

CALCUTTA HIGH COURT

Birendranath Chatterjee

Vs.

State of W.B

C.R. No. 695 (W) of 1964

(A.K. Sinha, J.)

28.03.1968

JUDGMENT

A.K. Sinha, J.

1. The petitioner's case in the instant Writ petition is that he is a voter of the West Bengal Legislative Assembly and after the constitution of a Gram Shabha named "Nawda-Asannagar Gramshabha" he became a member thereof as his name was included on the Electoral Roll in the voters' list of one of its Constituency, Beltalspara. His further case is that the election of Anchal members of the Asannagar Anchal which was held from 17-4-1964 to 29-4-1964 and the election of respondent No. 5 and respondent No. 10 as Prodhan and Upa-Prodhan held on 11-5-1964 are all illegal because among those who were elected as members of the said Anchal Panchayet, the respondents Nos. 3 and 6 are both below 25 years and the respondent No. 4 Mahendra Nath Biswas is a Pakistani citizen who surrendered his Pakistani passport after coming to India sometime in 1953 and since then he has not been registered as a citizen of India. It is also alleged that the respondent No. 14, Paban Kumar Mondal, filed a false affidavit stating that he is Paka Mondal who is voter No. 74 in part No. 240 of the Assembly Electoral Rolls. Still further case of the petitioner is that the Paschim Asannagar Gram Shabha, a constituent of Asannagar Anchal, had itself three Constituencies, namely, Paschim Asannagar Uttarpara having 4 seats for the Paschim Assannagar Panchayat, Paschim Asannagar Paschimpara having 3 seats and Paschim Assannagar Bazarapara having 3 seats and after the date of scrutiny of nomination papers was over, 35 voters were shifted to Paschimpara from Uttarpara and the number of seats was increased in Paschimpara from 3 to 4 and the number in Uttarpara was reduced from 4 to 3 and thus the entire election was vitiated by fatal irregularities.

2. Upon these facts the petitioner took several grounds and prayed for issue of a Writ in the nature of Mandamus directing the respondents Nos. 1 and 2, namely, the State of West Bengal and the Block Development Officer to withdraw and or cancel and or quash and or forbear from giving effect to the election of Asannagar Anchal as well as the election of Prodhan and Upa-Prodhan and also for a Writ in the nature of certiorari to quash the proceedings pertaining to both the said elections and thereupon a Rule nisi in terms of Prayers (a) and (b) was issued.

3. The only point canvassed before me by Mr. Chatterjee the learned Advocate for the petitioner,

is that both the said elections must be set aside as the respondent No. 4 who is a Pakistani citizen has been elected as one of the members of the said Anchal Panchayat and as such member he has participated in the election of Prodhan and Upa-Prodhan.

4. Before I deal with the point raised, I must notice that the present Writ petition is highly defective as on the prayers upon which a Rule nisi was issued this Court cannot grant any relief even if the election for any reason is held to be invalid. The West Bengal Panchayat Act is a self-contained statute and I fail to see any provision in the Act by virtue of which State Government or the Block Development Officer may be directed by this Court either to forbear from giving effect to the election or cancel the same. Issue of a Writ of Mandamus is only called for when there is a breach of statutory duty or (forbearance?) to perform statutory duty. But in the whole Act there is no provision imposing statutory duty upon the State Government or the Block Development Officer to cancel the said election or not to give effect to the election. The election under the Act can be set aside only in the manner prescribed under Rule 30 of West Bengal Panchayat Rules by the Tribunal and not by the State Government or the Block Development Officer.

5. The Rules, principles or procedures for issue of Writs have been introduced and adopted in this country substantially from "Crown practice" in England. The principles governing the grant of Writ of Mandamus and Quo Warranto are stated in paragraph 1274 of Halsbury's Laws of England (Vol. IX) Hailsham Edition (2nd Ed) now Halsbury's 3rd Edition, Vol. II, paragraph 165 as follows :-

"A mandamus to restore, admit, or elect to an office will not be granted unless the office is vacant. If the office is in fact full, proceedings must be taken by way of injunction or election petition to oust the party in possession (v). A mandamus will go only on the supposition that there is nobody holding the office in question (a). A mandamus will, however, be issued commanding election to an office when, although there has been an election to the office in question, yet that election is void or merely colourable. The Court will then consider that there has been, in fact, no election and that the office is not therefore, full (b). Apparently, too, the same view will be taken when the person in possession of the office is merely holding over (c)." In this case offences of the members of the Anchal Panchayat and Prodhan and Upaprodhan are all filled up and these members or office bearers are all functioning. Applying the above principles in the present case I do not think, any relief can be given to the petitioner on the prayer for issue of a Writ in the nature of Mandamus directing the State Government or the Block Development Officer or other respondents to cancel the said election.

6. Equally it passes my comprehension how a writ in the nature of certiorari would lie in quashing the election proceeding and if so, against whom? It is well settled that a writ in the nature of certiorari only may be issued against a body of persons or authority acting as a Tribunal exercising Judicial or quasijudicial powers. I do not see anything in the Act which places the State Government or the Block Development Officer in the position of a Tribunal exercising judicial or quasi-judicial powers in holding the election. Even so, no order passed by the State Government or the Block Development Officer has been complained of. The prayers, therefore,

in the present petition are totally misconceived and in my view, no relief can be given to the petitioner on the prayers as made by him in the Writ petition.

7. It is true that this Court has the discretion to issue such other appropriate Writ or Writs and in the present case, it may equally be true that writ in the nature of quo warranto may be the proper writ but this again would involve amendment of the petition and issue of a further rule or at any rate, further opportunities to be given to the respondents to meet the case of the petitioner. But at this stage I do not feel inclined to allow the petitioner to protract the proceedings any further. In my view, therefore, the present writ petition must fail on this preliminary ground. Even then I will deal with the point raised.

8. It is contended that the specific case of the petitioner as stated in paragraph 5 of the petition is that the respondent No. 4 is a Pakistani citizen and he entered into India with a Pakistani passport in 1953 and these facts have not been denied by him in his affidavit- in-opposition. On these admitted facts the election of the petitioner as a member of the disputed Anchal Panchayat was totally void and ineffective. I do not agree. I find in paragraph 7 of the affidavit-in-opposition the respondent No. 4 has denied the allegation made in paragraph 5 of the petition. The statements made in the said paragraph are as follows :-

"I deny the allegations made in paragraph 5 of the petition of motion. I say that I am an Indian citizen. The allegation that I am a Pakistani is absolutely false and malicious. I was a Modified Ration Shop Dealer at Asannagar for two years. I crave leave to produce the necessary papers at the time of hearing. The petitioner is fully aware of it. I own 8 bighas of land situated at village Asannagar and such lands are recorded in the Revisional Settlement Records. I crave leave to produce relevant papers showing my ownership of such land at the time of hearing. I crave leave to annex hereto some documents showing payment of Union Board tax by me in favour of Asannagar Union Board which is marked 'A'. My name was included in Assembly Voters' List prepared in 1960 (Krishnagore Assembly Constituency Electoral Roll-Part 234 Serial No. 121) and I exercised my franchise in 1962 Assembly and Parliamentary Elections. It is strange how in the face of such facts the petitioner could at all dispute that I am not a citizen of India. A copy of a letter issued by the Sub-Divisional Collector of Food and Supplies, selecting me as a dealer is annexed hereto and the same is marked with letter "B". I say that at the time of scrutiny of nomination papers and in fact, at no stage, was any objection taken by anybody to the effect that I am not an Indian Citizen. Such objection could by no stretch of imagination be taken."

9. The respondent No. 4 in a supplementary affidavit-in-opposition to the additional affidavit of the petitioner asserted that he is an Indian citizen owing allegiance to India and remains an Indian citizen by virtue of Article 5 of the Constitution and his citizenship did not suffer any eclipse because of partition of India. It is also stated that due to communal disturbances in Pakistan he came to India.

10. From the statement made by the petitioner and denial and counter-statement made by the

respondent No. 4, it is quite clear that the respondent No. 4 never admitted that he is a Pakistani citizen or that he came back to India with a Pakistani passport. Then again, the petitioner did not place any materials before the Court to show, excepting his own bare statement, that, in fact, the respondent No. 4 obtained a Pakistani passport or that he surrendered such a passport. No particulars as to how, where and or to whom such a passport has been surrendered have also been given. In such circumstances, the question in controversy raised a complicated issue of facts which can only be decided by competent authority after taking proper and sufficient evidence. This Court, therefore, will not go into such a disputed question of facts while exercising its discretion under Article 226 of the Constitution.

11. Mr. Chatterjee, however, relied on decision of P. B. Mukharji, J. in *Nitya Gopal De v. State of West Bengal reported in*¹ and contended that the respondent No. 4 not being an Indian citizen is not entitled to be on the Electoral Rolls and thus his election as a member of the Anchal Panchayat is entirely illegal and invalid; necessarily therefore, his participation in the election of Prodhan and Upa-Prodhan has vitiated such election. This case, in my view, has no application to the facts of the present case. In that case, there was an order upon the person who was elected as Prodhan to quit India by the Civil Authority under the Foreigners Act. In the background of such order it was held on an interpretation of Section 7 (1) of the Act with Article 326 of the Constitution of India that so long as that order stood, such person could not be elected or continued to act as Prodhan; even this view on appeal, I find, has not been upheld by a Division Bench of this Court in *Abdur Rahaman v. Nriya Gopal*² The appeal Court is of the opinion that the petitioner whose name appeared as a voter in the Electoral Rolls would not be deemed to have forfeited his right to be elected as Prodhan unless the question as to loss or acquisition of his citizenship was determined by the appropriate authority, namely, the Central Government under Section 9 (2) of the Citizenship Act, 1955. In a decision of Supreme Court in *State of Madhya Pradesh v. Pir Mohammad*³, I find while dealing with the question of acquisition of foreign citizenship Gajendragadkar J. (as he then was) observed (at page 648 paragraph 13 of the report) inter alia as follows :-

".....If a dispute arises as to whether an Indian citizen has acquired the citizenship of another country, it has to be determined by such authority and in such manner and having regard to such rules of evidence as may be prescribed in that behalf. That is the effect of Section 9 (2). It may be added that the rules prescribed in that behalf have made the Central Government or its delegate the appropriate authority to deal with this question and that means this particular question cannot be tried in Courts."

12. Then again the fact that, the respondent entered into India with a Pakistani passport, even assuming to be true may not be conclusive proof that he voluntarily acquired foreign citizenship before the relevant date. The question whether foreign passport was voluntarily obtained or not still remains to be determined by the Central Government under Section 9 (2) of the Citizenship Act if the plea is raised that such a passport was not voluntarily obtained, after giving an opportunity to the aggrieved person to rebut conclusive presumptions created under Rule 3 of Schedule III of Citizenship Rules. This is the view taken by the Supreme Court in *Mohammad Ayub Khan v. Commissioner of Police*⁴,

¹ AIR 1964 Calc 340

² De F. M. A. No. 3 of 1963 (Cal)

³ AIR 1963 SC 645

⁴ AIR 1965 SC 1623

13. Mr. Chatterjee in support of his contention also relied on a Bench decision of this Court in *Sultan Khan v. Sailesh Chandra*⁵, This case, again, I am afraid is of no assistance to the petitioner. In this case, there was a finding of the Election Tribunal that the petitioner never acquired the citizenship of India under the Constitution and that he never became a citizen of India. In that context it was held by this Court that in the eve of law the name of the non-citizen will be considered to have been struck off and not included in the Electoral Roll. In the present case before me, there is no such decision.

14. Mr. Moitra, learned Advocate for the respondent No. 4 contended that the present writ petition was also not bona fide. His argument is that even assuming that the petitioner has a legal right as a voter, he has not disclosed as to how such a right has been affected by the election. It is not his case that he himself is a candidate for any of the two elections nor he supported any rival candidate who could have been returned as a successful candidate in the election of the members of the Anchal Panchayat if the respondent No. 4 was not allowed to contest the said election. According to Mr. Moitra, the petitioner is not only bound to prove that there has been illegalities and irregularities in holding the election but by such illegalities and irregularities the results of the election have been materially affected. Mr. Moitra also referred to and relied on Sections 16 and 25 (2). 25 (b) of the Representation of the People Act and contended that if the respondent No. 4 was not a citizen of India, then it was open to the petitioner to take proper steps before the Appropriate authority for the removal of the name of the respondent No. 4 from the Assembly Electoral Roll but he had not done anything of the kind nor had he given any explanation in the petition as to why he could not do so. In fact, he withheld all necessary and material information from this Court and such act on his part has disentitled him to get any relief in the writ jurisdiction of this Court. I think, in the circumstances of the case, the contentions made by Mr. Moitra are not without any force. I, therefore, find that even on merits there is no substance in the point raised.

15. Before parting with this case, I must record that Mr. Chatterjee also raised three other points namely, (I) the respondent No. 14 is not a voter at all in the Assembly Electoral Roll, (II) the respondents No. 3 and 6 are disqualified as they are below 25 years of age, (III) the population of the two constituencies were re-distributed and the seats were reallocated illegally after the scrutiny of the nomination papers was over. But these points were subsequently given up by him.

16. The result is that the petition fails. The Rule is discharged but there will be no order as to costs.

Rule discharged.

⁵ AIR 1963 Cal 527