CALCUTTA HIGH COURT

Bhupendra Nath Basu

Vs

Ranjit Singh

(Fletcher, J.)

14.07.1913

JUDGMENT

Fletcher, J.

1. This is a Rule obtained by the plaintiff, Mr. Bhupendra Nath Basu, calling on Maharaja Ranjit Singh Bahadur and Mr. Surendra Nath Banerjee, defendants in the suit, to show cause why an injunction should not be awarded against them restraining them, until the final determination of the suit and until further orders from exercising their powers and functions as non-official additional members of the Council of the Governor-General of India.

2. The case has been argued by Mr. C.R. Das on behalf of the plaintiff and a good many interesting and difficult questions have been raised during the course of the argument. In my opinion, this application must fail upon the facts. The question as to the jurisdiction of His Excellency the Governor-General in Council, and to what extent he can make regulations under Section 6 of the Indian Councils Act, 1909, so as to exclude the jurisdiction of the Civil Courts is one of considerable importance, and in my opinion it is not necessary to decide that question in the present case. But assuming that the jurisdiction does not exist, what are the rights of the plaintiff in this case? The plaintiff was a candidate at the election held on February 14, 1913. At that election the second defendant stood at the head of the poll, the first defendant standing second, and the plaintiff was the third being only one vote behind the first defendant; acting under the terms of the Regulations that have been framed by the Governor-General in Council, the plaintiff preferred an appeal to His Excellency in Council, asking that he should declare the election void on the ground that two of the electors, who had given their votes at the election, had not taken the oath of allegiance, as required by the terms of the Regulations. The Governor-General in Council having received in writing the case of the plaintiff, as also the case of the defendants, decided that the two defendants were duly elected members of his Council. It seems to me, that on those facts, it is impossible to ask the Court to exercise jurisdiction, which is a discretionary jurisdiction in the Court. I altogether dissent from Mr. C.R. Das's argument that under Section 9 of the Civil Procedure Code he has got the right ex debito justitiae to have an order from the Court declaring that the two defendants were not duty elected as members of the Council of the Governor-General. Section 9 of the Code of Civil Procedure deals with the Courts, not with the rights of the parties. The rights which the plaintiff has got in this case, if any, are governed by the Specific Relief Act. As to that I have no doubt, and the rights that he has got

in this suit come under Chapter 6, Specific Relief Act, Section 42, which provides that any person entitled to any legal character may institute a suit, against any person denying or interested to deny, his title to such character, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not, in such a suit, ask for any further relief. The plaintiff in this case, as a matter of fact, asks for a declaration that the election of the two defendants is void, and he has only asked for other relief consequential on that declaration. Mr. C.R. Das stated that the rights of the plaintiff, in a suit instituted under the provisions of Section 42 of the Specific Relief Act, are such that he is entitled to an order as of course. With that view I am altogether unable to agree. Whatever the decision is that, the learned Counsel says, has been decided on that section, nothing can get out of the express words of the section, namely that "the Court may, in its discretion, make therein a declaration," and no case can do away with the express words used by the Legislature in enacting the section. If that was not so, we have got this absurd result: the period of limitation for a suit of this nature under the Indian Limitation Act is six years, the Council of the Governor-General is elected for three years, and therefore three years after the Council ceased the Court might be going on trying suits under Section 12 as to who were properly elected to the Council that ceased to exist three years before. That is, in my opinion, not a reasonable nor a proper construction to place upon Section 42. In my opinion in a suit of this nature what you have got to do is this. You have got to apply the principles of the Courts of Common Law in granting or refusing the prerogative writs. Those were reasonable rules which were founded on experience not of many years but of centuries. Those were the rules which governed the practice of the Courts as to interfering in cases of disputes relating to elections to all bodies other than the two Houses of Parliament, which are not subject to the jurisdiction of any Court, but decided for themselves who were elected and who had the right to sit and vote in either of those two Houses. But in all other bodies the right of election in which the Court had jurisdiction to interfere was governed by the principles by which the Courts of Common Law granted or refused the prerogative writs. If you apply those principles in this case, and assume that the Regulations made by the Governor-General in Council were ultra vires you have not much difficulty in dealing with this case. You have got to consider first of all the conduct of the plaintiff. First, that he deliberately elected to carry his appeal to the Governor-General in Council, where as he says he knew that the Governor-General in Council's decision was, according to his views, of no validity. Secondly, you have got to consider the very serious delay that has been occasioned in this matter by reason of the plaintiff having preferred his appeal to the tribunal, that he says, has no jurisdiction in this matter. The two defendants both sat and voted in the Council of the Governor-General for the whole of last session: Moreover, it may be a case of serious prejudice to the defendants. For aught I know, the electorate may not be the same: the majority by which both the defendants were elected over the plaintiff is a comparatively narrow one and it may be, as electors do sometimes, that some of the electors may have changed their views with regard to one or other of the defendants, which, if the plaintiff had come here more promptly, might not have been the case. It seems to me, under those circumstances, that even assuming that this Court had jurisdiction to interfere--as to which I desire to express no view--on the facts of this case, the Court ought not to interfere. I am not satisfied that if the Court had jurisdiction and did interfere, that the two defendants, by reason of the conduct of the plaintiff having carried the appeal to the Governor-General and then instituting this suit on the footing that he is not bound by the decision of the Governor-General, may not have suffered serious injury in their chances of being re-elected. On these grounds, I think that the Court would be wrong to interfere at any rate by means of interlocutory order to restrain the two defendants from exercising the functions that they claim the right to exercise. Moreover, I

am not satisfied that the view of the Government as to the taking of the oath of allegiance is not a correct one. Doubtless the English cases that were referred to, the case of the Mayor of Penryn 1 Strange 582 and *The King v. Swyer*[1] have decided that a person is admitted to a public office, which requires the oath of allegiance, only when the oath of allegiance is taken. That does not get rid of the difficulty that arises from these Regulations. These Regulations constitute an electoral College of elected members of the Local Council to elect two persons to be members of the Council of His Excellency the Governor-General. I am not satisfied on the Regulations that the learned Advocate-General has called my attention to, that when the electors have the right of giving their votes by means of registered letter, for the purpose of being members of electoral College and for that purpose only, that the mere fact of election to the local Council was not sufficient to constitute a person so elected a member of the electoral College. It is only for the purpose of exercising the legislative functions conferred by the Regulations and by the Act that the oath of allegiance is required. Moreover, as the Advocate-General has pointed out, the mere fact of omission to take an oath of allegiance does not ipso facto cause a member to vacate his seat; under Regulation VIII of the Bengal Council Regulations, the discretion is given to the Governor as to his declaring a seat to be vacant if the person elected fails to take an oath of allegiance. In my opinion, in this case the Rule fails and must be discharged, and discharged with costs.

Cases Referred.

1(1830) 10 B. & C. 486