not have been declared to be elected, it may also be pointed out that u/s 22(2) wide powers are given to the District Judge in an election petition. As we have pointed out in a recent case, the power & jurisdiction of the District Judge is not confined either to cases falling under Sub-section (3) (a) or (3) (b) of Section 22. Those two sub-sections deal with the specific cases which fall under them, but the power and jurisdiction of the District Judge is dealt with in Section 22(2) which power and jurisdiction consists in the District Judge having the power to pass an order confirming or amending the declared result of the election or setting the election aside. In this particular case the District Judge is called upon to amend the declared result of the election, and powers have been conferred upon him for exercising that jurisdiction u/s 22(3) (b).

7. Therefore, in our opinion, the learned Judge was, in error in coming to the conclusion that his jurisdiction in an election petition was confined to cases where there was an allegation of corrupt practice. We would, therefore, set aside the order of the learned District Judge and send the matter back to him with a direction that he should hold an inquiry as to the validity of the votes cast in favour of respondent 1 and also cast in favour of the petitioner. He should permit the petitioner to lead evidence to establish as he has alleged in his petition that invalid votes were cast in favour of respondent 1 and valid votes which were recorded in favour of the petitioner were not taken into account. After hearing such evidence as the petitioner may lead and also hearing such evidence as

respondent 1 may choose to lead in rebuttal, he will then decide what is the number of valid votes that were cast in favour of the petitioner and what is the number of valid votes that were cast in favour of respondent 1. It is only after that that he will decide whether the petitioner or respondent 1 should be declared to have been elected, and he will ultimately decide in accordance with the evidence led as to whether the petitioner's petition should succeed or fail. If he comes to the conclusion that the petitioner's petition should succeed, he will amend the result of the election and declare the petitioner to be elected. If, on the other hand, the petitioner fails to establish his allegations, the learned Judge will dismiss his petition.

8. Rule absolute with costs.

9. Rule made absolute.