

(2015) 07 AHC CK 0115

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 25114 of 2015

Shailendra Kumar Gupta

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Representation of the People Act, 1951 — Section 33(4), 36(4)
Uttar Pradesh High School and Intermediate Colleges (Payment of Salary to Teachers and Other Staff) Act, 1971 — Section 6(3)

Citation : (2015) 6 ADJ 732 : (2015) 112 ALR 609 : (2015) 5 AWC 4832 :
(2015) 3 ESC 1808 : (2015) 3 UPLBEC 2213

Hon'ble Judges : Yashwant Varma, J

Bench : Single Bench

Advocate : Rajendra Kumar Gupta and Radha Kant Ojha, for the Appellant;
Pradeep Chandra and Pratik Chandra, Advocates for the Respondent

Final Decision : Allowed

Judgement

Yashwant Varma, J—This petition assails the validity of an order dated 17 April, 2015 in terms of which the Regional Level Committee has accorded recognition to the elections held for constitution of the Committee of Management of an institution known as Shri Fatehchandra Smarak Uchchar Madhyamik Vidyalaya, Udanpur, Jalaun. The recognition to the said elections held on 11 January, 2015 came to be accorded by the Regional Level Committee overruling the report and objections conveyed by the District Inspector of Schools by his communication of 27 January, 2015. This petition was preferred consequent to the nomination of the petitioner being rejected and he being therefore prevented from participating in the election for the post of Manager. The facts of the case are really not in dispute. However, it would be apposite to notice the following events leading up to the holding of the elections in question.

2. The last undisputed elections for the constitution of the Committee of Management are stated to have been held in 2010. Consequent to the term of

the said Committee coming to an end the District Inspector of Schools accorded approval for the holding of elections by the Committee of Management by his order of 21 November, 2014. By this very order, the District Inspector of Schools appointed an Observer and one Mr. Girija Dutta Tripathi, a retired principal of an Intermediate College, to act as the Election Officer. The election programme was published in the newspaper on 27 & 29 November, 2014. As per the programme published the elections were to be held on 11 January, 2015. All nominations were to be filed between 10:00 A.M. to 12:00 P.M. on the same date, examined, withdrawals permitted and voting to take place thereafter.

3. The fact of the petitioner being a member of the general body is not disputed. He admittedly submitted his nomination seeking to contest for the post of Manager. During the course of examination of the nomination papers, the Election Officer received a complaint from Shankar Dayal Awasthi with respect to the nomination submitted by the petitioner. The objection taken was that the nomination submitted by the petitioner did not carry the serial number attributed to his name in the voter list. The Election Officer finding the objection to be valid consequently rejected the nomination.

4. The report of the Election Officer then records that for the various posts in the Committee of Management only singular nominations remained subsequent to withdrawal and that therefore he found no need for voting to take place and accordingly proceeded to announce the result of the Election and declared the names of persons elected to the various offices in the Committee of Management. Sri Shankar Dayal Awasthi, the Objector came to be declared elected as the Manager in the Committee of Management and the fourth Respondent herein is sued through him.

5. The papers relating to the election proceedings alongwith a report of the Election Officer came to be submitted to the District Inspector of Schools on 16 January, 2015. By his communication of 27 January, 2015, the District Inspector of Schools recorded that Shri Girija Dutta Tripathi, had failed to conduct the elections in accordance with the programme and procedure prescribed by the Scheme of Administration and the directives issued by him. He further proceeded to record that the scrutiny and rejection of nomination papers was undertaken arbitrarily and that the Election Officer had failed to proceed in an unbiased manner. The District Inspector of Schools also noted that various nomination papers which had been accepted were incomplete and did not carry the complete declarations and affidavits as was required. Accordingly, he opined that the elections stated to have been held on 11 January, 2015 were not liable to be accorded recognition. Noting that the term of the Committee of Management had come to an end on 3 January, 2015 he recorded that the circumstances warranted the appointment of an Authorised Controller in terms of Section 6(3) of the U.P. High School and Intermediate Colleges (Payment of Salaries of the Teachers and Other Employees) Act, 1971 (Act of 1971). This report was forwarded to the Regional Level Committee. The Regional Level Committee

taking the aforesaid report into consideration by its order of 17 April, 2015 proceeded to record that the objections taken by the District Inspector of Schools was not backed by any evidence. It further noticed the contention of the petitioner that his nomination had come to be illegally rejected and that nomination suffering from similar defects were approved by the Election Officer. Dealing with the above contention, the Regional Level Committee proceeded to hold that it was evident from the contention advanced by the petitioner that his nomination paper was incomplete and was therefore rightly rejected. In the absence of any other objection or evidence bearing upon the validity of the elections, the Regional Level Committee proceeded to accord recognition to the said elections.

6. Sri R.K. Ojha, learned Senior Counsel appearing in support of this petition has submitted that the Election Officer has clearly acted in an arbitrary fashion in proceeding to reject the nomination paper of the petitioner. He submits that in the absence of any dispute of the petitioner being a member of general body of the Society, no cause existed warranting rejection of the nomination submitted by him. Sri Ojha would contend that applying general principles also the nomination paper was not liable to be rejected and that the actions taken by the Election Officer smacked of malafides. Sri Ojha has further placed reliance upon the judgment rendered by a learned Single Judge in *Ambika v. Ram Bhual*, Election Petition No. 5 of 2002, decided on 28 October, 2004, as well as of the Supreme Court in *Rafiq Khan and Another Vs. Laxmi Narayan Sharma*, (1997) 2 SCC 228, to contend that a nomination paper is not liable to be rejected unless the defect be of a substantial character. Sri Ojha has specifically referred to what the Supreme Court held in *Rafiq Khan* (supra) with respect to defects of a substantial character:

"8. Our attention was lastly drawn to the decision of this Court in *Brij Mohan v. Sat Pal*. In this case Sat Pal had filed the election petition alleging that Dog Ram was registered as an elector at Serial Number 177, House No. 57 in Part 39 of the electoral roll of the Jind Constituency and Ram Pratap who proposed Dog Ram was registered as elector at Serial Number 313, House No. 6 in Part 39 of the same constituency. The name of Dog Ram and his postal address were correctly given in the nomination paper. But the part of the electoral roll was mentioned as 57 instead of 39 by mistake. So also in the case of the proposer, the serial number of the elector and the number of the constituency were correctly given but the house number was wrongly entered. These inaccuracies in the nomination paper were, contended the appellant, technical in nature and should have been rectified by the Returning Officer at the time of scrutiny. This Court held that the responsibility of producing documentary evidence of registration as elector in a different constituency rests entirely on the candidate. It further held that it was not possible to generalise and hold that all errors in regard to electoral roll numbers of the candidate and the proposer in the nomination paper do not constitute defects of a substantial character. They would not be defects of substantial character only if at the time of scrutiny the

Returning Officer either by himself or with the assistance of the candidate or his proposer or any other person is able to find out the correct serial numbers of the candidate and the proposer by reference to the correct part number of the electoral roll. If that is not the case, he would be committing a great error by accepting the nomination paper without verifying whether a candidate was a voter in that constituency. It was, therefore, said that the question whether the defect is of a substantial character or not, would depend on the facts of each case. Unless the defect is one which can be per se noticed and corrected at the stage of Section 33(4) or later at the stage of Section 36(4) without the need to refer to various other documents the same cannot be said to be of a non-substantial character. In the instant case also the defect as to the number could have been said to be not of a substantial character if the appellant had shown that the name of the proposer appeared on the very same sheet at Serial Number 138 instead of 136 i.e. only two steps away. In that case one can say that the Returning Officer could have verified the same if he had exercised due diligence. In such a situation even if the appellant and his proposer were absent the Court could have taken the view that the defect was not of a substantial nature. But the defect cannot be noticed unless the Returning Officer is required to sift through various other documents or the voters' list or is required to undertake an enquiry as to whether the proposer's name appears anywhere else in the voters' list. The defect may not be one capable of being cured without the assistance of the candidate or his proposer and in such a situation he would be justified in rejecting the nomination paper. In the instant case since there is no evidence to suggest that the name of the proposer appeared on that very sheet at Serial Number 138 instead of 136 in the electoral roll, we find it difficult to find fault with the rejection of the nomination paper by the Returning Officer."

(emphasis supplied)

7. Sri Ashok Khare, learned Senior Counsel appearing for the fourth respondent has on the other hand submitted that the right to contest election, the procedure thereof, the powers and duties of the Election Officer in connection therewith are all matters which are governed by rules which may be statutory or otherwise. He submits that the right to contest an election is neither a fundamental right nor is it a right traceable to the common law. In his submission the conduct of the elections and the powers exercised by the Election Officer in respect thereof are to be tested only against the provisions of the Scheme of Administration inasmuch as admittedly no other statute or provision referable to the Intermediate Education Act, 1921 or the various rules and regulations framed thereunder governed or operated in this field. It is his contention that no provision of the Scheme permits the Election Officer to grant liberty to a contestant to rectify or alter the nomination papers filed. He would submit that the provisions of the Scheme did not confer any power on the Election Officer to permit completion of particulars or to alter the nomination paper once submitted.

8. Sri Khare, learned Senior Counsel has further submitted that the decisions

relied upon by the petitioner have all been rendered with reference to the provisions of Section 36(4) of the Representation of Peoples Act, 1951 and can have no application to the controversy at hand.

9. In the alternative, Sri Khare has submitted that even if general principles flowing from Section 36(4) of the Act, 1951 were applied then also the nomination submitted by the petitioner was rightly rejected. Relying upon the decision of the Supreme Court in *Prahladdas Khandelwal Vs. Narendra Kumar Salave*, AIR 1973 SC 178 : (1973) 3 SCC 104 : (1973) 2 SCR 157 , Sri Khare submitted that a correction in the nomination paper is not to be permitted. Sri Khare has lastly submitted that the omission to specify a serial number in the ballot paper of the candidate may itself amount to a defect of a substantial character rendering the nomination liable to be rejected. Sri Khare, in this connection, has placed reliance upon the decision rendered by the Supreme Court in *Mathura Prasad Vs. Ajeem Khan*, AIR 1990 SC 2274 : (1990) 2 JT 331 : (1990) 1 SCALE 754 : (1990) 3 SCC 659 : (1990) 2 SCR 503 : (1990) 2 UJ 234 .

10. Having duly considered the rival submissions and in order to delineate the scope of inquiry it becomes relevant to first recognise certain basic principles. Undoubtedly the right to elect or to stand for election is not a fundamental right. It is also not a right traceable to the common law. The right to elect and to contest an election was and was always understood to be conferred by statute. As far back as in *Jyoti Basu and Others Vs. Debi Ghosal and Others*, AIR 1982 SC 983 : (1982) 1 SCALE 115 : (1982) 1 SCC 691 : (1982) 3 SCR 318 : (1982) 14 UJ 186 , the Supreme Court succinctly explained the legal position in the following terms:

"7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the Constitutional and statutory provisions in relation to these rights have been explained by the Court in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, and *Jagan Nath v. Jaswant Singh*. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating

to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

11. The above position in law was reiterated by the Supreme Court of India in *Vipulbhai M. Chaudhary v. Gujarat Co-operative Milk Marketing Federation Limited and others*, in the following terms:

"47. There is no quarrel with the well-settled proposition that a right to elect is not a fundamental right nor a common law right; it is a statutory right, and any question relating to election has to be resorted within the four corners of the Act as held by this Court in *Jyoti Basu and Others Vs. Debi Ghosal and Others*, AIR 1982 SC 983 : (1982) 1 SCALE 115 : (1982) 1 SCC 691 : (1982) 3 SCR 318 : (1982) 14 UJ 186 . To quote paragraph-8.....

12. Having thus recognized the basic principles, the issues which fall for consideration and which now stand crystalised may be noted as being the following.

"(a) Whether the provisions of Section 36(4) of the Act, 1951 or principles analogous thereto stand attracted to the present elections?; and

(b) Whether the decision of the Election Officer in rejecting the nomination of the petitioner was valid in law or not?"

13. Dealing with issue (a) this Court must necessarily hold that the provisions of Section 36(4) of the Act, 1951 can obviously have no application. Admittedly no provision of the Act, 1921 or the various Rules and Regulations framed thereunder, incorporate or adopt the provisions of the Act, 1951. The Act, 1951 is a special statute dealing with all matters connected with election to representative offices. It however does not ipso facto apply to elections like the present. The Scheme of Administration operating in respect of the elections in question also does not lay down any rule or guideline with respect to the mode

and manner of scrutiny of nomination papers or their rejection. It is also true that there are no common law principles or rules which govern the conduct of elections and/or disposal of issues connected therewith. But then in such a vacuum is one to understand that the Election Officer is not bound by any principles at all? The answer in the opinion of this Court has to surely be in the negative. In the absence of codified rules, regulations or instructions, in the opinion of this Court, the Election Officer would be liable to approach the issue at hand from the point of view of a reasonable person. The exercise of power by the Election Officer in such a situation would have to be tested on the basic principles of fairness, reasonable standards and rationale conduct. If there be one underlying theme which pervades the principle of the rule of law as evolved by our Courts, it is the rule of non arbitrary action. The concept of unfettered discretion is the sworn enemy to the rule of law. It is in these areas that the Courts have proceeded to evolve the mythical "common man" test.

14. In *Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others*, AIR 2001 SC 24 : (2000) 87 FLR 877 : (2000) 2 JT 206 Supp : (2001) 1 LLJ 583 : (2000) 7 SCALE 19 : (2001) 1 SCC 182 : (2001) SCC(L&S) 189 : (2001) 2 UJ 1185 : (2000) AIRSCW 3826 : (2000) 7 Supreme 112 , the Supreme Court observed:

"1. Since the decision of this Court in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, AIR 1970 SC 150 : (1969) 2 SCC 262 : (1970) 1 SCR 457 , one golden rule that stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. What, however, does this doctrine exactly mean? Lord Reid about four decades ago in *Ridge v. Baldwin*, 1964 AC 40 : (1963) 2 All ER 66 (HL), very succinctly described it as not being capable of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances -- who then is a reasonable man -- the man on the Clapham omnibus? In India, however, a reasonable man cannot but be a common man similarly placed. The effort of Lord Reid in *Ridge v. Baldwin*, 1964 AC 40 : (1963) 2 All ER 66 (HL) , in not attributing a definite meaning to the doctrine but attributing it to be representing a fair procedure still holds good even in the millennium year. As a matter of fact this Court in the case of *The Keshav Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others*, AIR 1973 SC 389 : (1973) 1 SCC 380 : (1973) 3 SCR 22 : (1973) 5 UJ 502 , upon reliance on the attributes of the doctrine as above-stated as below: (SCC p. 387, para 8)

"8. The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more difficult one to answer. We do not think it either feasible or even desirable to lay down any fixed or rigorous yardstick in this manner. The concept of natural justice cannot be put into a strait-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind

in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the observations of Lord Parker in *H.K. (an infant), In re* [(1967) 2 QB 617 : (1967) 2 WLR 962]. It only means that such measure of natural justice should be applied as was described by Lord Reid in *Ridge v. Baldwin* case [1964 AC 40 : (1963) 2 All ER 66 (HL)] as "insusceptible of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances". However, even the application of the concept of fair play requires real flexibility. Everything will depend on the actual facts and circumstances of a case. As Tucker, L.J. observed in *Russell v. Duke of Norfolk* [(1949) 1 All ER 109 (CA)]:

"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth."

(emphasis supplied)

15. In *Vinod Kumar Vs. State of Haryana and Others*, (2013) 11 AD 68 : AIR 2014 SC 33 : (2013) 14 JT 207 : (2014) LabIC 1525 : (2013) 5 LLN 6 : (2013) 13 SCALE 161 : (2014) 1 SCJ 339 : (2014) 1 SCT 312 : (2014) 1 SLJ 155 , the Supreme Court held:

"23. We may usefully refer to the judgment of the English Court in *Roberts v. Hopwood*, 1925 AC 578 : 1925 All ER Rep 24 (HL), laying down the law in the following terms: (AC p. 613)

"... A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so--he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

24. The matter can be looked into from another angle as well. In those cases where Courts are concerned with the judicial review of the administrative action, the parameters within which administrative action can be reviewed by the Courts are well-settled. No doubt, the scope of judicial review is limited and the Courts do not go into the merits of the decision taken by the administrative authorities but are concerned with the decision-making process. Interference with the order of the administrative authority is permissible when it is found to be irrational, unreasonable or there is procedural impropriety. However, where reasonable conduct is expected, the criterion of reasonableness is not subjective but objective; albeit the onus of establishment of unreasonableness rests upon the person challenging the validity of the acts. It is also trite that while exercising limited power of judicial review on the grounds mentioned above, the Court can examine whether administrative decisions in exercise of powers, even if

conferred in subjective terms are made in good faith and on relevant considerations. The Courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or facts in a material respect. (See M.A. Rasheed and Others Vs. The State of Kerala, AIR 1974 SC 2249 : (1974) 2 SCC 687 : (1975) 2 SCR 93 : (1974) 6 UJ 611)"

16. The action of the Election Officer is therefore liable to be tested on the above principles. The sole ground on which the Election Officer proceeded to reject the nomination paper was that the serial number of the Petitioner as appearing in the list of the general body did not find mention therein. The impact of this commission was not considered by the Election Officer. The submission of Sri Ojha that the name of the Petitioner did find mention in the list of the general body also assumes significance here. The Election Officer while scrutinizing the nomination paper was obliged to consider whether the omission warranted cancellation or not. The omission was liable to be considered and judged on reasonable and rationale grounds.

17. Coming to issue (b) this Court however finds that the matter has not been considered by the Regional Level Committee in its correct perspective. The objections taken by the Petitioner before the Regional Level Committee in respect of the above action also did not receive the consideration required. In the opinion of this Court, it was incumbent upon the Regional Level Committee to consider whether the action of the Election Officer was justified and warranted. The Regional Level Committee was obliged to consider whether a common man standing in the position of the Election Officer would have come to the same conclusion. It would have to pose and answer the question whether a reasonable person similarly placed would have rejected the nomination paper. Since the Committee has not accorded consideration on this aspect of the matter, it would be appropriate to remit the matter back to its records requiring it to reconsider the issue in light of the observations made hereinabove. Accordingly the writ petition shall stand allowed. The impugned order dated 17 April, 2015 made by the Regional Level Committee shall stand quashed. The matter shall stand remanded back to the Regional Level for decision afresh in light of the observations made hereinbefore.