BOMBAY HIGH COURT

Pyase Saheb

Vs.

Dashrath

Special Civil Applns. Nos.1253 and 1337 of 1976

(Masodkar and Dighe, JJ.)

25.06.1976

JUDGEMENT

Masodkar, J.

1. Both these petitions arise out of the election proceedings filed by the respondent No.1 before the District Judge, Nagpur under Section 428 of the City of Nagpur Corporation Act, 1948 (hereinafter called the Act) read with the Rules framed under Section 420(3)(xviii) and (xix) of the Act (hereinafter called the Rules).

2. Respondent No.1 the election-petitioner before the District Judge was the candidate to the election to elect a Councilor from Ward No.31, called also Juna Motorstand Ward, of the City of Nagpur. There were other ten duly nominated candidates. The poll took place on 29-1-1975, counting on 31-1-1975 and the result was gazetted on 4th of February, 1975. At the counting the petitioner in the first petition Pyare Saheb, having secured 1132 votes being the highest in the number of votes polled, was declared elected. The election-petitioner polled next highest number of votes, being 803. The petitioner in another companion petition i.e., Special Civil Application No.1337 of 1976 polled 700 votes. The other candidates similarly polled votes, the number of which need not be stated.

3. Election-petitioner claimed by the petition before the District Judge that election of Pyare Saheb from the said Ward should be set aside, he being disqualified in view of the provisions of Section 15(i) of the Act having directly a share or interest in the contract with the Corporation on all the relevant dates, in that he had since 1972-73 taken a license of 5 Otas at Rs. 60/- per month and he continued to be under the license and as such owned an interest or share in the contract with the Corporation, the Otas being the property of the Corporation. It was also the case of the election-petitioner Dashrath that Pyare Saheb being disqualified and election-petitioner having polled the next highest number of votes should be declared as elected from that Ward. Having

prayed for such a declaration he impleaded to the petition all the contending candidates as is required by the Rules.

4. At the tr

ial the learned District Judge found upon material placed by the parties that in fact there existed a license of 5 Otas the possession of which was taken initially by the returned candidate in the year 1972-73 and though the initial license was in writing and stipulated a period of one year and thereafter there was no written license executed, there was ample material to hold that the license continued during the relevant period and that even on the date of evidence the returned candidate was in possession of the licensed property. He thus found that the returned candidate was disqualified to be the Councilor and adjudged his election as void. Having so found, because of the provisions of Section 428(2) to which a little later on we will make a detailed reference, he purported to make a declaration in favor of the election petitioner solely on the basis that he was the candidate who had next highest number of votes polled.

5. By the first petition the returned candidate questions the validity of the first part of the order and by the second petition, original respondent No.4 who was himself a duly nominated candidate and who has polled as stated earlier 700 votes, questions the validity of the latter declaration in favors of the election-petitioner. As we proceed to deal with these petitions and the several submissions made at the Bar, we will indicate the exact scope of the submission.

6. Taking the petition filed by the returned candidate before this Court, i.e., the first petition, it is indeed difficult to find any merit in the same. Mr. Munshi, the learned counsel appearing for the petitioner in this petition, argues that because of the provisions of the statute, particularly provisions of Section 63 and Section 348, upon true construction the provisions of Section 15(i) which speak of any contract with, by or on behalf of the Corporation, must necessarily mean a contract executed and in writing in accordance with these provisions. Any other type of contract will not be enforceable against the Corporation and as such, according to the learned counsel, it is not a contract within the meaning of clause (i) providing for disqualification. The learned counsel, therefore, submits that the provisions regarding the making of the contract which should necessarily bind the corporate authority should be impliedly governed by the meaning of the word "contract" as laying down the disqualification.

7. The provisions with regard to the disqualification have been made in the interest of purity of public administration and so as to avoid the possible conflict of interest and duty attached to the public office. A pedantic approach or a literal meaning which will defeat the said provision is not postulated. The provisions of Section 63 are regarding the procedure for making contracts on behalf of the Corporation and we do not see anything in terms of this section which will affect the relationship referable to a contract which may not strictly comply with the requirements of Section 63. Provisions of Section 348 mainly deal with the procedure regarding licenses and written permission and are declaratory in nature. There is hardly any dispute in the present case that for the initial year i.e., 1972-73 a written agreement of license existed between the parties

which was to expire on 31-3-1973 (See documents Exhs.49 and 50 in the trial). What is being relied upon is the omission to execute the document for the period till the year 1974-75. It was urged that for renewal of the original license no written application was made and, therefore, because of sub section (6) of Section 348, there would be no license as contemplated by Section 348 itself and if there was no license as such, logically, the submission is, there is no contract. Sub-section(6) of Section 348 only states what will be the consequences if after the period of the license has expired the license is not renewed as far as the licenses is concerned. Sub-section(7) of Section 348 further makes it clear that such licencee pending decision on the application for renewal is entitled to act as if the license has been renewed and sub section (8) clarifies the position that mere acceptance of the fee will not clothe the licensee paying the fee with the right or entitlement, as a licencee. These provisions are of little assistance to the petitioner if we look to the evidence from which an inference can be drawn that, for the Corporation, for all purposes, the petitioner was treated to be the licensee with regard to the property given in license initially for the year 1972-73. As the facts are, under Exh.53 which is of 7-9-1974, on behalf of the Corporation, demand was made for all the balance of the rent including the period upto December 1974. Under Exh.54 the petitioner applied that for making the payment of the lease-money two months' time should be given. Under Exh.52 the Corporation accepted the payment of Rs. 720/- at the rate of Rs. 60/- per month till the year 1974-75. The receipt conclusively shows that Corporation accepted the petitioner to be the licensee with regard to Otas Nos.19 to 23 which were initially given under the license agreement Exh.50, which document in no uncertain terms raises an inference that the petitioner continued to be the licensee of 5 Otas taken by him in the year 1972-73. Even on the date of the evidence, i.e., 13-12-1975, the petitioner, who has been examined at Exh.59 as witness No.1 for respondent No.1 admitted that he had paid rent upto 31-3-1975. He further admitted that though he could have paid the rent and surrendered the possession even when he had decided to contest the election, he did not desire or intend to leave the possession of the Otas and, therefore, he paid the rent. On behalf of the election-petitioner, evidence of Corporation agent as P.W.1 is clear enough to show that for the corporation rent was accepted till the year 1974-75 and the petitioner was continued and treated as the licensee of the Otas.

8. Thus we find that there was enough and sufficient material before the learned District Judge to infer that there existed a relationship under a contract of license between the Corporation and the returned candidate and that clearly established the disqualification contemplated by Section 15(i) of the Act. It is not possible to take any other view of the matter.

9. The election, therefore of the returned candidate was rightly set aside.

10. Coming to the question of the declaration that the election-petitioner, who had secured 803 votes, should be declared having been duly elected, the learned Judge has relied on the terms of sub section (2) of Section 428 of the Act, observing that there is no cause for objection against the election of the election-petitioner. The order further states that admittedly the election-

petitioner got second highest number of votes and therefore, because of the wording of sub section (2), he has to be declared elected. It appears that it was urged before the learned Judge that having set aside the election on the ground of disqualification, the only course open was to direct fresh election. That submission was turned down presumably because the learned Judge thought that there is a mandate in sub section (2) to declare the second highest candidate to be elected as the councillor from the ward.

11. Before us this part of the approach and this part of the declaration is strenuously challenged by the counsel appearing for the petitioner in this petition. It is submitted that such a declaration is not contemplated by the words of sub section (2) of Section 428 and the matter has to be adjudicated by the election Tribunal. There is no automatic declaration available to the person who has polled the second highest number of votes, for the result of disqualification of the returned candidate will be to find out what would happen to the votes polled by the disqualified candidate at such an election. The burden that the election-petitioner or any other candidate is entitled to be so declared is always on the petitioner to show that the votes polled by the disqualified returned candidate were in fact thrown away or wasted votes and are not available for consideration. There being no evidence it is urged the declaration made by the learned District judge is entirely erroneous.

12. As against this, for the original election-petitioner it is contended that sub section (2) of Section 428 posits a definite scheme of the statute and it should not be permissible to introduce an addition of words to its terms. What is contemplated by the Legislature is that in case the election of a returned candidate is found to be null and void because of the disqualification, there is automatic election of the candidate who has polled second highest number of votes. The enquiry as to the votes polled by the disqualified returned candidate in the wisdom of the Legislature has been ruled out and what remains is the declaration to be given in favors of the second candidate who has polled the highest number of votes. This process, according to the submission of the learned counsel, is mandatory and can be indicated by stages, first being finding out whether the election of a returned candidate can be declared null and void because of the disqualification. Having so found out, statute declares the candidate who has polled next highest number of votes as the duly elected Councillor in his place. This declaration can be put in jeopardy like any other challenge to election by pointing out the grounds on which such election can be set aside, like disqualification, corrupt practice or non-compliance with the procedure etc. In other words, the enquiry as to the validity of the votes earned by the disqualified candidate is excluded in the scheme of this type of adjudication. Reference was made by the learned counsel to the Rules also and particularly, to Rule 9, where the discrimination proceedings (sic) of counter-election petitions can be filed. From that it was submitted that unless such petition is filed and the election Judge upholds the ground in such a petition, the statutory declaration in favors of the second next candidate as a matter of course must be made.

13. Now to clear the ground before we proceed to consider the scheme of Section 428 and the

powers of the election Court thereunder, we may at once state that more or less the election adjudication with regard to a finding that a particular returned candidate was disqualified, raises a question to be always adjudicated by the Election Tribunal in respect of the votes cast in favors of such disqualified returned candidate. Election by itself is a process to find out the choice of the majority from the given constituency. When the majority returns a candidate, he represents the whole constituency. The votes polled at such an election could be treated to be validly cast unless it is shown that these votes are just thrown away or wasted. The doctrine of "wasted vote" is known to Election Jurisprudence since the concept of finding the futility of exercise of that vote is in vogue. The voter or elector, consciously or with knowledge, may cast a vote in favour of a person who by reason of the disqualification attached to him and which is known to the voter could not in law be entitled to be elected or the vote may be treated as tainted or thrown away if it is procured by exercise of corrupt practice. Excepting these two types of cases, for which proof would be necessary, the normal legal presumption would be that a voter validly acts in exercise and in furtherance of his right and the vote cast by him is a valid one. The offshoot of this doctrine often creates the problem of consideration as to whether the votes earned by a given candidate who is found at the trial to be disqualified should be treated as entirely thrown away or should be available yet for the purpose of consideration in such an election adjudication. We may only refer to the decision of the Supreme Court in *Vishwanath Reddy v. Konappa*[1], where the exception as well as the rule is indicated by all qualifications in a case where there were only two contesting candidates and one of them was found to be statutorily disqualified. The Court observed:

> "..... When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification and no fresh poll is necessary. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate."

Though undoubtedly the case arose under the provisions of the Representation of the People Act, that highlights the principal doctrine which governs the exclusion of the votes from the consideration by the Election Tribunal. It is indeed clear that when there are only two candidates and one is subjected to statutory disqualification, the votes cast in favour of such disqualified candidate may be treated as having been thrown away; but that result would not automatically follow if there are more than two candidates in the field seeking election to one seat.

14. Turning to the provisions of Section 428 of the Act, we may proceed to extract sub-sections (1) and (2) which read as follows:

"428. (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 fifteen days from the date on which the election of Councillor is notified under Section 16, apply to the District Court. If the application is for a declaration that any particular candidate shall he deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, had contested the election from the same ward.

(2) If the District Court, after making such inquiry as it deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, it shall confirm the declared result of the election. If it finds that the person whose election is objected to is disqualified for being a Councilor, it shall declare such person's election null and void. If it finds that the election is not a valid election it shall set it aside. In either cases it shall direct that the candidate, if any, in whose favors next highest number of valid votes is recorded

[1](AIR 1969 SC 604)

after the said person or after all the persons who were returned as elected at the said election, and against whose election no cause of objection is found, shall be deemed to have been elected."

Along with this we may indicate that rules have been framed which lay down the procedure regarding the contents of the petition, its presentation, its conduct and also the matters to be taken into account by the Court upon several challenges and the reliefs prayed for in such an election dispute.

15. These rules and the provisions of Section 428 permit any elector to question the validity of election on the grounds mentioned in sub section (1) *inter alia* being improper rejection of a nomination or improper reception or refusal of a vote or any other cause which may include the cause regarding disqualification or want of qualification of the elected Councilor. It further shows that apart from disputing the validity of the election of the Councilor, it is permissible to pray by such petition that after the election is found to be null and void or invalid, any particular candidate should be declared to have been duly elected at such an election. The petitioner may be the nominated candidate or may be simple elector. In both such cases such prayer can be made. When the petition seeks such a consequential prayer, both subsection (i) and Rule 1(b) require that all nominated candidates at the election should be joined as parties to that petition. If the declaration is only with regard to invalidity of the election and no further consequential prayer is made, this requirement is not necessary to be followed.

Having filed such a petition, the scheme of the rule shows that a proper election trial has to be

held. Rule 15 goes on to indicate what should be the result if the Court comes to the conclusion upon the matters indicated by clauses (a), (b) and (c) of that rule. In other words, if the election is affected by corrupt practice or if it is affected by the corrupt practice committed by an elected candidate or his agent or the result of the election has been materially affected by any irregularity with regard to the nomination, the election would be declared as void. Rule 15 provides a proviso where the Court may not make a declaration if the conditions of clauses (a) to (d) in the proviso of the rule are satisfied. Rule 16 proceeds to lay down that if an election is declared void, the Court may either declare that a casual vacancy has been created or that the applicant or any other candidate has been duly elected. The scheme of these Rules clearly is in consonance with whatever is stated in sub section (2) of Section 428. In other words, after holding inquiry if the Court comes to the conclusion that there is a valid election, the statute indicates that the Court has to make an order confirming the declared result of the election. If the Court finds that the returned candidate wag disqualified, then it has to declare that his election is null and void. If the Court finds that the election is not valid on any other ground, it has to make an order setting it aside. The Election Court is enabled in any of these cases to make a further declaration in favor of the candidate in whose favor the next highest number of valid votes is found, to be the elected candidate at such an election subject to any cause not permitting such a declaration. Obvious it is that this further declaration could be made only in a petition seeking such a relief and clearly making of such a declaration in our view is a matter of adjudication and cannot be mechanical or automatic.

16. The phrase as available in the last sentence of sub-section (2) is "against whose election no cause of objection is found" and that has to be read along with the earlier clause "in whose favor next highest number of valid votes is recorded". The power conferred by that sub-section is enabling and is conferred to assess and decide upon the claim of all candidates", who may not, at the election be the next highest to the returned candidate, but yet may upon trial be entitled to such a declaration. In any case, that itself shows that the matter requires consideration and adjudication and it is not as if when the returned candidate is found disqualified, the automatic result is that the next candidate standing below him in the count gets elected in his place.

17. The deeming introduced or spoken of by sub-section (2) operates to clothe such declared election with all sense of substance and reality. Fiction statutorily enacted would be available to any of the candidates found by the Court to be entitled to such declaration. The construction seeking to have automatic declaration runs counter in our view to the basic concept of election adjudication. For all purposes, the Court has to apply its mind to the facts and circumstances so as to further the intention of the voters so as to find out the candidate who could be said to have got next highest valid votes. The term "valid" indicates the intention of the legislature and the votes earned by disqualified candidate are very well within the ken of consideration. That by itself would raise implicit question as to how those votes could have been distributed had disqualification been known or notified to the voters. Sub-section(2) does not render the result by itself to affect those votes so as to exclude them as simply thrown away or wasted.

18. Such an inference in favor of assumption that votes do stand thrown away cannot be deducted for more than one reason.

19. Firstly, such an inference would be against the basic concept of election dispute wherein not only the party but the entire body of concerned electorate is interested and would further work hardship on the constituency as a whole. A person getting a meagre number of votes or even a few votes as compared to the votes polled by the returned candidate, will be entitled to an automatic declaration and by itself that would be contrary to the possible choice of the constituency. Attempt has to be to ascertain the valid and free choice and such an approach would defeat it. Often in this country in ignorance of the disqualification majority of the voters cast their vote. In spite of this reality are we to attribute an intention to the Legislature that even though the candidate at second number having polled meagre number of votes he has to be statutorily declared elected once a disqualification is found against the candidate who has polled large majority of votes? Construction that will further the ends of justice - and here when we speak of justice, justice to the constituency and to the voter is implicit- should be put on the scheme indicated by the terms of the statute. We are inclined, therefore, to hold that only because the returned candidate has been found to be disqualified sub-section (2) does not indicate that all the votes earned by the disqualified returned candidate are required to be treated as votes wasted away. Those continue to remain valid unless proved to be thrown away and the matter is open for adjudication when the contest was between more than two candidates for single seat and cannot be determined automatically.

20. Secondly, we find that the clause "against whose election no cause of objection is found", is wide enough to take into account the consideration of the fact of the number of votes which were cast in favour of the disqualified returned candidate and possible distribution amongst other contesting candidates. That would include the candidate seeking to have declaration and will be required either to show that votes be treated as wasted or he would have got majority out of those votes upon fair possibility. There is no reason to restrict the term "cause of objection" as referring only to the grounds on which an election of the returned candidate can be challenged under the Act or under the Rules. The compass of this particular phrase in our view, would take in clearly the consideration of the votes that were earned by the disqualified returned candidate and when there are more than two contestants it will have to be shown how those votes would have been cast or as to whether were in fact thrown away by the voters.

21. Thirdly, we find it rather difficult to accept such a mechanical approach in the matters of adjudication of election disputes. We have before us Rule 16 which in terms permits the Election Court to make a declaration that a casual vacancy has been created or to make a declaration that an applicant or any other candidate has been duly elected. If what is contended for is accepted then this rule is rendered nugatory and otiose. For, upon the construction favoring automatic result no such power can be conceived in favor of the Court to declare vacancy in a petition

where returned candidate is found to be disqualified and declaration of election in favor of some other candidates is sought. By itself rule throws light on the intention of the statute and permits alternative reliefs being granted. Provisions being express it is not possible to curtail its scope by such an approach.

22. Finally, we find that such a declaration in favor of the applicant of any other candidate can be made even in those cases where the election is not challenged only on the ground of disqualification of the returned candidate but on any other permissible ground. That itself would indicate that the applicant or any other such candidate to the satisfaction of the Election Court will have to show that he is entitled to a declaration that he should be deemed to have been elected. If the dispute is regarding the corrupt practice either committed at the election or by the returned candidate or his agent, obviously it would raise an issue when the consequential declaration of such a kind is claimed and that to the satisfaction of the Court it will have to be shown that there are tainted votes that are required to be treated as invalid and further that excluding those votes such a declaration is available either to the applicant or to any other returned candidate. Instance of similar type which will call for consideration of the other votes can easily be available and must be treated as present to the mind of the legislature. Further the burden in election dispute is on the petitioner to substantiate the claim for such type of declaration and that is indicated by the very words available in sub section (1) and sub section (2) of Section 428 taken together. In other words, before the declaration can be made, the election-petitioner will have to show that at the election in dispute either he himself or the candidate in whose favor such a declaration is sought would have been the returned candidate having earned the majority of the valid votes. It cannot be assumed that this rule is not available in the scheme of sub section (2) of Section 428 of the Act.

23. For those reasons we do not accept the approach of the learned District Judge, for, he has not at all taken into account the votes polled by the disqualified returned candidate, being 1132 and its character. Indeed before us no material was shown and there is no evidence tendered by the election-petitioner with regard to these votes so as to hold that these can be treated as wasted or thrown away or on fair possibility the majority of it being available to any of the candidates. It was conceded that no such material has been placed on record. It follows therefore that election-petitioner was not entitled to the declaration that he only by the fact that he had polled at the election next highest number of votes stands elected as Councilor from Ward No.31. The only declaration having found the disqualification of the returned candidate that could have been made by the learned District Judge was that a casual vacancy has occurred and the fresh election be taken according to law to fill the vacancy.

24. That being our conclusion, we hold that the learned District Judge was right in setting aside the election of Pyare Saheb Gulzar Chhotumiya from Ward No.31 of the City of Nagpur. However, we find that the declaration granted that the election-petitioner, i.e., Dashrath Wasudeo Daff stands duly elected from that Ward, is made in error and the same is set aside. Instead of

that, there would be a direction treating that there has occurred a casual vacancy in Ward No.31 and fresh election be held according to law.

25. Special Civil Application No.1253/76 is thus partly allowed, while Special Civil Application No.1337/76 is allowed in its entirety. In the circumstances, there would however be no orders as to costs in any of the petitions.
Order accordingly.