

(1962) 08 CAL CK 0006

In the Calcutta High Court

Case No : Civil Revision Case No. 903 (W) of 1961

Tarapada Mondal and Another

APPELLANT

Vs

Addl. District Magistrate and Others

RESPONDENT

Date of Decision : 20-08-1962

Acts Referred:

Bengal Municipal Act, 1932 — Section 16, 18, 24(4), 26, 36
Constitution of India, 1950 — Article 226

Citation : 67 CWN 193

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Susil Kumar Biswas and Radhika Lal Tarafdar, for the Appellant; J. Majumdar and S.K. Roy Choudhury, for the Respondent

Judgement

P.B. Mukharji, J.—This is an application under Article 226 of the Constitution challenging the order of the Government dated the 15th July, 1961 whereby it was directed as follows:-

The undersigned is directed to say that the Second Election of Ward No. VIII of the Budge Municipality held u/s 26 of the Bengal Municipal Act, 1932 was set aside by the Subordinate Judge as a result of an election petition u/s 36 of the Act. Section 42 of the Act, therefore, clearly applies and there should be a fresh Election as provided in the Section. It is clear from section 42, read with section 58 of the Act, that this fresh election is of the nature of a by-election to fill a casual vacancy and not an election u/s 26 so as to attract rule 46 of the West Bengal Municipal Election Rules, 1960. The fresh election should be held after revision of the electoral roll under Rule 18 (2), unless this has been done already and after calling for fresh nominations.

The Chairman of the Budge Municipality has been informed.

This order is contained in a communication addressed by the Deputy Secretary of the Government of West Bengal to the Additional District Magistrate, 24-

Parganas, on the subject of Election of Ward No. VIII of the Budge Budge Municipality. The petitioners challenge this order and direction.

2. The facts on which the petition rests are simple- The last general election of Commissioners of Budge Budge Municipality was fixed to be held on the 31st day of March, 1959. The elections in seven Wards of the Budge Budge Municipality were duly held but election for Ward No. VIII could not be held on account of heavy rains and storm which damaged the polling booth. The natural storm followed by legal storm has now posed the present problem of municipal election.

3. Rule 41 of the Rules for the election of Commissioners of Municipalities under the Bengal Municipal Act, 1932 corrected up to January, 1952 which governed this election provides:

A second election, u/s 26 of the Act, shall begin at the stage from which the original election failed, e.g., if the election failed at the time of polling a fresh poll only shall be held or if the election failed for want of candidates, fresh nominations shall be called for.

4. The new Rule is similar to this old one in material particulars, as will appear from Rule 46 of the new West Bengal Election Rules of 1960. The election was again held on the 4th October, 1959 and it was contended at that time that this was held not with the original nomination papers and with the original Voters' List, but on the basis of fresh nomination papers which were called for and on the revised Voters' List. As a result of the election held on the 4th October, 1959 the petitioners lost and one Dr. Ratan Chandra Das and Kishori Mohan Mandal were duly declared elected. This was followed by an election petition to the District Judge which was ultimately tried by the learned Subordinate Judge. After a full hearing of the election petition the learned Subordinate Judge on the 13th August, 1960. set aside the election held for Ward No. VIII. Thereupon on the 7th September, 1960 the Budge Municipality obtained a Civil Rule under Article 226 of the Constitution for quashing the order of the learned Subordinate Judge setting aside the election. That Rule was ultimately discharged on the 5th April, 1961. This: was followed by the Government order dated the 15th July, 1961 which I have quoted above, to hold the election of Ward No. VIII as a casual vacancy. It is this order which is challenged. The petitioners still contend that the election should be held on the basis of old nomination papers filed in 1959 and that the present election of Ward No. VIII is part of the general election held on the 4th October, 1959.

5. This petition must, in my judgment, fail on a short point. The petitioners invoke and rely on section 26 of the Bengal Municipal Act to say that this is a case where the "electorate has failed to elect" the number of Commissioners and therefore, the situation prevailing in 1959, namely the old nomination papers then filed and the old Voters' List then prevailing should be the governing factors. The language of section 26 relevant for the purposes of this application is:--

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

6. The election was originally fixed to be held on the 31st March, 1959. It could not be held due to heavy rains and storms. Therefore, u/s 26 another date was appointed namely the 4th October, 1959. This was the "second election" within the meaning of section 26 of the Act. It is only at the time of holding the "second election" that Rule 41 can apply because Rule 41 expressly says as follows:--

A second election, u/s 26 of the Act shall begin at the stage from which the original election failed, e.g., if the election failed at the time of polling, a fresh poll only shall be held or if the election failed for want of candidates, fresh nominations shall be called for.

7. The express language of the Rule and the section makes it abundantly and indisputably clear that Rule 41 is only attracted in case of the "second election" u/s 26 of the Act. But when as in this case, the second election had been held on the 4th October, 1959 and thereafter an election petition was actually filed and as a result whereof the election held on the 4th October, 1959 was in fact set aside by judicial verdict then there is no scope left further for invoking section 26 or Rule 41. The situation after setting aside of the election by judicial verdict must be governed by section 42 of the Bengal Municipal Act which provides as follows:--

If an election is set aside by the Judge, a date shall forthwith be fixed and the necessary steps taken for holding a fresh election for filling up the vacancy, as though it had been a casual vacancy.

8. The bare reference to the actual language used in section 42 of the Act shows that if the election is set aside by the Judge what happens thereafter is "a fresh election" and the vacancy which this fresh election is supposed to fill is by statute expressly recognised as "a casual vacancy". It, therefore, can no longer be a "second election" within the meaning of section 26 of the Act. A casual vacancy is mentioned in section 24(4) of the Act which provides:

Elections and appointments in respect of casual vacancies shall be held and made at such other times as may be prescribed in accordance with the provisions of this Act.

9. Section 58 of the Act makes provision for filling up vacancies. Section 58 (2) expressly refers inter alia to the case where the election of any Commissioner is set aside under the provisions of section 38. It also provides that "vacancy so caused shall be filled by the appointment or election, as the case may be of

another person," Then sub-section (3) of section 58 goes on to provide that the person elected or appointed to a vacancy shall fill such vacancy for the unexpired remainder of the term.

10. The basic fallacy, therefore, of the petitioners arises from their misconception of section 26 of the Act. Section 96 of this Act speaks of the case where "the electorate fails to elect". But when the electorate does elect and the election is set aside u/s 38 then it is no longer a case of electorate failing to elect but is the case of Judge setting aside the verdict of the electorate because such verdict of the electorate is not in accordance with the law as laid down in section 38 of the Act. In that event there is the vacancy and that "vacancy" is regarded by the statute as "casual vacancy". It is also directed by the statute that a fresh election should be held to fill up a vacancy. That is the plain effect of the Municipal Act. Although there is no decision exactly on this point of the Bengal Municipal Act a similar situation on another statute with similar provision was considered by Biswas, J. in (1) Sashi Sekhar Bose v. Province of Bengal, where section 10(1) (2) along with sections 18B and 19 of the Bengal Local Self Government Act of 1885 were considered. That case is reported in 76 C.L.J. 281 and the relevant observations are to be found at page 284 of that Report.

11. For these reasons the petition must fail and the Rule is discharged. There will be no order as to costs.