

# GUJARAT HIGH COURT

Mahmadhusein Kurbanhusein Mithiborwala

Vs.

Onali Fidaali

Spl. Civil Appln. No. 524 of 1968

(J.B. Mehta, J.)

06.11.1968

## JUDGMENT

### **J.B. Mehta, J.**

1. The petitioner, who was the original opponent No. 1 to the election-petition has challenged the order of the Election Tribunal viz. The Assistant Judge, Panchmahals, dated 22nd March, 1968, dismissing the petitioner's application to treat the list of the voters as conclusive evidence under Section 10 (3) of the Gujarat Municipalities Act, 1963, hereinafter referred to as "the Act", and to desist from further inquiry by recording evidence as regards the age of the twenty-four voters, who have been alleged to be below 21 years of age and were, therefore, alleged to be not qualified to be included in the voters' list.
2. Section 9(1) provides for the list of voters. It enacts that the electoral roll of the Gujarat Assembly prepared under the provisions of the Representation of the People Act, 1950 for the time being in force on such date as the State Government may by general or special order notify in this behalf for such part of the constituency of the Assembly as it included in the relevant ward of a municipal borough shall for the purposes of this Act, be deemed to be the list for such ward.
3. Section 9(2) provides for its publication.
4. Section 9(3) lays down that if on an application made to the Officer who is to maintain the list of voters under sub-section 2 or on his own motion the designated officer is satisfied that the list of voters is at variance with the relevant part of the electoral roll of the Gujarat Legislative Assembly on account of any mistake in the list, he shall amend the list so as to bring it in conformity with the said electoral roll and for that purpose may amend, delete or add any entry in that list.

5. Section 10(1) provides that every person, whose name is in the list of voters referred to in Section 9 and who is not disqualified under the Act or any other law for the time being in force, shall be qualified to vote, and every person whose name is not in such list shall not be qualified to vote, at the election of a member for the ward to which such list pertains.

6. Section 10(3) enacts that subject to any disqualification incurred by a person, the list of voters shall be conclusive evidence for the purpose of determining under this section whether the person is qualified or is not qualified to vote or is qualified or is not qualified to be elected, as the case may be, at any election.

7. Section 12 lays down that no person shall vote at any municipal election under Municipalities Act, if he

(a) is of unsound mind and stands so declared by a competent court or

(b) is not a citizen of India or has voluntarily acquired the citizenship of foreign State or is under acknowledgment of allegiance or adherence to a foreign State.

8. Section 14 provides for resolution of disputes regarding validity of elections by the Judge appointed for the purpose. Section 14(5)(a) (iv) provides that if the judge is satisfied that the result of the election, in so far as it concerns the elected candidate, has been materially affected by the improper reception, of any vote which is void, or by any non-compliance with the provisions of this Act or any rules or the orders made under this Act, the Judge shall set aside the election.

9. From this scheme of the Act it is clear that Section 9 by a process of fiction treats electoral roll of the State Assembly for the time being in force on the notified date, as the list of voters. Section 10(1) confers the right of voting to every person whose name is on the list of voters, unless he is disqualified by the Act or by any other law. Section 12 laying down the disqualification of the voters does not apply in the present case. Therefore, by reason of Section 10, all these 24 voters whose names were shown in the list of voters were qualified to vote at the impugned election, as there was no question of any disqualification subsequently incurred by such persons. By reason of Section 10(3) the list of voters has to be treated as conclusive evidence for the purpose of determining under Section 10(1) whether these 24 voters were qualified to vote. The Election Tribunal under Section 14 would not, therefore, have jurisdiction to permit evidence being led for determining this question whether voters were entitled to vote. This list itself was conclusive evidence by reason of Section 10(3).

10. Mr. Surti argued that under Section 14(5)(a)(i) the concerned judge has no jurisdiction to permit fresh evidence on this question, as under the Act all these 24 votes by persons admitted to be on the voters' list could not be said to be void or vitiated by any provision of the Act, or the rules or orders. This question is completely settled by the decision of the Division Bench in *Kantilal Mathuradas Parikh v. Village Panchayat of Shivrajpur*<sup>1</sup>, consisting of Shelat C. J. (as he

then was) and Bakshi J. The Division Bench interpreted the identical scheme in Sections 12 and 13 of the Bombay Village Panchayat Act, as amended by the Gujarat (Adoptation of Laws) Order, 1960. Section 12 (1) treated the electoral roll of the said assembly in force on the notified date as the list of voters. Section 13(1) provided that every person whose name was on the list was qualified for the vote unless he is disqualified under that Act or under any other law. Section 13(2) made the list of voters conclusive evidence, subject to any disqualification incurred for the purpose of determining under Section 12(1) whether any person was qualified to vote. The Division Bench on interpretation of this scheme held that the list of voters having been

<sup>1</sup>(1963) 4 Guj LR 929

made conclusive by Section 13(3), the same cannot be challenged. The names of 125 persons being on the list, it could not be disputed that they were entitled to vote by virtue of Section 13 (1) until their names were removed by suitable proceedings from the list of voters for the Assembly election for that particular Constituency. The Division Bench in terms followed the decision of the Supreme Court in *B. M. Ramaswamy v. B. M. Krishnamurthy*<sup>2</sup> where the Supreme Court interpreted identical Sections 9 and 10 of the Mysore Village Panchayats and Local Boards Act (10 of 1959), corresponding to Sections 12 (1) and 13(1) of the Village Panchayat Act. The Supreme Court held that the Mysore Act proceeded on the basis that the voters' list is final for the purpose of election. It was held that there was no provision which enabled the High Court to set aside the election on the ground that though the name of candidate was in the list, it had been included therein illegally. The Division Bench also distinguished the decision of the Supreme Court in the *Chief Commissioner of Ajmer v. Radhey Shyam Dani*<sup>3</sup>, holding that it is of the essence of the elections that proper electoral roll should be maintained and in order that proper electoral roll should be maintained it was necessary that after the preparation of the electoral roll, opportunity should be given to the parties concerned to scrutinise whether the persons enrolled as electors possessed the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. That case was distinguished on the ground that it was on the special facts and provisions of the Ajmer Statute. In view of Sections 12 and 13 of the Village Panchayats Act, the Division Bench has not accepted this contention. These authorities would, therefore, conclude the present question.

11. Mr. Shelat, however, vehemently relied upon the decision in *S. V. Viswanathan v. Rangaswamy*<sup>4</sup> by the Division Bench, consisting of M. Anantanarayanan C. J. and Ramakrishnan J. Under the corresponding provisions of the Madras District Municipalities Act, 1920, the Division Bench of the Madras High Court held in that case that in view of the fundamental Constitutional provision under article 326 prescribing the minimum age of the voters for the assembly elections as 21 years, the entry of voters below that age on the electoral roll would be in contravention of the Constitutional provision in article 326 of the Constitution. Such an electoral roll prepared under the provisions of Representation of the People Act would be an instrument made under that Act. Such a statutory instrument prepared in violation of the Constitutional provision must be deemed to be void or non est, or nullity and if the voter's name

is non est on the electoral roll it would be equally non est on the voters' list of the Municipal Ward and, therefore, reception of such votes of non est voters would be void. The Division Bench distinguished the decision of the Supreme Court in AIR 1963 Supreme Court 458, by relying upon the following passage at p. 461:-

"The terms of the section are clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil court but it could be rectified only in the manner prescribed by law, i. e. by preferring any appeal under Rule 24 (Section 27) of the Rules, or resorting to any other appropriate remedy. But it was contended before the High Court that the action of the electoral registration officer was a nullity

<sup>2</sup> AIR 1963 SC 458

<sup>4</sup> AIR 1967 Mad 244

<sup>3</sup> AIR 1957 SC 304

inasmuch as he made the order without giving notice as required by the Rules. We find it difficult to say that the action of the electoral registration officer is a nullity.....Such non-compliance cannot make the officer's act non est though his order may be liable to be set aside in appeal or by resorting to any other appropriate remedy."

With great respect to the learned Judges of the Madras High Court, I cannot agree. There the learned Judges had not considered the important question as to the jurisdiction of the Electoral Registration Officer, which was elaborately considered by the Supreme Court. It is true that the Supreme Court in terms dealt only with the question of non-compliance of the procedure before making the entries in the roll, and it was held that such non-compliance did not affect the jurisdiction of the said Officer though it might render his action illegal. On a parity of reasoning, the Electoral Registration Officer had complete jurisdiction to decide all the facts in issue for enrolling a voter on the electoral roll, as to whether he fulfilled all the conditions as regards age, citizenship or residence. This was not a finding on any collateral issue but a finding on facts in issue before the Electoral Registration Officer, whose decision was made final, and Section 30 of the Representation of the People Act, 1950 even excluded the jurisdiction of the Civil Courts to question the illegality of action taken by or under the authority of Electoral Registration Officer. It was in view of this special scheme which gave finality to the decisions of the Electoral Registration Officer on all matters left to his decision by the Legislature regarding qualifications of the persons concerned that the Supreme Court held that the action of the Electoral Registration Officer in including the names of the persons on the Electoral Roll, though illegal, could not be questioned in the Civil Courts. It could be rectified only in the manner prescribed under the Representation of the People Act by preferring an appeal or by resorting to any other appropriate remedy.

12. In the subsequent decision the Supreme Court dealt with this question in *M/s. Kamla Mills Ltd. v. State of Bombay*<sup>5</sup>, on an examination of relevant provisions of the Bombay Sales Tax Act,

1946, which conferred jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applied, the Supreme Court held that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions were expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. The whole activity of assessment which began with the filing of the return and ended with an order of assessment fell within the jurisdiction of the appropriate authority under the Act. No part of it constituted a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. In this view of the matter it was held by the Supreme Court that the finding of the appropriate authority that a particular transaction was taxable under the charging section was not, therefore, a finding on a collateral fact and decisions as to the character of the sale transactions on which a dealer had been taxed could not be said to be without jurisdiction. Therefore, even if the authority while exercising such jurisdiction erroneously held that a transaction, which is an outside sale within the meaning of Article 286 of the Constitution as it stood in 1956, was not an outside sale, and proceeded to levy sales tax on it, the decision of appropriate

<sup>5</sup> AIR 1965 SC 1942

authority could not be said to be without jurisdiction. The Supreme Court kept open the question whether such a conclusion could be challenged under Article 226 or Article 32 of the Constitution. Therefore, merely because the question involved was as to the age of the voter, which by a Constitutional provision could not be less than 21, it could not be presumed, as the learned Judges of the Madras High Court have done, that this would be a finding on any collateral fact by the Electoral Registration Officer, and that if he committed any error in giving the decision on this question on a matter which was left to his exclusive jurisdiction, the decision would be without jurisdiction or nullity or non est in the eye of law. In view of this settled legal position there is no ground on which the aforesaid decision of the Supreme Court in AIR 1963 Supreme Court 458 which was followed by our Division Bench could be distinguished, because the question as regards the minimum age of the voter is also expressly left to be determined as a fact in issue by the Electoral Registration Officer who prepared electoral roll for the State Assembly.

13. Mr. Shelat had relied upon the decisions of the Full Bench of the Kerala High Court in *P. Kunhiraman v. V. R. Krishna Iyer*<sup>6</sup>, and by Satyanarayana Raju J. in *Viswanadhuni Venkatakondayya v. Election Commissioner*<sup>7</sup>, All of them proceeded on same reasoning that the question of age being one under Article 326 of the Constitution, the decision of the Electoral Registration Officer would not be final when it is in contravention of this fundamental Constitutional Provision. As I have already shown, this is not the question which really arises, and the real question is as regards the jurisdiction of Electoral Registration Officer, as to whether his decision on this question of age was a decision without jurisdiction or nullity as assumed in all these decisions.

14. Mr. Shelat, however, argued that the section 9(3) only provided a machinery for bringing the voters' list in accordance with the electoral roll and there was no machinery for adjudication of disputes as to the entry on the electoral roll. This is the point which is already answered by our

Division Bench in the aforesaid decision in (1963) 4 Guj LR 929 and, therefore, this contention cannot be accepted that no machinery has been provided. The Electoral Registration Officer could have been moved, and once he amended the electoral roll of the State Assembly, the voters' list of the Constituency would be brought in the line with the same.

15. Mr. Shelat finally argued that the voters' list is conclusive evidence only at the time of nominations, but the Election Tribunal could go into this question. This contention is contrary to the very language of Section 10(3), and is already concluded by the Supreme Court in the case of AIR 1963 Supreme Court 458.

16. Mr. Surti rightly relied upon the decision of the Full Bench of the Punjab High Court in *Roop Lal Mehta v. Dhan Singh*<sup>8</sup>, and of the Full Bench of Allahabad High Court in *Ghulam Mohiuddin v. Election Tribunal for Town Area Sakit*<sup>9</sup> which treat the voters' list in such cases as conclusive and do not permit the Election Tribunal to hold an inquiry on the question of minimum age as required under Article 326 of the Constitution. These decisions are in line with the view taken by our Division Bench.

17. In the result the Election Tribunal is acting without jurisdiction in proceeding to record evidence on the question of age of 24 voters in question and it had wrongly rejected the petitioner's application. Therefore, this petition is allowed and the order of the

<sup>6</sup> AIR 1962 Ker 190 (FB)

<sup>8</sup> AIR 1968 Pun 1 (FB)

<sup>7</sup> AIR 1955 And 109

<sup>9</sup> AIR 1959 All 357 (FB)

learned Assistant Judge is set aside and he is prohibited from taking evidence on this question of the age of 24 voters and he is directed to dispose of the election petition in accordance with the law as expeditiously as possible, because sufficient time has now elapsed.

18. Rule is accordingly made absolute and Respondents Nos. 1 to 9 are ordered to pay costs of the petitioner.

Rule made absolute.