

## CRIMINAL REVISION.

*Before Lord-Williams and Khundkar J.J.*

NOOR AHMAD

v.

JOGESHCHANDRA SEN.\*

1934

Aug. 8, 9.

*Cognizance—Municipal commissioners preparing electoral roll, if can be prosecuted without sanction—Bengal Municipal Act (Beng. XV of 1932), ss. 21, 28, 540—Code of Criminal Procedure (Act V of 1898), s. 197.*

Persons, contemplated by section 28 (1) of the Bengal Municipal Act, 1932, are persons who fall outside the category of those who have to deal with the electoral roll in the course of their official duty.

Members of a committee appointed under section 21 (1) to prepare and publish an electoral roll are not municipal officers or servants within the meaning of section 28 (2). Such members cannot be prosecuted under section 28 of the Act.

*Hemchandra Das v. Subodhechandra Das Gupta* (1) distinguished.

The members of such committee do not cease to be commissioners while exercising the functions of the committee. They are, consequently, public servants not removable from their office save by or with the sanction of the Local Government. The functions of the committee are covered by the expression of "official duty" in section 197 of the Code of Criminal Procedure. Section 197 operates as a bar to a prosecution of such members while acting or purporting to act in the discharge of their official duty except with the previous sanction of the Local Government.

This bar, however, does not operate with regard to an offence committed by such members after the final publication of the electoral roll when the committee ceases to function.

### CRIMINAL REVISION.

This Rule was obtained by five accused persons to show cause why the proceedings pending against them under section 28 of the Bengal Municipal Act and sections 193 and 465 of the Indian Penal Code should not be quashed. The other material facts and arguments appear fully from the judgment of the Court.

\*Criminal Revision, No. 465 of 1934, against the order of B. K. Banerji, Magistrate, First Class, Chittagong, dated April 27, 1934.

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*Narendrakumar Basu* and *Manowar* for the petitioners Nos. 1 to 3.

*A. K. Fazlul Huq* and *Abul Kasem Khan* for the petitioners Nos. 4 and 5.

*S. N. Banerjee*, *Jaygopal Ghosh* and *Anilkumar Das Gupta* for the opposite party.

*Cur. adv. vult.*

KHUNDKAR J. This is a Rule obtained at the instance of five persons, of whom petitioner No. 1 Moulvi Nur Ahmad is the Chairman of the Chittagong Municipality, petitioner No. 2, Babu Mahendrachandra Das, is a commissioner of the Chittagong Municipality, petitioner No. 3, Moulvi Mahammad Nasir, is also a commissioner of that municipality, petitioner No. 4, Moulvi Hefazatur Rahman, is a tax *dâroga* of that municipality and petitioner No. 5, Munshi Ashraf Ali, is a clerk of that municipality.

It appears that, under the provisions of section 21 of the Bengal Municipal Act, (Bengal Act XV of 1932) as amended by Bengal Act IX of 1933, the petitioners Nos. 1 to 3 were appointed as a committee for the purpose of preparing and publishing an electoral roll of persons qualified to vote. An electoral roll was prepared by the petitioners Nos. 1 to 3, assisted, it is alleged, by the petitioners Nos. 4 and 5, and was published as the final electoral roll on the 14th February, 1934. On the 20th February, 1934, a petition of complaint, which bore the date 14th February, 1934, was presented by Babu Jogeshchandra Sen, a *mukhteâr* and a municipal voter, in the court of a magistrate, Mr. B. K. Mukherji. The petition contained allegations against a number of persons, including the petitioners, and prayed for summonses against them. The allegations, which it is necessary to consider for the purposes of this Rule, may conveniently be referred to here. In paragraph 5 of the petition of complaint, it was alleged that the accused persons, acting in concert, had, by improper, dishonest and fraudulent means, procured the entry,

in the finally published electoral roll, of the names of persons who were not legally eligible to vote, and had wilfully and improperly omitted from the electoral roll the names of certain other persons. In paragraph 6 of the petition, it was alleged, that the petitioners before us had fraudulently and dishonestly altered the electoral roll, after its final publication, by inserting certain names therein without lawful authority.

The magistrate, Mr. B. K. Mukherji, directed another magistrate, Moulvi Salamatulla Chaudhuri, to hold an enquiry into the matter and to make a report. On the 27th April, 1934, the magistrate, after perusing the report, submitted by Moulvi Salamatulla Chaudhuri, and after hearing the parties, recorded an order to the effect that he was of opinion that a *prima facie* case of offences under section 28 of the Bengal Municipal Act and sections 193 and 465 of the Indian Penal Code had been disclosed, and ordered summonses to issue accordingly. It is against that order that this Rule is directed, and we are invited by Mr. Basu, appearing for the petitioners Nos. 1 to 3, and by Mr. Fazlul Huq, appearing for petitioners Nos. 4 and 5, to quash the proceedings, for reasons which may be briefly enumerated.

Firstly, on behalf of all the petitioners, it was argued that section 28, sub-section (1) of the Bengal Municipal Act has no application to the facts alleged.

Secondly, on behalf of the petitioners Nos. 1 to 3, it was argued that they are not municipal officers, servants or polling officers, and are, therefore, not hit by section 28, sub-section (2) of the Act. In support of the first and second arguments, reliance was placed upon the case of *Hemchandra Das v. Subodhchandra Das Gupta* (1) and the case of *Satyacharan Mukherji v. Krishnamohan Banerji* (2).

Thirdly, it was argued, also on behalf of the petitioners Nos. 1 to 3, that they were public servants not

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(1) (1933) I. L. R. 61 Calc. 361. (2) (1934) Cr. Rev. 418 and 457 of 1934 decided by Guha and Bartley JJ. on the 8th June.

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removable from their offices save by or with the sanction of the Local Government, that the acts alleged against them, if committed at all, purported to have been done in the discharge of their official duty, and that, therefore, by reason of section 197 of the Code of Criminal Procedure, no prosecution for a criminal offence was maintainable against them without the previous sanction of the Local Government, which had not in this case been obtained.

Fourthly, it was argued, on behalf of all the petitioners, that the allegations made against them did not disclose offences under section 193 or 465 of the Indian Penal Code.

Lastly, and this argument was advanced on behalf of petitioners Nos. 4 and 5 only, that they must have acted in what they did, under orders of the petitioners Nos. 1 to 3, and in concert with them, that, if the proceedings against the latter deserved to be quashed, the proceedings against the petitioners Nos. 4 and 5 could not be separately treated. This question would depend upon the facts which the prosecution are able to prove, and it might as well be stated here that we are not in a position to decide the question whether charges can be framed against these petitioners or not. It would be convenient to deal with the contentions above enumerated seriatim.

The first argument, which is on behalf of all the petitioners, must prevail. In our judgment, the language of section 28 of the Act indicates with reasonable clearness that the persons contemplated by the first sub-section are persons who fall outside the category of those who have to deal with the electoral roll in the course of their official duty. This view is in consonance with the interpretation put upon this sub-section in the case of *Hemchandra Das v. Subodhchandra Das Gupta* (1). Persons who deal with the electoral roll, in the course of their official duty, are embraced in the ambit of the second sub-section, which opens with the words "Every municipal officer

“or servant or polling officer”. This leads up to the second contention advanced in support of the Rule. It was argued, that, though the preparation and publication of the electoral roll was the business of the petitioners Nos. 1 to 3, they are not hit by the penal provision of section 28 (2) of the Bengal Municipal Act, inasmuch as they are not within the strict meaning of those terms, municipal officers, municipal servants, or polling officers. Before we examine this contention further, we are constrained to observe that no support for it is furnished either by the case of *Hemchandra Das v. Subodhchandra Das Gupta* (1) or by the case of *Satyacharan Mukherji v. Krishnamohan Banerji* (2). From the opening paragraph of the judgment in the former case it does not appear that the three petitioners therein were commissioners of the municipality. What is stated is that two of them were pleaders, and one a *tálukdár* and merchant, and that they were appointed by a committee, consisting of the chairman and two commissioners, under order 4 of the orders, issued under notification No. 5717M., dated the 1st December, 1932, as the revising authority to revise the Preliminary Electoral Roll. That rule, we are informed, is no longer in force. This being so, the ruling in that case, that a member of the revising authority was not a municipal officer or servant, is of no assistance to the petitioners before us. As regards the second case relied upon, a perusal of the judgment shows that, so far as the present argument regarding the applicability of section 28 (2) is concerned, it merely adopted the view expressed in the earlier case. That the petitioners in the former case were three persons appointed as a revising authority by a committee consisting of the chairman and two commissioners, and were not, as far as can be gathered, commissioners themselves, was a circumstance to which the attention of the court, which decided the second case, does not seem to have been invited. For this reason, we are not prepared to

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regard it as an authority in the special facts of the present case, for the argument here under examination. Whether the petitioners Nos. 1 to 3 come within the meaning of the expressions "municipal officer" "or servant or polling officer" is a question which must be determined upon the language of the statute itself. The words are not defined, but our attention has been invited by Mr. Basu to section 22 (1) (e) and sections 66, 67 and 540 of the Bengal Municipal Act. Section 22 (1) provides that a person shall not be eligible for election or appointment as a commissioner, if such person labours under certain disqualifications. One of these is described in clause (e) which runs as follows:—

is a municipal officer or servant or holds any office of profit under the commissioners.

Mr. Basu's argument is that, as the committee provided for in section 21 (2) must consist of the chairman and two commissioners who do not cease to be commissioners of the municipality by reason of their becoming members of such committee, the office of municipal officer or servant must necessarily be deemed to exclude the office which a person enjoys as member of the committee in question. It is difficult to see how this argument can be negatived, and, in our judgment, there is further security for it in the language of sections 66, 67 and 540. Section 66 makes provision for the appointment of subordinate officers, and sub-section (1) of the section is as follows:—

The commissioners at a meeting may, subject to the provisions of this Act and the rules made thereunder from time to time, determine what officers and what servants of the commissioners are necessary for the municipality, and may fix the salaries and allowances to be paid and granted to such officers and servants.

The officers and servants here contemplated are clearly regarded as the officers and servants of the commissioners. Section 67 provides for the appointment of officers of a superior order and mentions a secretary, an engineer, a health officer, and one or more sanitary inspectors. Here again it is the

commissioners who are, on a requisition by the Local Government, to appoint the officers mentioned. Section 540 enumerates the categories of persons connected with municipal administration who are to be deemed to be public servants, and the opening words of the section are :—

Every commissioner, every municipal officer and servant, every person employed for the collection of any municipal rate, tax, or fee and every person authorised by the chairman or the commissioners at a meeting or otherwise to do any act under this Act or any rule or bye-law made thereunder shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (Act XLV of 1860).

Effect must, therefore, be given to this contention of the petitioners Nos. 1 to 3, and we hold that the members of the committee contemplated by section 21 (1) are not municipal officers or servants within the meaning of sub-section (2) of section 28. It is nobody's case that they are polling officers. A prosecution for offences under section 28 of the Bengal Municipal Act is, therefore, not maintainable against petitioners Nos. 1 to 3.

The next argument divides itself into three branches, which may, for convenience, be separately considered.

Firstly, it is contended that, though not municipal officers or servants or polling officers, the petitioners Nos. 1 to 3 are nevertheless public servants. This proposition emerges with reasonable clearness from section 540 of the Act already referred to, as also from section 21, clause (1) of the Indian Penal Code and from the illustration thereunder. Secondly, it is said that these petitioners are not removable from their office as commissioners, save by or with the sanction of the Local Government. That this must be so is equally clear from the provisions of sections 61, 62 and 63 of the Act. Mr. Banerji, who appeared to show cause, attempted to meet this point by maintaining, that these petitioners were not removable in the manner provided for in those sections from their positions in the committee appointed under section 21 (1), and that, if they were removable from the committee at all, it could only be by the

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commissioners at a meeting, and, in support of this, he referred us to section 17 of Bengal Act III of 1897 (the Bengal General Clauses Act). Be that as it may, it is not to be denied that the members of the committee in question must be commissioners to begin with, and commissioners they certainly remain while exercising the functions of the committee. The third branch of the argument is that, in discharging the duties of the committee, the members thereof act or purport to act in the discharge of their official duty. The relevant words of section 197, Criminal Procedure Code, are as follows:—

When any person who is a judge within the meaning of section 19 of the Indian Penal Code, or when any magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Local Government.

Mr. Banerji's contention is that "official duty" must refer to duty properly attaching to the office from which only the Local Government or some higher authority can remove the officer or by sanction permit his removal. After anxious consideration, we are not prepared to give effect to such contention. It would, in our judgment, to a large extent, defeat the immunity from irresponsible, frivolous or vexatious prosecutions which the section extends to public servants, were we to interpret the words "official duty" in this narrow sense—for there are occasions when public servants are called upon to perform, and do properly and legally perform, the duties which do not fall strictly and literally within the tasks appertaining to the particular appointment or office which they may at the moment be holding. In our judgment, the functions of the committee, appointed under section 21 (1) of the Bengal Municipal Act, are covered by the expression "official duty" in section 197 of the Criminal Procedure Code, and as no person could be appointed to such a committee unless he was, in the first instance, a commissioner, an office from which his removal could be effected only by or with



the sanction of the Local Government, we are clearly of opinion that section 197 operates as a bar to any prosecution of the petitioners Nos. 1 to 3 for anything done while acting or purporting to act in the discharge of their official duty except with the previous sanction of the Local Government.

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Regard being now had to all that has been before stated, the conclusion to which we are led as regards the petitioners Nos. 1 to 3 is that no charge under section 28 of the Bengal Municipal Act is maintainable against them, and that, in so far as offences under sections 193 and 465 of the Indian Penal Code are concerned, the sanction of the Local Government is necessary before a prosecution can be proceeded with in respect of anything done or purporting to be done by them while acting as aforesaid. The acts to which these observations apply are those alleged in paragraph 5 of the petition of complaint referred to above. As regards the acts alleged in paragraph 6 of that petition other considerations arise.

It is conceded by Mr. Basu that the petitioners Nos. 1 to 3 ceased to function as the committee in question upon the final publication of the electoral roll. The acts, complained of in paragraph 6 of the petition, were acts said to have been done after the final publication of the electoral roll and had no reference to anything done by them while acting or purporting to act as aforesaid, and, therefore, do not attract the protection given by section 197 of the Criminal Procedure Code. Mr. Basu sought to contend that the making of entries at that stage was something which the petitioners were purporting to do as members of the committee. This, in our judgment, is to do violence to language. A person who makes a document with the intention of making it appear that it was made by some other person, or by the maker in some other capacity, may be pretending to be that other person, or pretending to act in that other capacity, but that is not, in our clear opinion, the connotation of the word "purport".

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It remains now, so far as all the petitioners are concerned, to consider the argument that the petition of complaint does not disclose offences under sections 193 or 465 of the Indian Penal Code. It is said, that the fabrication alleged does not fall within the meaning of the expression "to fabricate false evidence" in section 192 of the Indian Penal Code, for there is nothing to show that the intention was that the document in question, that is, the electoral roll, should ever be used in any judicial proceeding. We are not prepared at this stage to give effect to this argument. One of the purposes to which an electoral roll may very well be put is the furnishing of evidence in any dispute concerning the legality of an election which may come up for decision in a court of law. It is as yet too early to say that the prosecution will be unable to call any evidence to establish such an intention. As regards the charge under section 465 of the Indian Penal Code, Mr. Basu contended that the acts complained of did not amount to the offence of forgery defined in section 463 of the Indian Penal Code. His argument, as we apprehend it, was that these acts were not done with intent to cause damage or injury to the public or to any person. In our judgment, the allegations contained in the petition of complaint do amount, if true, to the charge of an act done with intent to cause injury to the public, or to some person or persons. Injury, which is defined in section 44 of the Indian Penal Code, "denotes any "harm whatever illegally caused to any person in "body, mind, reputation or property" and is sufficiently wide to cover some at least of the consequences which might follow upon the fabrication alleged in the complaint.

In the result, we are not prepared to hold that no offences under section 193 or section 465 have been disclosed in the allegations made against all the petitioners. As regards the petitioners Nos. 1 to 3 we would repeat that for the reasons already stated, no prosecution for offences under section 28 of the Bengal Municipal Act is maintainable, and no prosecution

for any acts which these petitioners did, while acting or purporting to act in the discharge of their official duty, is maintainable in the absence of the previous sanction of the Local Government, and the Rule so far as all these charges against them are concerned must be made absolute.

As regards the petitioners Nos. 4 and 5, the fact that they acted under the orders of petitioners Nos. 1 to 3, or in concert with them, affords them no immunity from prosecution, and for this no previous sanction of the Local Government is necessary in their case. It is further apparent that they come within the contemplation of section 28 (2) by the penal provision of which they may be affected.

The Rule is discharged against the petitioners Nos. 4 and 5. As regards petitioners Nos. 1 to 3, the Rule is made absolute in so far as it affects offences under section 28 of the Bengal Municipal Act, and the offences alleged to have been committed by them while acting or purporting to act as aforesaid before the electoral roll was finally published, and it is discharged to the extent of the charges under sections 193 and 465 of the Indian Penal Code adumbrated in paragraph 6 of the petition of complaint. The proceedings against these three petitioners for all the offences alleged to have been committed by them while acting or purporting to act as aforesaid before the electoral roll was finally published and for offences under section 28 of the Bengal Act XV of 1932 as amended by Act IX of 1933 are hereby quashed.

The proceedings against the petitioners Nos. 4 and 5, and the proceedings for offences under sections 193 and 465 of the Indian Penal Code against the petitioners Nos. 1 to 3, which are alleged to have been committed by them after the final publication of the electoral roll, will proceed to be heard according to law.

LORT-WILLIAMS J. I agree.

*Rule absolute in part.*

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