

PATNA HIGH COURT

Parmeshwar Mahaseth

Vs

State of Bihar

Misc. Judicial Case No. 745 of 1956

(Ramaswami, C.J. and Kanhaiya Singh, J.)

10.05.1957

JUDGMENT

Kanhaiya Singh, J.

1. This is a writ petition under Article 226 of the Constitution and involves, inter alia, the question of validity or otherwise of the elections of the Commissioners of the Darbhanga Municipality held on the 6th and 7th September, 1956. Petitioners 1 to 5 are some of the electors residing within the said municipality and petitioners 6 to 10 are the candidates who were defeated at the said election.

2. The State of Bihar is Opposite Party 1. Opposite party 2 is the District Magistrate of Darbhanga and Opposite party 3 is Sri S. A. Haider, the Returning Officer. Opposite party 4 to 35 are the persons who were elected as Commissioners at the said election and Opposite party 36 is the Chairman of the Darbhanga Municipality. This application was presented on behalf of the petitioners on 26th September, 1956 for an appropriate writ quashing the election and an order restraining Opposite party 1 to 3 from publishing the result of the said election, opposite party 4 to 35 from acting as Commissioners and Opposite party 36 from calling the first meeting of the elected Commissioners and for a mandamus against Opposite party 2 to hold an election of the Darbhanga Municipality in accordance with law.

3. On 9th May, 1956, the District Magistrate of Darbhanga (Opposite party 2) in exercise of the powers conferred upon him under Rule 7 (1) of the Bihar Municipal Elections and Election Petitions Rules, 1953 (hereinafter referred to as the Election Rules), called upon the electors of all the wards of the Darbhanga Municipality to elect Commissioners latest by 7th September, 1956. On 21st May, 1956, he appointed Sri S. A. Haider, (Magistrate 1st Class. Darbhanga (Opposite party 3) as the Returning Officer. On 30th May, 1956, a programme of the general election was approved by the District Magistrate and was notified. This programme was adhered to in holding the election. With the approval of the District Magistrate the Returning Officer, fixed 6th and 7th September, 1956, for holding the elections and poll. Some of the candidates were returned unopposed. The polls were taken on the appointed dates, that is, on 6th and 7th September, 1956, and the result of the election was announced on 11th, 12th and 13th September,

1956, except for ward No. 13, 25 and 28, where the taking of the polls was postponed.

4. For the purposes of this election, the electoral roll of the Assembly constituency of the State of Bihar in respect of the areas comprised within the limits of the Darbhanga Municipality of 1955 was adopted. The petitioners contended that the elections were unlawful, because of the violation of the mandatory provisions of the Bihar and Orissa Municipal Act, 1922, and the Election Rules. The grounds on which the petition is rested are that the electoral roll of the Assembly constituency of the State of Bihar is not suitable for the purposes of elections of the Commissioners of the said Municipality, because for the purposes of the Assembly election the Darbhanga Municipality had been divided into nine constituency whereas for the purposes of election to the Municipality the town of Darbhanga had been divided into thirtytwo wards: that no notification under the proviso to R. 4 of the Election Rules was issued; that the adoption of the electoral roll of the Assembly constituency caused confusion and inconvenience inasmuch as voters of one ward were included into the electoral roll of another ward and some voters were wrongfully excluded from their wards, on account of which the electoral roll was frequently amended and corrected, which process continued up to 5th September, 1955; that the notification required by R. 7 of the Election Rules was not published in the Bihar Gazette; and that petitioners 1 to 5 were debarred from exercising their franchise, because they had no information of the election.

5. Cause has been shown on behalf of Opposite party 1 to 3. They alleged that the election was held perfectly in consonance with the provisions of the Bihar and Orissa Municipal Act and the Election Rules and denied that there was any confusion or inconvenience in holding the election and repudiated the charge of frequent alterations in and amendments to the electoral roll. They alleged that the notification required by rule 7(1) of the Election Rules was signed by Opposite party 2 on 9th May 1956, and sent on 14th May 1956, for publication in the Bihar Gazette and in addition, was published throughout the municipality, by the beat of drum. Mr. B. C. Ghose appearing for the petitioners contended that the entire election was unlawful, as the mandatory provisions of R. 7 of the Election Rules were not followed. Rule 7 is in the following terms :

"(1) For the purpose of constituting the municipality or reconstituting it on the expiration of the term of office of the Commissioners under Section 386, the District Magistrate shall by a notification published in the Official Gazette and in the manner laid down in Section 356, call upon all the wards of the municipality to elect Commissioners in accordance with the provisions of the Act and these rules before such date as may be specified in the notification :

Provided that in the case of a general election held on the eve of the expiration of the term of the Commissioners, a notification under this rule shall not be issued more than four months prior to the date on which the terms of the Commissioners is due to expire under the provisions of the Act.

(2)

(3)"

Section 356 provides as follows :

"Every byelaw, order, notice or other document directed to be published under this Act shall be written in, or translated into the vernacular of the district, and deposited in the office of the Commissioners, and a copy shall be posted up in a conspicuous position at such office, and in such other public places as the Commissioners may direct;

and a public proclamation shall be made throughout such municipality by beat of drum, notifying that such copy has been so posted up and that the original is open to inspection in the office of the Commissioners."

6. Learned counsel urged that the notification was not published in the Bihar Gazette and further it was not published in the manner provided in Section 356 of the Bihar and Orissa Municipal Act. There is a counter affidavit that the notification was proclaimed publicly throughout the municipality by beat of drum and copies of it were posted up in accordance with the provisions of Section 356. There is, however, no denial of the fact that the notification was not published in the Official Gazette, namely the Bihar Gazette. It was urged that the notification was signed by the District Magistrate and was sent to the Superintendent, Government Printing Press, Gulzarbagh for publication. This is, however, no proof of the publication. It must be taken, therefore, that the provisions of R. 7 respecting the publication of the notification in the Bihar Gazette were not complied with. The question is, what is the consequence of the breach of the provisions of R. 7? The learned Government Advocate contended that non-publication of the notification in the Official Gazette constituted a mere irregularity. His submission is that the essential requirement of R. 7 is that the District Magistrate should call upon all the wards of the municipality to elect Commissioners in accordance with the provisions of the Act and the Election Rules and there was sufficient compliance with this essential condition when the notification was published as laid down in Section 356 of the Act. He referred to R. 75. The relevant portion of R. 75 may be quoted here."

- "(1) Subject to the provisions of this rule if in the opinion of the Election Commissioner :
- (a)
 - (b)
 - (c) the result of the election has been materially affected by the improper acceptance or rejection of any nomination or by reason of the fact that any person nominated was not qualified or was disqualified for election, or by the improper reception or refusal of a vote or by the reception of any vote which is invalid, or by any non-compliance with the provisions of the Act or of the rules framed under the Act in respect of the election, or by any mistake in the use of any prescribed form; or
 - (d) the election of the returned candidate shall be void.
- (2)"

7. The contention of the learned Government Advocate is that even non-compliance with the provisions of the Act or the rules framed there under in respect of the election is per se not fatal to the election, and is not sufficient to avoid the election unless the result of the election has been materially affected thereby. I think, the contention of the learned Government Advocate is not sound. It is indeed difficult in many cases to determine whether a particular provision of a statute

is imperative or directory. In every case a distinction has to be made between the essential and the non-essential, between the important and the unimportant parts of the statute. The test to determine this is laid down in Section 72 of Crawford's Construction of Statutes which may be reproduced here.

"A statute, or one or more of its provisions, may be either mandatory or directory. While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to the construction of statutes, yet it may be stated, as a general rule, that those whose provisions relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance are directory. So, a mandatory statute may be defined as one whose provisions or requirements, if not complied with, will render the proceedings to which it relate illegal and void, while a directory, statute is one where non-compliance will not invalidate the proceedings to which it relates....."

8. In the case of *Ajit Kumar Sen v. State of West Bengal*¹, the Calcutta High Court laid down the following principle to determine whether a particular statute was directory or mandatory :

".....No universal rule can be laid down for the construction of statutes as to whether any enactment shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed; *Liverpool Borough Bank v. Turner*², per Lord Campbell L. C. In each case the subject-matter is to be looked to and the importance of the provision in question in relation to the general object intended to be secured by the Act, is to be taken into consideration in order to see' whether the matter is compulsive or merely directory...."

9. Applying these principles, it will be seen that the publication of the notification is the very foundation of the election, and the non-compliance with these provisions is calculated to deprive any electors of their right to vote at the election. The publication of this notification really gives the District Magistrate jurisdiction to hold elections of the Commissioners of the Municipality. Mere proclamation of the notification by beat of drum by posting copies thereof, as laid down in Section 356, is not sufficient for the simple reason that most of the residents of different wards of the Darbhanga Municipality may be residing at different places. It is really the publication in the Official Gazette which will convey necessary information about holding of the election to the prospective voters. The omission to give due publicity, to the notification will occasion great inconvenience to the electors. Great prejudice is inherent in non-publication of the notification, and the result of such election cannot but be deemed to have been materially affected. In these circumstances, the principle of R. 75, on which the learned Government Advocate relied, is not really applicable to the present case. I think, the provision of R. 7 of the Election Rules is mandatory, and noncompliance with those provisions will invalidate the entire election.

5. It was next contended by Mr. Ghose that the electoral rolls had not been properly prepared and finalized and therefore the elections held on the basis of such electoral rolls cannot be regarded as valid. He referred to the following rules of the Election Rules

"3. The qualification for the registration of electors at elections of Municipal Commissioners shall be the same as those for the registration of electors at elections of members of the Bihar Legislative Assembly of the State of Bihar.

4. So much of the electoral roll or rolls of an Assembly constituency of the State of Bihar for the time being in force, as relates to the local areas comprised within the limits of the municipality, shall be deemed to be the electoral roll for that municipality for the purpose of elections of Municipal Commissioners and so much of the said electoral roll or rolls as appertain to a particular ward of the municipality shall be deemed to be the electoral roll of that ward:

Provided that where the District Magistrate is of opinion that electoral roll or rolls of an Assembly constituency are not suitable for purposes of elections of Commissioners of the Municipality an electoral roll for that municipality shall be prepared on the basis of such qualification and in such manner as the State Government may, by notification direct.

5 (1). No person who is not and except, as expressly provided by these rules, every person, who is, for the time being entered in the electoral roll of any ward of a municipality shall be entitled to vote in that ward of the municipality.

(2) No person shall vote at any general election in more than one ward of the same Municipality.

(3) No person shall at any election vote in the same ward more than once, notwithstanding that his name may have been entered at more than one place in the electoral roll of that ward." Rule 6 (a) lays down that every person who is entitled to vote at an election under Rule 5 shall be eligible to be elected as a Commissioner. Rule 6 (b) prescribe the disqualifications for being a candidate for election as a Commissioner. These rules have to be considered along with the corresponding provisions of the Bihar and Orissa Municipal Act :

"15 (1) The State Government shall, by rules prescribe the qualifications and disqualifications, and the manner of the registration of voters at elections of Municipal Commissioners:

Provided that a person shall not be entitled to be registered as a voter who,

(a) has not attained the age of 21 years:

(b) is not a citizen of India, or

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

(2) Every person who is registered as a voter in accordance with rules made under subsection (1) shall be entitled to vote at an election of Municipal Commissioners, and no person who is not so registered shall be entitled to vote at any such election."

"17. A person shall not be qualified for election to be a commissioner of a municipality

unless he is entitled to vote at the election of Commissioners of such municipality; provided that an undischarged insolvent shall not be qualified for election to be a Commissioner of a municipality.

"19. For the purpose of election of Commissioner, the Chairman, Vice-Chairman and the President, the State Government may with respect to municipalities generally or to any municipality or class of municipalities in particular, make such rules, consistent with this Act, as it may think fit to regulate and determine-

(1) the dates, times and mode of holding-elections; (2) the authority which shall decide disputes arising under any rules made under this, section; and (3) any other matter relating to elections in respect of which this Act makes no provisions or insufficient provision, and provision, is in the opinion of the State Government necessary."

10. The Election Rules have been framed under Sections 15 and 19. The submission of Mr. Ghose is that the electoral roll of the Assembly constituency of the State of Bihar was not an appropriate roll for the municipality inasmuch as while for the Assembly election, the areas within the limits of the Darbhanga municipality had been divided into nine wards, the same for the municipal election had been divided into thirty two wards. He urged that this was most inconvenient and resulted in great confusion. He also pointed out that the electoral rolls were not finalized and published, and were corrected and modified frequently up to the 5th September, 1956, that is to say, up to the day preceding the day fixed for the taking of polls.

11. The election and polls were held on 6th and 7th September, 1956. I do not consider that his first submission is valid. There appears to be no particular difficulty in adopting the Assembly electoral roll for the municipality. The difference in the number of wards into which the Darbhanga municipal area was divided for the Assembly election and the municipal election does not present any insuperable difficulty. Rule 4 makes the position perfectly clear and provides that so much of the electoral roll of an Assembly constituency of the State of Bihar as appertain to a particular ward of the municipality shall be deemed to be electoral roll of that ward. A comparison of the Assembly electoral roll with the area comprised in any particular ward will easily disclose who were the electors in that ward. At any rate, under the proviso to R. 4 it is entirely for the District Magistrate to consider whether or not the electoral roll of the Assembly constituency is suitable for the municipal elections. The District Magistrate of Darbhanga apparently did not consider it unsuitable. There is no merit in this contention.

12. The second contention of Mr. Ghose is no doubt valid. The relevant provisions of the Election Rules and the Bihar and Orissa Municipal Act, set out, hereinabove, do not dispense with the preparation of a separate register of voters ward by ward, of course, on the basis of the electoral roll of the Assembly constituency. All that R. 4 says is that electoral roll or rolls of an Assembly constituency of the State of Bihar for the time being in force, as relates to the local areas comprised within the limits of the municipality shall be deemed to be the electoral roll for that municipality. Whether or not an electoral roll for each ward will be separately prepared for the benefit of the electors is a different question Section 15 envisages a separate register of voters and the Election Rules do not and cannot override the statutory provision. Rule 3 lays down the qualification for registration as electors. R. 6 (b) described the disqualifications. Section 19 empowers the State Government to make rules inter alia to regulate and determine the authority

which shall divide disputes arising under any rules made under this section. The effect of those provisions is that the adoption of the Assembly electoral roll did not entirely do away with the investigation of claims to be enrolled therein and objections to such enrolments, otherwise the prescription of qualifications and disqualifications will be meaningless. It is manifest therefore that though the Assembly electoral roll was to be the basis for the municipal electoral roll, there must be a separate roll for each ward and further that this roll must be prepared and published before the holding of the election is notified. In this particular case the electoral rolls for the municipality were not finalised until the date fixed for the taking of polls. Mr, Ghose has urged, and there is no effective denial, that numerous changes and modifications therein were made until the last moment. Such electoral rolls can hardly form the basis of a valid election. In a somewhat similar situation their Lordships of the Supreme Court made the following observations, in the case of *Chief Commissioner of Ajmer v. Radhey Shayam Dani*³,

"It is of the essence of these elections that proper electoral rolls should be maintained and in order that a proper electoral roll should be maintained it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinize 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.

Unless this is done, the entire obligation cast upon the authorities holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties, concerned. It was in our opinion, therefore, necessary for 'the Chief Commissioner to frame rules in this behalf, and in so far as the rules which were thus framed omitted these provisions they were defective.'" The same view has been expressed in Article 160 of Halsbury's Laws of England, 3rd Edition Volume 14, page 86. It runs thus:

"The first formal step towards the election of a member of Parliament is the issue of the writ out of the Crown Office in Chancery. If a writ is illegally issued, the election, following thereon will be void."

As pointed out in the case of *Sukar Gope v. State of Bihar*⁴, election means all the different states of election, commencing after the appointment of dates for making nominations. "The Returning Officer commences his election activities' as soon as any person is nominated as a candidate for election and the nomination paper is delivered to him in the prescribed manner". It seems that electoral roll must be finalized and published before the election starts.

13. In this case, this was not done, and for this reason the election held on the basis of such electoral rolls must be held to be invalid.

14. It was urged by the learned Government Advocate that the election cannot be disputed except by an election petition, as laid down in R. 62 of the Election Rules. He submitted that petitioner 9

had already filed an election petition after the presentation of this writ application. This contention is not valid. What is challenged here is not the election of a particular candidate, but the validity of the entire election, because of the violation of the essential provisions of the Election Rules and the Act. I think, R. 62 provides for a case where a person challenges the election of a particular candidate. I would overrule the objection.

15. This application must, therefore, be allowed, a writ of certiorari would issue quashing the election, and there would be a mandamus against the District Magistrate to hold fresh election according to law. An order would issue restraining opposite party 4 to 35 calling the first meeting of the elected Commissioners. In the circumstances of the case, there will be no order for costs.

Ramaswami C.J.

16. I agree.

Petition allowed.

Cases Referred.

¹ AIR 1954 Cal 49

²(1860) 2 De G F and J 502 at p. 507

³1957 SCA 135

⁴ ILR 31 Pat 145 at p. 154: (AIR 1953 Pat 47 at p. 49)