## APPELLATE CIVIL.

*Before Suhrawardy and Costello JJ.*

RATHISCHANDRA MUNSHI

*v.*

AMULYACHARAN GHATAK.*

1930

*Feb.* 25.

*Election—Nomination paper—Rules framed (1927) under the Bengal Municipal Act (Beng. III of 1884), rr. 15 (1), 16.*

R, a candidate at a municipal election held on the 17th December, 1927, sent his nomination paper on the 19th November that year. The nomination was accepted and the candidate was elected.

*Held*, the nomination paper was out of time by virtue of rule 15 (1) of the Municipal Election Rules framed in 1927 under sections 15 and 69 of the Bengal Municipal Act, 1884.

*Held*, also, that a suit to set aside that election lay in a civil court.

*Nishi Kanta Chaudhury* v. *Gopeswar Chatterjee* (1) followed.

*Held*, further, that in a joint election when the nomination of one candidate is void, the whole election should be set aside.

SECOND APPEAL by the defendants.

This suit was instituted by Amulyacharan Ghatak, an unsuccessful candidate at a municipal election for ward No. 1 of Ranaghat Municipality, against Rathischandra Munshi, Kunjabihari Basu and the Chairman of Ranaghat Municipality for a declaration that the election was invalid and for an injunction restraining the defendants Nos. 1 and 2 from acting as municipal commissioners. The plaintiff's contention was that the defendant Rathischandra Munshi sent his nomination paper on the 19th November, 1927, for the election held on 17th December, 1927, while rule 15 (*1*) of the rules framed by the Local Government in 1927 under sections 15 and 69 of the Bengal Municipal Act, 1884, says that such nomination paper shall be sent not less than 28 days before the day fixed for election.

*Appeal from Appellate Decree, No. 2313 of 1928, against the decree of A. N. Sen, District Judge of Nadia, dated May 17, 1928, reversing the decree of Ramchandra Banerji, Munsif of Ranaghat, dated Feb. 11, 1928.

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The Munsif trying the case dismissed the suit; on that the plaintiff appealed and the learned District Judge allowed the appeal, declaring the election to be invalid and restraining the first two defendants from sitting on the municipal board and exercising the functions of municipal commissioners.

Against that decision, the two defendants filed this appeal in the High Court.

*Satindranath Mukherji* and *Mukundabihari Mallik* for the appellants.

*Tarakeshwar Pal Chaudhuri*, *Hiralal Ganguli*, *Anilchandra Datta* and *Harakrishna Pramanik* for the respondent, Amulyacharan Ghatak.

The respondent Chairman did not appear.

SUHRAWARDY J. This appeal arises out of a suit relating to a municipal election at Ranaghat within the district of Nadia. The facts are that at the municipal election, held on the 17th December, 1927, the defendants Nos. 1 and 2, who are the appellants before us, were declared elected. The plaintiff, who was a rival candidate, along with another person, named Abanikanta Basu were defeated. Under rule 15 (*1*) of the rules framed by the Government of Bengal in 1927 in exercise of the powers conferred on it by sections 15 and 69 of the Bengal Municipal Act, 1884, every person, who is a candidate for election, shall send his name to the chairman in writing not less than 28 days before the date fixed for election. In the present case, the date fixed for election was the 17th December, 1927. The nomination paper submitted by defendant No. 1 was at 11 a.m. on the 19th November, 1927. The plaintiff applied to the District Magistrate, under rule 16, to omit the name of defendant No. 1 from the list of candidates, inasmuch as the nomination paper filed by him was not submitted within time. The District Magistrate, however, held that it was submitted in time and ordered the election to be held, with the result that

the appellants were elected. The plaintiff, thereafter, brought the present suit in the civil court, for a declaration that the election of defendants Nos. 1 and 2 was void and liable to be set aside. The suit was dismissed by the Munsif, but, on appeal, the learned District Judge of Nadia held that the election of defendants was void and ordered it to be set aside. The defendants Nos. 1 and 2 have appealed. The basis of the judgment of the learned District Judge is that the nomination paper filed by defendant No. 1 was not submitted within 28 days, as provided by rule 15 (*1*) and that the provision of that rule is imperative; the defendant No. 1, therefore, was not a duly qualified candidate and his election was illegal. The learned District Judge is also of opinion that, as the election could not be partially set aside, the election of both the defendants must be set aside. It is argued, on behalf of the appellants that the provisions of rule 15 (*1*) is not imperative, but is merely directory, and is of such a nature that any irregularity in respect thereof may be waived by the officer concerned in holding the election. In this case, the chairman, who presided at the election, accepted the nomination paper of defendant No. 1 and the District Magistrate, who seems to be the final controlling authority, adopted the view of the chairman. We are, however, unable to agree with the view taken by the chairman and the District Magistrate with regard to the irregularity of procedure complained of in this case. The words used in rule 15 (*1*) are quite clear and are capable of one meaning only, namely, that the person who is a candidate for election shall send his name to the chairman in writing not less than 28 days before the date fixed for the election; in other words, there must be 28 clear days between the submission of the nomination paper and the day on which the election is to be held. According to this calculation, the nomination paper ought to have been submitted before the midnight of the 18th November. There can be no doubt that there has been an

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infringement of this rule. See Rawlinson's Municipal Corporations Acts, 10th Ed., par. 230, p. 155.

The next question is whether the rule is merely a rule of procedure or it is so substantial as to affect the validity of the election. Rule 15 appears under the heading "Qualification of Candidates." Rule 14 says that any person qualified to vote and not disqualified under the Act shall be qualified to be elected a commissioner. Rule 15, as I have already said, lays down that every person, who is a candidate, shall send his name to the chairman not less than 28 days before the date fixed for the election. These are the two qualifications mentioned of a person who may validly be a candidate at a municipal election. Want of any of these two qualifications disqualifies the candidate. It cannot, therefore, be said that rule 15 only concerns itself with the procedure to be followed at the election. It seems to me, however, that it is a matter of substance and, dealing, as it does, with the qualifications of candidates at a municipal election, it must be taken to be laying down a qualification without which a candidate cannot be said to be duly qualified. Whatever the reason of the rule may be, it is clear that the rule made it incumbent upon the intending candidate to send his name at a certain time fixed by the authorities. If, on the other hand, it is held to be directory and can be relaxed at the pleasure of the person holding the election, one does not know where to stop and up to what limit of time the indulgence may be shown. It seems to me that this rule should be strictly observed. I, accordingly, agree with the view taken by the District Judge that rule 15, not having been complied with in this case, it must be held that defendant No. 1 was not qualified at the time of the election and his election should be set aside.

The next question, that has been argued on behalf of the appellants, is that the order of the magistrate holding that the nomination paper sent in by defendant No. 1 was in time within rule 15 must be deemed

final under rule 16 and is not liable to be questioned in a civil suit. Rule 16 says that any person whose name has been excluded from the list of candidates, or who disputes the claim of any other candidate to be on the list, may apply to the magistrate for an order to have his name included or any name omitted from the list and the order passed, thereupon, by the magistrate shall be final. The previous rules framed by the Local Government in 1896 contained similar provision; and the question in the form in which it has been placed before us came up for consideration in *Nishi Kanta Chaudhury* v. *Gopeswar Chatterjee* (1) to which decision I was a party. There, it was held that section 15 of the Bengal Municipal Act, 1884, confers and at the same time controls and limits the power of the Local Government to frame rules under the Act and it enjoins that such rules should not be inconsistent with any provisions of the Act and provides that nothing contained in that section, nor any rules made under the authority of the Act, shall be deemed to affect the jurisdiction of the civil courts. There cannot be any doubt as to the intention of the legislature in putting this proviso to section 15. That section opens with the words "The Local Government shall lay down such "rules not inconsistent with the provisions of the "Act." The jurisdiction of the civil courts has been specially reserved under the provision of the Act. One kind of rules which the Local Government is authorised to frame under section 15 relates to qualifications required to entitle a person to stand as a candidate at an election and in respect of the mode of election and the authority which shall decide the dispute relating thereto. The Local Government has laid down that the authority which shall decide disputes relating to elections shall be the District Magistrate and hence it declares that his order shall be final. The civil courts under section 9 of the Civil Procedure Code have jurisdiction to try all suits

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of a civil nature (and a dispute relating to election is a suit of a civil nature) unless there is any enactment to the contrary. There is no enactment to the contrary; on the other hand, there is an express proviso to section 15 of the Bengal Municipal Act, 1884, retaining or conferring on civil courts jurisdiction to try suits relating to elections. I may note that this objection with regard to the jurisdiction of civil courts was not taken in any of the courts below, for the obvious reason that suits of this nature are not uncommon in the *mofussil*. I am fortified in my view by the absence of any provision either in the Act or in the rules for setting aside an election by election petition, the legislature thereby indicating that it can be questioned in a civil suit. I am of opinion that the civil court has jurisdiction to declare an election held under the Municipal Act invalid, and the order of the District Magistrate is final so far as executive authorities are concerned.

The last point which has been urged is with regard to the decree passed against the defendant No. 2. There is no doubt that defendant No. 2 is not concerned in any irregularity or illegality connected with the elections. His nomination paper was submitted in time and he was duly elected. The learned District Judge, however, thinks that it would be in the interest of all parties that the whole election should be set aside and he ordered accordingly. I gave my anxious consideration to this matter, because I find that defendant No. 2 is not guilty of any omission or commission and has been penalised for the irregularity committed by the defendant No. 1. But it seems to me that an order to be passed in a joint election must be based on some principle. There is no doubt that if the election of defendant No. 1 alone is set aside there will be one vacancy in the constituency. But the intention of the legislature is that two persons out of the total number of candidates should be elected from a particular ward at one election. It does not contemplate that an election may be held

piece-meal. Besides, if, in this case, the magistrate or chairman had refused to accept the nomination of defendant No. 1, as they should have done, there would have been a fight between the other candidates and it is difficult to say how the votes that were cast in favour of defendant No. 1 would have been divided among them.

Another difficulty in the way of upholding an election partially suggests itself to me. If a fresh election is held in place of defendant No. 1 only, the voters who had voted for him will vote for one candidate only, though under the law, they are entitled to vote for two. In cases in which one candidate has to be elected and the rival candidate, who has secured the next largest number of votes, got the election set aside, it has been held that the latter is not entitled to be declared elected and a fresh election has always been ordered to be held. See the case of *Nishi Kanta Chaudhury* (1). On the whole, I think that, in fairness to the constituency and the other candidates, it will be a proper order to pass in this case that the entire election should be set aside and a fresh election held if necessary.

There is one sentence in the learned District Judge's judgment which is not clear, but which ought to be made clear. The learned District Judge, after declaring the election contrary to law and setting it aside, directs that the first and second defendants are restrained by a perpetual injunction from sitting on the municipal board. I think that by "perpetual," the learned Judge means—so long as they are not duly elected.

The result is that this appeal is dismissed. Each party should, in the circumstances of this case, bear his own costs throughout.

COSTELLO J. I desire to add a word or two. I am not altogether satisfied as to the effect of rule 16 of the Bengal Municipal Election Rules. It is quite

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clear that the provisions of rule 15 are imperative and not merely directory. It was held in England, in the case of *Monks* v. *Jackson* (1), which arose in connection with an election under the Municipal Election Act, 1875, that the provisions of that Act requiring nomination papers to be delivered to the Town Clerk by the candidate himself or by his proposer or seconder personally and not by an agent were obligatory and were not complied with by the delivery of nomination papers to the Town Clerk by an agent of the candidate. In the same case, it was held that an objection to a nomination, in the circumstances I have mentioned, was one cognizable by the Mayor, who was the returning officer, but that his decision disallowing it might be questioned on a petition against the return of the successful candidate. It is to be observed that, for the purposes of election under the Bengal Municipal Act, the chairman of the municipality is vested with duties equivalent to those of a returning officer under the English system of election. But objections under rule 15 of the Bengal Municipal Election Rules are not to be disposed of by the chairman, but by the magistrate under the terms of rule 16. Even, under the English system, it was held in *Howes* v. *Turner* (2) that, although the Mayor of a corporation was empowered to deal with objections to nominations, he had no power to dispense with statutory requirements for the delivery of nomination papers. In other words, the Mayor as a returning officer could not deal with an objection as to the time of delivery of nomination papers and that if he did, his decision might be questioned upon petition to the Election Court. But the case which is now before us, is different in this respect that it is not the chairman, as quasi-returning officer, who is the person appointed to deal with any kind of objection but it is the magistrate. That rather seems to indicate, to my mind, that the magistrate, for the purpose of municipal elections in Bengal, is

(1) (1876) 1 C. P. D. 683. (2) (1876) 1 C. P. D. 670.

acting as a judicial officer. Rule 16 confers upon the magistrate rather ample power, inasmuch as it says that the magistrate shall make such order as to the insertion or omission of the name as appears to him to be just. Therefore, it would seem that the magistrate is vested with judicial authority, at any rate as to all matters dealt with in rule 15. The fact that, in rule 16, it is declared that such order, that is to say any order that the magistrate may think fit to make, shall be final seems to indicate that the magistrate is to exercise some of the functions of an Election Court. It is the inclusion of these words that raises some doubt in my mind, as to whether it was not intended that this rule should confer upon the magistrate, as a judicial officer, summary jurisdiction to settle once and for all certain disputes in connection with municipal election. Had it not been for the proviso to section 15 of the Bengal Municipal Act, it would, I think, be perfectly plain that, so far as the decision of a magistrate in connection with regard to disputes under rule 15 goes, that decision would be final and conclusive for all purposes and could not be challenged after the election had in fact been held. But the proviso to section 15 does seem to suggest that, in spite of rule 16, there shall be a right of reference to the civil court, where there has been an irregularity in connection with the holding of the election, such as an unqualified candidate being allowed to go to the pole. While expressing this doubt, as to what is the effect of rule 16 in the light of section 15 of the Act, I am, however, not prepared to disagree with what my learned brother has said. I entirely agree with him on the other points. Therefore, I am of opinion that the election was void and must be set aside in its entirety.

*Appeal dismissed.*

N. G.