

ORIGINAL CIVIL.

Before Fletcher J.

BHUPENDRA NATH BASU

v.

RANJIT SINGH.*

1913

July 14.

Election—Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act V of 1908), s. 9—Discretionary Relief, principles on which granted—Delay—Indian Councils Act, 1909 (9 Edw. VII, c. 4), s. 6—Power of Governor-General in Council to make Regulations—Civil Court, jurisdiction of.

When a plaintiff seeking to impugn the validity of an election held on February 14, 1913, first made an application to the Governor-General in Council in accordance with Regulations framed under s. 6 of the Indian Councils Act, 1909, which Regulations provided that the decision of the Governor-General in Council on the intention, construction, or application of the Regulations should be final; and afterwards, when the election of the defendants had been declared to be valid by the Governor-General in Council, filed a suit on June 19, 1913, praying for a declaration that the election was invalid, and for an injunction restraining the defendants from exercising the functions of the office to which they had been elected:—

Held, without deciding the question as to the jurisdiction of the Court and the power of the Governor-General in Council to make Regulations excluding that jurisdiction, that in the circumstances the Court should not exercise its discretionary jurisdiction under s. 42 of the Specific Relief Act in favour of the plaintiff. The Court in interfering in cases of disputed elections should apply the principles followed by the Courts of Common Law in granting or refusing prerogative writs.

MOTION.

The facts of this case were as follows. On February 24, 1913, an election was held by the non-official additional members of the Bengal Legislative Council to elect two persons to serve as additional members of the Legislative Council of the Governor-General.

* Original Civil Suit No. 598 of 1913.

The election and general position of the non-official additional members of the Bengal Legislative Council were governed by Regulations framed by the Governor-General under section 6* of the Indian Councils Act, 1909, 9 Edw. VII, c. 4, (hereafter called the Bengal Council Regulations), and published in the Gazette of India of November 23, 1912. Regulation VII provided that every person elected or nominated under the regulations should before taking his seat at a meeting of the Council make an oath or affirmation of his allegiance to the Crown. By Regulation VIII—

“If any person fails to make the oath or affirmation prescribed by Regulation VII within such time as the Governor in Council may consider reasonable, the Governor shall, by notification in the local official Gazette, declare the election or nomination to be void or his seat to be vacant.”

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The election to the Legislative Council of the Governor-General was conducted under Regulations also framed under section 6* of the Indian Councils Act, 1909 (hereafter called the “Imperial Council Regulations”) and published in the Gazette of India of November 16, 1912. Imperial Council Regulation XVI provided that if the validity of any election were brought in question by any person qualified either to be elected or to vote at such election, such person

*“6. The Governor-General in Council shall, subject to the approval of the Secretary of State in Council, make regulations as to the conditions under which and manner in which persons resident in India may be nominated or elected as members of the Legislative Councils of the Governor-General, Governors, and Lieutenant-Governors, and as to the qualifications for being, and for being nominated, or elected, a member of any such Council, and as to any other matter for which regulations are authorised to be made under this Act,” and also as to the manner in which these regulations are to be carried into effect. Regulations under this section shall not be subject to alteration or amendment by the Legislative Council of the Governor-General.”

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might apply to the Governor-General in Council to set aside such election, and the Governor-General in Council should, after such enquiry (if any) as he might consider necessary, declare by notification whether the candidate whose election was questioned or any or what other person was duly elected, or whether the election was void.

By Imperial Council Regulation XVII—"The decision of the Governor-General in Council on any question that may arise as to the intention, construction or application of these Regulations shall be final."

At the election held on February 14, 1913, the plaintiff, the first defendant the Hon'ble Maharaja Ranjit Singh (commonly called the Maharaja of Nashipur), the second defendant the Hon'ble Mr. Surendra Nath Banerjee, and the Hon'ble Nawab Badruddin Haidar were candidates. There were at the time thirty-four non-official additional members of the Bengal Legislative Council, each having two votes.

As a result of a poll, the defendant Mr. Banerjee obtained 22 votes, the defendant the Maharaja of Nashipur 18 votes, the plaintiff 17 votes, and Nawab Badruddin Haidar 11 votes; and the defendants were thereupon declared by the returning officer to be duly elected.

Of the non-official additional members voting at the election two had not taken the oath or affirmation of allegiance prescribed by Bengal Council Regulation VII, but no declaration had been made in respect of their seats under Bengal Council Regulation VIII.

The plaintiff, thereupon, applied to the Governor-General in Council in respect of the election of the defendant, the Maharaja of Nashipur, under Imperial Council Regulation XVI, praying that the votes of the two members who had not taken the oath of

allegiance at the time of the election should be expunged and a fresh announcement made of the result of the ballot after eliminating the votes aforesaid, and, if necessary, a fresh election should be held.

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On May 9, 1913, it was notified in the Gazette of India that the Governor-General in Council having made enquiries declared the Maharaja of Nashipur to have been duly elected.

The plaintiff filed his plaint in this suit on June 19, 1913, praying, *inter alia*, that it might be declared that the election of February 14, 1913, was void and invalid, and that the defendants might be restrained by injunction from attending any of the meetings of the Legislative Council of the Governor-General as members thereof and from exercising any of the functions, rights and privileges appertaining to the office of members of such Council.

On June 23, 1913, the plaintiff obtained this Rule calling upon the defendants to show cause why an injunction should not be awarded against them restraining them until the final determination of the suit from exercising their powers and functions as non-official additional members of the Legislative Council of the Governor-General of India.

The defendants contended that in view of Imperial Council Regulation XVII, the Court had no jurisdiction to entertain the suit.

Mr. C. R. Das (with him *Mr. S. R. Das*, *Mr. N.N. Sircar*, *Mr. C. C. Ghose* and *Mr. S. Ghose*), for the plaintiff, in support of the Rule. The Court has jurisdiction under section 9 of the Civil Procedure Code. Imperial Council Regulation XVII, in so far as it purports to oust the jurisdiction of the Court on questions of construction, is *ultra vires*. Any regulation not covered by the terms of section 6 of the Indian

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Councils Act, 1909, must be *ultra vires*. The words "conditions under which and manner in which persons may be elected" cannot possibly include the right to determine the validity of votes given by persons alleged not to be qualified. The powers of the Court to determine questions of construction can only be taken away by very clear words: see Craies on Statute Law, 2nd edition, p. 14.

[FLETCHER, J. You are seeking declaratory relief under section 42 of the Specific Relief Act, that relief is discretionary, and the Court will not act unless the party aggrieved comes before it immediately; here there has been delay.]

I have a right apart from the Specific Relief Act, and under section 9 of the Civil Procedure Code this Court should try it: *Sabhapat Singh v. Abdul Gaffur* (1).

The Advocate-General (Mr. G. H. B. Kenrick, K.C.), for the defendant, the Maharaja of Nashipur, called the attention of the Court to Bengal Council Regulation VIII.

[FLETCHER, J. It would seem from that, that failure to take the oath does not make a person any the less a member.]

The Advocate-General and Mr. P. K. Mozumdar, for the defendant the Maharaja of Nashipur; and

Mr. B. Chakravarti, Mr. J. Chaudhuri, and Mr. B. K. Lahiri, for the defendant the Hon'ble Mr. Surendra Nath Banerjee, were not called upon.

FLETCHER, J. This is a Rule obtained by the plaintiff, Mr. Bhupendra Nath Basu, calling on Maharaja Ranjit Singh Bahadur and Mr. Surendra Nath Banerjee, defendants in the suit, to show cause why an injunction should not be awarded against them

restraining them, until the final determination of the suit and until further orders from exercising their powers and functions as non-official additional members of the Council of the Governor-General of India.

The case has been argued by Mr. C. R. Das on behalf of the plaintiff and a good many interesting and difficult questions have been raised during the course of the argument. In my opinion, this application must fail upon the facts. The question as to the jurisdiction of His Excellency the Governor-General in Council, and to what extent he can make regulations under section 6 of the Indian Councils Act, 1909, so as to exclude the jurisdiction of the Civil Courts is one of considerable importance, and in my opinion it is not necessary to decide that question in the present case. But assuming that the jurisdiction does not exist, what are the rights of the plaintiff in this case? The plaintiff was a candidate at the election held on February 14, 1913. At that election the second defendant stood at the head of the poll, the first defendant standing second, and the plaintiff was the third being only one vote behind the first defendant; acting under the terms of the Regulations that have been framed by the Governor-General in Council, the plaintiff preferred an appeal to His Excellency in Council, asking that he should declare the election void on the ground that two of the electors, who had given their votes at the election, had not taken the oath of allegiance, as required by the terms of the Regulations. The Governor-General in Council having received in writing the case of the plaintiff, as also the case of the defendants, decided that the two defendants were duly elected members of his Council. It seems to me, that on those facts, it is impossible to ask the Court to exercise jurisdiction, which is a discretionary jurisdiction in the Court. I altogether dissent

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from Mr. C. R. Das's argument that under section 9 of the Civil Procedure Code he has got the right *ex debito justitiæ* to have an order from the Court declaring that the two defendants were not duly elected as members of the Council of the Governor-General. Section 9 of the Code of Civil Procedure deals with the Courts, not with the rights of the parties. The rights which the plaintiff has got in this case, if any, are governed by the Specific Relief Act. As to that I have no doubt, and the rights that he has got in this suit come under Chapter 6, Specific Relief Act, section 42, which provides that any person entitled to any legal character may institute a suit, against any person denying or interested to deny, his title to such character, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not, in such a suit, ask for any further relief. The plaintiff in this case, as a matter of fact, asks for a declaration that the election of the two defendants is void, and he has only asked for other relief consequential on that declaration. Mr. C. R. Das stated that the rights of the plaintiff, in a suit instituted under the provisions of section 42 of the Specific Relief Act, are such that he is entitled to an order as of course. With that view I am altogether unable to agree. Whatever the decision is that, the learned counsel says, has been decided on that section, nothing can get out of the express words of the section, namely that "the Court may, in its discretion, make therein a declaration," and no case can do away with the express words used by the Legislature in enacting the section. If that was not so, we have got this absurd result: the period of limitation for a suit of this nature under the Indian Limitation Act is six years, the Council of the Governor-General is elected for three years, and therefore three years after the Council ceased the

Court might be going on trying suits under section 42 as to who were properly elected to the Council that ceased to exist three years before. That is, in my opinion, not a reasonable nor a proper construction to place upon section 42. In my opinion in a suit of this nature what you have got to do is this. You have got to apply the principles of the Courts of Common Law in granting or refusing the prerogative writs. Those were reasonable rules which were founded on experience not of many years but of centuries. Those were the rules which governed the practice of the Courts as to interfering in cases of disputes relating to elections to all bodies other than the two Houses of Parliament, which are not subject to the jurisdiction of any Court, but decided for themselves who were elected and who had the right to sit and vote in either of those two Houses. But in all other bodies the right of election in which the Court had jurisdiction to interfere was governed by the principles by which the Courts of Common Law granted or refused the prerogative writs. If you apply those principles in this case, and assume that the Regulations made by the Governor-General in Council were *ultra vires*, you have not much difficulty in dealing with this case. You have got to consider first of all the conduct of the plaintiff. *First*, that he deliberately elected to carry his appeal to the Governor-General in Council, where as he says he knew that the Governor-General in Council's decision was, according to his views, of no validity. *Secondly*, you have got to consider the very serious delay that has been occasioned in this matter by reason of the plaintiff having preferred his appeal to the tribunal, that he says, has no jurisdiction in this matter. The two defendants both sat and voted in the Council of the Governor-General for the whole of last session. Moreover, it may be a case of serious

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prejudice to the defendants. For aught I know, the electorate may not be the same: the majority by which both the defendants were elected over the plaintiff is a comparatively narrow one and it may be, as electors do sometimes, that some of the electors may have changed their views with regard to one or other of the defendants, which, if the plaintiff had come here more promptly, might not have been the case. It seems to me, under those circumstances, that even assuming that this Court had jurisdiction to interfere—as to which I desire to express no view—on the facts of this case, the Court ought not to interfere. I am not satisfied that if the Court had jurisdiction and did interfere, that the two defendants, by reason of the conduct of the plaintiff having carried the appeal to the Governor-General and then instituting this suit on the footing that he is not bound by the decision of the Governor-General, may not have suffered serious injury in their chances of being re-elected. On these grounds, I think that the Court would be wrong to interfere at any rate by means of interlocutory order to restrain the two defendants from exercising the functions that they claim the right to exercise. Moreover, I am not satisfied that the view of the Government as to the taking of the oath of allegiance is not a correct one. Doubtless the English cases that were referred to, the case of the *Mayor of Penryn* (1) and *The King v. Swyer* (2), have decided that a person is admitted to a public office, which requires the oath of allegiance, only when the oath of allegiance is taken. That does not get rid of the difficulty that arises from these Regulations. These Regulations constitute an electoral College of elected members of the Local Council to elect two persons to be members of the Council of His Excellency the Governor-General. I am not satisfied on the

(1) 1 Strange 582.

(2) (1830) 10 B. & C. 486.

Regulations that the learned Advocate-General has called my attention to, that when the electors have the right of giving their votes by means of registered letter, for the purpose of being members of electoral College and for that purpose only, that the mere fact of election to the local Council was not sufficient to constitute a person so elected a member of the electoral College. It is only for the purpose of exercising the legislative functions conferred by the Regulations and by the Act that the oath of allegiance is required. Moreover, as the Advocate-General has pointed out, the mere fact of omission to take an oath of allegiance does not *ipso facto* cause a member to vacate his seat; under Regulation VIII of the Bengal Council Regulations, the discretion is given to the Governor as to his declaring a seat to be vacant if the person elected fails to take an oath of allegiance. In my opinion, in this case the Rule fails and must be discharged, and discharged with costs.

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Rule discharged.

Attorney for the plaintiff: *D. M. Ghosh.*

Attorneys for the defendant, Maharaja Ranjit Singh:
Manuel & Agarwalla.

Attorneys for the defendant, Surendra Nath Banerjee: *G. C. Chunder & Co.*