Durga Shankar Mehta

Vs

Thakur Raghuraj Singh and Others

Civil Appeal No. 150 of 1953

(CJI M.C. Mahajan, B.K. Mukherjea, Vivian Bose, N.H. Bhagwati, T.L. Venkatarama Ayyar JJ)

19.05.1954

JUDGMENT

MUKHERJEA J. -

This appeal, which has come before us on special leave, is directed against the judgment and order of the Election Tribunal, Jabalpur, at Nagpur, dated the 30th April, 1953, whereby the Tribunal declared the election held on the 29th December, 1951, for the double member Lakhnadon Legislative Assembly Constituency, to be wholly void under section 100(1)(c) of the Representation of the People Act (hereinafter called "the Act").

To appreciate the contentions that have been raised by the parties to this appeal, it would be necessary to state briefly the material facts. The Lakhnadon Legislative Assembly Constituency in Madhya Pradesh is a double member constituency, one of the seats in which is reserved for Scheduled Tribes. The appellant and respondents Nos. 1, 3, 5 and 7 were duly nominated candidates for the general seat in the said constituency, while respondents Nos. 2, 4 and 6 were nominated for the reserved seat. No objection was taken before the Returning Officer in respect of the nomination of either the appellant or respondent No. 2, Vasant Rao. Out of these eight candidates, respondents Nos. 5, 6 and 7 withdrew their candidature within the prescribed period under section 37 of the Act and the actual contest at the election was between the remaining five candidates, namely, the appellant and respondents Nos. 1 to 4. The votes secured by these five candidates at the polling were found to be as follows :-

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(1) The Appellant (General) ... 18,627

(2) Respondent No. 1 (General) ... 7,811

(3) Respondent No. 2 (Reserved) ... 14,442

(4) Respondent No. 3 (Reserved) ... 7,877

(5) Respondent No. 4 (General) ... 6,604

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Accordingly the appellant and respondent No. 2 were declared elected to the general and reserved seat respectively, under section 66 of the Act, and the results were duly published in the Madhya Pradesh Gazette on 8th of February, 1952. On the 14th of May, 1952, the respondent No. 1,

Raghuraj Singh, filed an election petition against the appellant and the other respondents, under section 81 of the Act, praying that the said election to the Lakhnadon Legislative Assembly Constituency be declared wholly void or in the alternative the election of Vasant Rao and/or that of the appellant, Durga Shankar Mehta, be declared void. There was a string of allegations made in the petition accusing the appellant of various corrupt practices in the matter of securing votes but none of these, are material for our present purpose, as the Tribunal, by a majority, held these allegations to be unfounded and not supported by proper evidence. The substantial ground upon which the petitioner sought to assail the validity of the election was, that the respondent No. 2, Vasant Rao, who was declared duly elected to the reserved seat in the said constituency was, at all material times, under 25 years of age and was consequently not qualified to be chosen to fill a seat in the Legislative Assembly of a State under article 173 of the Constitution. This allegation was found to be true by the majority of the Tribunal and by its judgment dated the 30th of April, 1953, the Tribunal came to the conclusion that the act of the Returning Officer in accepting the nomination of Vasant Rao, who was disqualified to be elected a member of the State Legislature under the Constitution, amounted to an improper acceptance of nomination within the meaning of section 100(1)(c) of the Act and as the result of the election was materially affected thereby, the whole election must be pronounced to be void. It is the property of this decision that has been challenged before us in this appeal.

Mr. Hazarnavis, appearing for the respondent No. 1 before us, to a preliminary point challenging the competency of the appeal. It is contended by the learned counsel, that article 329(b) of the Constitution ousts the jurisdiction of all ordinary Courts in election disputes and provides expressly that no election to either House of Parliament or to 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. It is urged that there can be no challenge to the validity of an election except by way of an election petition, and the authority to which, and the manner in which, such petition is to be presented, have been embodied in the Representation of the People Act which has been enacted by the Parliament under article 327 of the Constitution. Section 80 of the Act, which is worded almost in the same manner as article 329(b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part"; and section 105 says that "every order of the Tribunal made under this Act shall be final and conclusive." It is contended by the learned counsel that the jurisdiction that is created in the Election Tribunal is a special jurisdiction which can be invoked by an aggrieved party only by means of an election petition and the decision of the Tribunal is final and conclusive.

These arguments, though apparently attractive, appear to us on closer examination to be untenable. We agree with the learned counsel that the right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right, no other remedy by ordinary action in a Court of law is available to a persons in regard to election disputes. The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation. The non obstante clause with which article 329 of the Constitution begins and upon with which the respondent's counsel lays so much stress debars us, as it debars any other Courts in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such dispute, and the proceedings has to be initiated by an

election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised. It is now well settled by the majority decision of this Court in the case of Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd. ([1950] S.C.R. 459) that the expression "Tribunal" as used in article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions. The only Courts of Tribunals, which are expressly exempted from the purview of article 136, are those which are established by or under any law relating to the Armed Forces as laid down in clause (2) of the article. It is well known that an appeal is a creature or statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself. The powers given by article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provision for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way. Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far is that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this Court can exercise in the matter of granting special leave under article 136 of the Constitution.

This overriding power, which has been vested in the Supreme Court under article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England. The prerogative of the Crown can be taken away or curtailed by express legislation and even when there are no clear words in a particular statute expressly taking away the Crown's prerogative of entertaining an appeal but the scheme and purpose of the Act show unmistakably that there was never any intention of creating a Tribunal with the ordinary incident of an appeal to the Crown annexed to it, the Privy Council would not admit an appeal from the decision of such Tribunal. This is illustrated by the decision of the Privy Council in Theoberge v. Laudry ((1876-77) 2 App. Cas. 102) upon which Mr. Hazarnavis places considerable reliance. In that case the petitioner having been declared duly elected a member to represent the elected district of Montmainer, in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void, by judgment of the superior Court under the Quebec Controverted Elections Act, 1875, and he himself was declared guilty of corrupt practices. He applied for special leave to appeal to His Majesty in Council. The application was refused and Lord Cairns in delivering the judgment of the Board held, that although the prerogative of the Crown could not be taken away or limited except by express words and the relevant section of the Quebec Controverted Elections Act of 1875 providing that "such judgment shall not be susceptible of appeal" did not mention either the Crown or its prerogative, yet the fair construction of the above Act as also of the previous Act of 1872 was that it was the intention of the Legislature to create a Tribunal for the purpose of trying election petition in a manner which would make its decision final for all purposes and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

This decision in our opinion does not assist Mr. Hazarnavis. In the first place article 136 is a constitutional provision which no Parliamentary legislation can limit or take away. In the second

place the provision being one, which override ordinary laws, no presumption can arise from words and expressions declaring an adjudication of a particular Tribunal to be final and conclusive, that there was an intention to exclude the exercise of the special powers. As has been said already, the non obstante clause in article 329 prohibits challenge to an election neither to Parliament or any State Legislature, except in the manner laid down in clause (2) of the article. But there is non-prohibition of the exercise of its powers by the Supreme Court in proper cases under article 136 of the Constitution against the decision or determination of an Election Tribunal which like all other judicial Tribunals comes within the purview of the article. It is certainly desirable that the decisions on matters of disputed election should, as soon as possible, become final and conclusive so that the constitution of the Legislature may be distinctly and speedily known. But the powers under article 136 are exercisable only under exceptional circumstances. The article does not create any general right of appeal from decisions of all Tribunals. As regards the decision of this Court in Ponnuswami v. Returning Officer, Namakkal Constituency, and Others ([1952] S.C.R. 218), to which reference has been made by the learned counsel, we would only desire to point out that all that this case decided was that the High Court had no jurisdiction, under article 226 of the Constitution, to interfere by a writ of certiorari, with the order of a Returning Officer who was alleged to have wrongly rejected the nomination paper of a particular candidate. It was held that the word "election" in article 329(b) of the Constitution had been used in the wide sense to connote the entire process, culminating in a candidate's being declared elected and that the scheme of Part XV of the Constitution was that all matters which had the effect of vitiating election should be brought up only after the election was over and by way of an election petition. The particular point, which arises for consideration here, was not decided in that case and was expressly left open. In our opinion therefore the preliminary point raised by Mr. Hazarnavis cannot succeed.

Coming now to the appellant's case, Mr. Sen who appeared in support the appeal, has pressed only one point for our consideration. He plainly stated that he could not challenge the propriety of the finding arrived at by the majority of the Tribunal that respondent, Vasant Rao, was below 25 years of age at all material times. This, he concedes, is a finding of fact and being based on evidence, is not open to challenge before us in an appeal by special leave. His contention in substance is, that there has been no improper acceptance of nomination in the present case, as has been held by the Tribunal and consequently the provision of section 100(1)(c) of the Act would not be attracted to it and the entire election could not have been declared void. It is true, says the learned counsel, that on the finding of the Tribunal there has been a violation of or non-compliance with the provision of article 173 of the Constitution and as respondent No. 2 suffers from a constitutional disability by reason of his under-age and is not qualified to be chosen to fill a seat in the Legislative Assembly of a State, his election can undoubtedly be declared void under section 100(2)(c) of the Act, but there was no justification for pronouncing the whole election, including that of the appellant, to be void. The whole controversy thus centres round the point as to whether, upon the facts admitted and proved, the present case comes within the purview of sub-section (1)(c) of section 100 of the Act or of sub-section (2)(c) of the same section. The relevant portions of section 100 of the Act so far as are material for our present purpose may be set out as follows :-

> "100. Grounds for declaring election to be void -
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> (1) If the Tribunal is of opinion -
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> #(a).....(b).....##
>
> (c) that the result of the election has been materially affected by the improper

acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void.

#.....##

(2) Subject to the provisions of sub-section (3), if the Tribunal is of opinion -

#(a).....(b).....##

(c) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void."

The first point for our consideration is whether the nomination of Vasant Rao was improperly accepted by the Returning Officer and that has materially affected the result of the election. It is not suggested on behalf of the respondent that the nomination paper filed by Vasant Rao was in any manner defective. It is admitted that the names and electoral numbers of the candidates and his proposer and seconder as entered there were the same as those entered in the electoral rolls. It is also not disputed that the nomination paper was received within proper time as is laid down in section 33, sub-section (4) of the Act. Section 36 of the Act provides for scrutiny of nominations and under sub-section (2) the Returning Officer has got to examine the nomination papers and decide all objections that may be made to any nomination and he may either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the grounds whip are specified in the different clauses of the sub-section. The ground mentioned in clause (a) of the sub-section is, that the candidate is not qualified to be chosen to fill the seat under the Constitution or the Act. The contention of the respondent No. 1 is that the nomination of Vasant Rao should have been rejected on this ground and as the Returning Officer did not do that, his act amounted to an improper acceptance of nomination within the meaning of section 100(1)(c) of the Act. We do not think that this contention is sound. If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Office has no other alternative but to accept the nomination. This would be apparent from section 36, sub-section (7) of the Act which runs as follows :

"(7) For the purposes of this section -

(a) the production of any certified copy of an entry made in the electoral of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election or to subscribe a nomination paper, as the case may be, unless its proved that the candidate is disqualified under the Constitution or this Act, or that the proposer or seconder, as the case may be, is disqualified under sub-section (2) of section 33."

In other words, the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The electoral roll in the case of Vasant Rao did describe him as having been of proper age and on the face of it therefore he was fully qualified to be chosen a member of the State Legislative Assembly. As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, the latter was bound to take the entry in the electoral roll as conclusive; and if in these circumstances he did not reject the nomination of Vasant Rao, it cannot be said that this was an improper acceptance of nomination on his part which section 100(1)(c) of the Act contemplates. It would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself for on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the grounds that his nomination was improperly accepted by the Returning Officer. In our opinion Mr. Sen is right that a case of this description comes under sub-section (2)(c) of section 100 and not under sub-section (1)(c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution, and that is one of the grounds specified in clause (c) of sub-section (2). The expression "non-compliance with the provision of the Constitution" is in our opinion sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all. The English law, after the passing of the Ballot Act of 1872, is substantially the same as has been explained in the case of Stowe v. Jolliffe (9 C.P. 734). The register which correspondence to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament.

It is argued on behalf of the respondent that the expression "non-compliance" as used in sub-section (2)(c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provision of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is an material difference between "non-compliance" and "non-observance" or "breach" and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provision of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clauses. When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to dec__lare his election to be void. Under section 98 of the Act this is one of the orders which the Election Tribunal is competent to make. It is said that section 100 of the Act enumerates exhaustively the grounds on which an election could be held void either as a whole or with regard to the returned candidate, we think that it would be a correct view to take that in the case of a candidate who is constitutionally incapable of being returned as a member there is non-compliance with the provision of the Constitution in the holding of the election and as such sub-section (2)(c) of section 100 of the Act applies. The result therefore is that in our opinion the contention of the appellant succeeds. We allow the appeal in part and modify the order of the Election Tribunal to this extent that the election of respondent No. 2

Vasant Rao only is declared to be void; the election of the appellant however will stand. We make no order as to costs of this appeal. Order accordingl

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