

BOMBAY HIGH COURT

Bhaishankar Nanabhai

Vs

The Municipal Corporation

(Lawrence Jenkins, C.J. K.C.I.E and Batty, JJ.)

18.04.1907

JUDGMENT

Lawrence Jenkins, C.J.

1. The occasion of this suit is the recent Justices election in the City of Bombay.
2. The plaintiff is a retiring Councillor within the meaning of Section 34 of the City of Bombay Municipal Act 1888; the defendants 3 to 18 are, according to the plaint, "made parties as Councillors claiming to act as such under " that, election; and defendants 19 to 31 were unsuccessful candidates for election.
3. Though by his plaint Mr. Bhaishankar submitted that "there has been no election at all by the Justices," and prays that this Court "may be pleased to declare that there was no general election," his case as finally developed has been, not that there was no general election, but that no Councillor was elected at the general election.
4. The facts on which the plaintiff relies are set forth in his plaint, but stated in its simplest form his case is, that defendant No. 2, the Municipal Commissioner, having once fixed the Justices' election to take place on the 13th of February, subsequently changed it to the 14th; that as the number of valid nomination exceeded that of the vacancies, an election had to be made from among the persons nominated (Section 26(2)(j)); and that the poll was not taken till the 21st of February.
5. On these facts the plaintiff contends that the change of date was beyond the Commissioner's powers; that the poll should have been, taken on the 20th (Section 27(1)); and that as it was not taken till the 21st, no Councillor was elected.
6. By arrangement no written statements have been filed, but the following issues have been raised:-[His Lordship read the issues.] Though the issues are numerous the substantial defence of defendants 1 and 2 to the suit is in effect that the election was good and valid : that Councillors

were elected at the General Election ; and that in any case this suit will not lie, first because this Court has no jurisdiction to try it, and, secondly, because the plaintiff has no cause of action that can support the prayers to the plaint.

7. The right claimed by the plaintiff is that he may be deemed to be re-elected by virtue of Section 34 (1) of the Act and that claim rests on the theory that no Councillor was elected at the Justices' election.

8. But this right is the creation of the Municipal Act and the question is whether the Act has not indicated the Tribunal, by which alone, the facts on which The right depends can at this stage be determined.

9. Now. Section 33 of the Act is in these terms :-

(1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may at any time, within eight days after the result of the election has been declared, apply to the Chief Judge of the Small Cause Court.

(2) If the said Chief Judge', after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election. If he finds that the election was not a valid election he shall set it aside, so far as concerns the person whose election is objected to. If he finds that there is no objection to the validity of the election-proceedings, but that the person whose election is objected to is disqualified for being a Councillor, he shall declare such person's election null and void and direct that the candidate, if any, in whose favour the next highest number of votes was recorded after the said person, or after all the persons who were returned as elected at the said election, shall be deemed to have been elected.

(3) The said Chief Judge's order shall be conclusive.

(4) If he sets aside an election or if, when he declares a person who has been declared elected disqualified for being a Councillor, there is no other candidate who can be deemed to have been elected, proceedings for filling the vacancy or vacancies shall be taken under section,34.

(5) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election.

10. So, if the validity of any election is questioned, application may be made to the Chief Judge of the Small Cause Court. If the Chief Judge finds that the election was not a valid one, he shall

set it aside and his order shall be conclusive.

11. It is argued for the plaintiff that "election" here means, not the election as a whole, but the election of an individual candidate and in support of this Mr. Setalvad points to the concluding provision of Sub-section 2 : Mr. Inverarity in support of the rival view retorts by calling in aid the provision that the validity of any election may be questioned by reason of the improper rejection of a nomination. Neither argument is conclusive and in my opinion it matters little which view prevails. I will assume (without deciding) that the plaintiff's contention is correct and that "election" here means the election of an individual candidate. Starting from this, the plaintiff argues that the Chief Judge has no jurisdiction in the circumstances of this case, because the objection is to the election as a whole.

12. But in this there is an obvious fallacy: if the applicant can question before the Chief Judge the election of any candidate, he can question the election of every candidate.

13. Further he can do this on the ground that the election as a whole was invalid, for the section, after specifying two permissible grounds of objection, provides that the validity of any election may be questioned "for any other cause," and these words are wide enough to cover the ground of objection urged in this case. I may here refer to *Hoves v. Turner*¹ and *Line v. Warren*² not as binding authorities, but as containing a statement of views not irrelevant to the question in hand.

14. But, then, Mr. Setalvad (who has argued this case with considerable skill and resource) says that he does not question the validity of any election, but he maintains that the proceedings of the 21st of February were no part of the election, as they were beyond the time permitted by the Act.

15. It is however, clear that the word "election" in the section is designed to express something wider than a legally valid election and the words used are consistent with the view that an election, which in fact took place under conditions that made it possible that there should be a valid election, can be questioned. This is involved in the fact that the validity of an election can be questioned. Moreover it would be impossible to assert in the circumstances of this case (even if the plaintiff's contentions be correct), that there is no colour of foundation in fact for the allegation that there was an election.

16. Now in truth a poll was taken on the 21st of February and the Chief Judge as a result of that poll has actually ordered that Sir Pherozeshah Merwanjee Mehta shall be deemed to have been elected.

17. Even if it be assumed that the poll was taken on the wrong day still it was treated as a part of the election so that there was a de facto contested election (Section 26(2)(j)). It is the validity of this defaulte contested election that is really questioned.

18. But under Section 33 the Chief Judge has jurisdiction to determine the validity of a contested election and so he is the Tribunal appointed by the Act for that purpose.

19. But where a special Tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive.

20. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any (Maxwell on Statutes, Chap. 5); there is no change of the old order of things : a new order is brought into being.

21. Here not only is the Chief Judge appointed the Tribunal, but it also is expressly provided that his order shall be conclusive and that every election not called in question in accordance with the provisions of Section 33 shall be deemed to have been to all intents and purposes a good and valid election.

22. But then it is argued that this is a suit of a civil nature and Section 11 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature. But from this rule are excepted " suits of which their cognizance is barred by any enactment." And the jurisdiction of the Courts can be excluded not only by express words, but also by implication and there certainly is enough in Section 33 of the Municipal Act for this purpose ; for there is no right which the plaintiff can at this stage assert as the subject of this suit, which is not subject to the condition that its essential basis must depend on the decision of the Tribunal created for that purpose.

23. I, therefore, find on the first issue in the negative and hold that the Court has no jurisdiction to entertain this suit.

24. Though I come to this conclusion without regard to the inconveniences that the opposite view would involve, I may point out that, while it is provided that an application to the Chief Judge must be within fifteen days after the result of the election has been declared (with the purpose no doubt that all questions should be raised and, if possible, determined, before the day for retirement), there would be no such limitation to the time within which a suit might be brought; and a deplorable uncertainty might thus be created as to the Corporation's constitution and proceedings.

25. Then again, if the High Court has the jurisdiction suggested by the plaintiff, there might be a conflict between the view of this Court and the order of the Chief Judge, in which the order of

the Chief Judge must by the express terms of the Act prevail. And were we to accept Mr. Sctalvad's argument in all its branches, this conflict would actually arise in this case; for if we were to declare that no Councillor had been elected-a conclusion absolutely essential to the success of the plaintiff's claim- then we should have to brush aside the Chief Judge's order that Sir Pherozechah Merwanji Mehta should be deemed to have been elected, though the Act expressly provides that the Chief Judge's order shall be conclusive.

26. But if we have no jurisdiction to entertain this suit, it would be obviously improper for us to express any opinion on the merits of the questions discussed before us, though that discussion was necessary before we could determine the issue as to jurisdiction, of *Pritchard v. Mayor of Bangor*³

27. Still the arguments before us show that the language of the Act is in more than one respect needlessly ambiguous, and, as it is of paramount importance that in matters relating to elections there should be as little obscurity as possible, it may be worthy of consideration whether the Act should not be so amended as to remove the ambiguities which the discussion before us has disclosed.

28. My finding on the first issue involves the consequence that the suit must be dismissed with costs.

Cases Referred.

- 1(1876) L.R. 1 C. P. D. 670
- 2(1885) L.R. 14 Q.B.D. 548
- 3(1888) I.L.R. 13 A.C. 241