CIVIL REVISION.

Before R. C. Mitter J.

PHANIBHOOSHAN SEN

v.

SANATKUMAR MAITRA.*

1935

July 22, 24.

Municipality—Election petition—Municipal election—Procedure—Review, if applicable—Code of Civil Procedure, if applicable—Code of Civil Procedure (Act V of 1908), ss. 4, 115 ; O. XLVII—Bengal Municipal Act (Beng. XV of 1932), ss. 22 (2) 36, 37, 38 (d), 41, 44 (f), 46, 50—Rule 5 under section 44 (f) of Bengal Municipal Act (Beng. XV of 1932).

Rule 5 of the Rules framed by the Local Government under section 44 (*f*) of the Bengal Municipal Act of 1932 makes the procedure of the Code of Civil Procedure (including the provisions for reviews thereunder) applicable to trials of election petitions by the District Judge under the Act.

In such trials, the District Judge is the presiding judge of the principal civil court of original jurisdiction in the district.

Naranarayan Mandal v. *Aghorechandra Ganguli* (1) referred to.

In such trials, the District Judge can entertain an application for review of the order or the judgment, even after the publication of the result of the election in the "Calcutta Gazette" under section 50 of the Act ; and, further, he can, under section 38 (*d*) of the Act, again go into the question of the validity of the nomination paper of the candidate (notwithstanding a decision by the Chairman and the District Magistrate of the same being in order), and can also go into the grounds mentioned in section 22, sub-section (2) of the Act.

In the Matter of the Petition of *Hadjee Abdoollah. Reasut Hossein* v. *Hadjee Abdoollah* (2) referred to.

Framros Dosabhai v. *Dalsukhbhai Fulchand* (3) distinguished.

CIVIL RULE.

The petitioner and the opposite parties were candidates for election as commissioners of the Rajshahi municipality. The nomination paper of the petitioner was found to be in order by the Chairman, although it was objected to on the ground that

*Civil Revision, No. 797 of 1935, against the order of S. S. R. Hattiangadi, District Judge of Rajshahi, dated May 13, 1935.

(1) (1935) I. L. R. 63 Cal. 136. (2) (1876) I. L. R. 2 Cal. 131 ; L. R. 3 I. A. 221.

(3) (1920) I. L. R. 45 Bom. 972.

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he was convicted under section 420 of the Indian Penal Code about two years before the municipal election. But, as the certified copy of the order of conviction was not produced, the Chairman held that the nomination paper was in order. The District Magistrate also refused to modify the Chairman's scrutiny. Thereafter, opposite party filed the election petition before the District Judge of Rajshahi, setting out the ground that the petitioner was not qualified to stand for election under the provisions of section 22(*2*) of the Bengal Municipal Act of 1932. But during the trial of the election petition, the opposite party failed to obtain from the Local Government an expression of its opinion as to whether the aforesaid conviction of the petitioner involved moral turpitude, and so the election petition was dismissed and the name of the petitioner was published in the "Calcutta Gazette" as one of the elected commissioners of the Rajshahi municipality. Thereafter the Local Government wrote a letter to the Commissioner of the Rajshahi Division stating therein that the conviction of the petitioner of the said offence involved moral turpitude. Upon the opposite party coming to know of this fact, he made an application to the District Judge for reconsideration of the previous order, which application was treated as an application for review. Then the learned District Judge set aside the petitioner's election. Hence the petitioner moved the Honourable High Court against that order and obtained this Rule.

Shishirkumar Ghosh and *Rabeendranath Bhattacharjya* for the petitioner.

Surajitchandra Lahiri for the opposite party.

Cur. adv. vult.

R.C. Mitter J. The petitioner and opposite parties Nos. 1 and 2 stood as candidates for election as commissioners from ward No. 5 of the Rajshahi municipality.

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The election was held on the 28th March, 1934, and the petitioner was declared elected. He filed his nomination paper on the 26th February, 1934. It was scrutinised by the Chairman on the 3rd March, 1934, and was found to be in order. At that time, an objection was raised to the effect that he was not eligible for election on the ground that he had been convicted about two years ago under section 420 of the Indian Penal Code and sentenced to a fine of Rs. 500, and detention till the rising of the court. However the certified copy of the judgment of the magistrate was not produced at the time, with the result that the Chairman held that his nomination paper was in order. Against the action of the Chairman a petition was filed before the District Magistrate of Rajshahi, but the latter refused to enter into the merits of the petition, throwing it out on the ground that it was unstamped.

On the 6th April, 1934, opposite party No. 1 filed an election petition before the District Judge of Rajshahi and the only ground which was persisted in was that the petitioner was not qualified to stand for election by reason of the provisions of section 22, sub-section (2) of the Bengal Municipal Act (Bengal Act XV of 1932). That sub-section is in these terms :

> If any person is or has been convicted by a criminal court of any such offence as in the opinion of the Local Government involves moral turpitude and which carries with it a sentence for transportation or imprisonment for a period of more than six months such person shall not, unless the offence of which he was convicted has been pardoned, be eligible for election or appointment for five years from the date of the expiration of the sentence :
>
> Provided that, on an application made by a person disqualified under this sub-section, the Local Government may remove the disqualification by an order made in this behalf.

An offence under section 420 of the Indian Penal Code carries with it a sentence of imprisonment for more than six months, for the maximum sentence on conviction is seven years. The question, therefore, is whether the conviction under section 420 of the Indian Penal Code involves moral turpitude, and whether it

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involves moral turpitude or not is made to depend solely upon the opinion of the Local Government.

The election petition remained pending before Mr. S. K. Haldar, District Judge of Rajshahi, for a number of months and during that time the opposite party No. 1 tried his utmost to obtain from the Local Government an expression of its opinion as to whether the conviction under that section involved moral turpitude. Letters were written and memorials sent, but the letter communicating the opinion of the Government did not reach him in time with the result that Mr. Haldar did not give further time and dismissed the election petition on the ground that the opinion of the Local Government that the said conviction involved moral turpitude had not been produced before him. Thereafter, a notfication was issued in the "Calcutta Gazette" publishing the result of the general election of the Rajshahi municipality, and the name of the petitioner along with the names of all the other commissioners elected at the general election was mentioned therein.

On the 10th January, 1935, the Local Government wrote a letter to the Commissioner of the Rajshahi Division, wherein it was stated that conviction of the petitioner of the said offence involved moral turpitude. On the contents of the said letter being made known to the opposite party No. 1, he made an application to the District Judge for reconsideration of Mr. Haldar's order. The said application was treated as an application for review made on the ground of discovery of new and important evidence by Mr. Hattiangadi, District Judge of Rajshahi, who succeeded Mr. Haldar, and has been granted by him. By order dated the 16th May, 1935, Mr. Hattiangadi has set aside the petitioner's election. The petitioner moved against this order and obtained the Rule.

In my judgment, notwithstanding a decision by the Chairman or the District Magistrate that the nomination paper of a candidate for election is in

order, the District Judge, in considering an election petition, can go into the question again. Section 38 (*d*) is explicit on the point. I do not, therefore, see my way to accede to the contention of the petitioner that it was not open to the opposite party No. 1 to urge before the District Judge the grounds mentioned in section 22, sub-section (*2*).

A point of greater importance has, however, been raised on behalf of the petitioner in this Rule. It is that the learned District Judge had no power to review an order made under section 37, be it an order confirming or amending the declared result of an election or setting the election aside. A subsidiary point has been raised, namely, that even if such an order can be reviewed by the District Judge, the District Judge has no power to admit an application for review or set aside an election after the publication of the result of the election in the "Calcutta Gazette". In my judgment there is no substance in the last mentioned point. Section 50 is the section which deals with the publication in the "Calcutta Gazette". It is the last step of an election. It is only after publication in the "Calcutta Gazette" of the names of elected and appointed commissioners that the commissioners are to meet and, within 21 days of such publication, the chairman is to be elected by them (section 45). The Act does not contemplate that the publication in the "Calcutta Gazette" of the names of the commissioners elected is to be after all disputes about the validity of a particular election has been settled. It, on the other hand, contemplates that the commissioners are to carry on their functions notwithstanding that the election of some or all of them may be under challenge in proceedings taken under section 36 of the Act (section 41). The publication in the "Calcutta Gazette" of the name of a person as an elected commissioner does not, in my judgment, prevent proceedings for setting aside his election being taken or continued before the District Judge.

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The principal question raised in the Rule must now be considered. The District Judge who has to hear an election petition is not a *persona designata*. He is the presiding judge of the principal civil court of original jurisdiction in the district. *Naranarayan Mandal* v. *Aghorechandra Ganguli* (1). By reasons of section 4 of the Code of Civil Procedure and section 37 of the Bengal Municipal Act, the Civil Procedure Code does not *ex proprio vigore* apply. The Local Government, however, by virtue of the powers conferred on it by section 44 (*f*) of the Bengal Municipal Act, may prescribe rules of procedure in relation to election petitions. Rule 5 of the rules so prescribed is relevant. It runs thus:—

> Every election petition shall be enquired into by the judge, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits; provided that it shall not be necessary for the judge to make a memorandum of the substance of the evidence of any witness examined by him.

Whether a civil court or a public officer, exercising judicial functions, has inherent power to review its or his judgment or order is a question on which divergent views have been expressed [see the cases collected in *Hiralal Mukerji* v. *Premamoyee Debi* (2) and *Baijnath Ram Goenka* v. *Nand Kumar Singh* (3)], but so far as this case is concerned it is not necessary to decide the said question, for, in my judgment, the power of reviewing his order or judgment has been conferred on the judge dealing with an election petition by the aforesaid statutory rule. Rule 5, which I have quoted above, in my judgment, imports section 114 and Order XLVII of the Code of Civil Procedure and all rules of procedure contained therein relating to suits which are consistent with the provisions of the Bengal Municipal Act. Nor do I think that sub-section (4) of section 37, which gives to the order of the judge a finality, excludes the power of the judge to review his own order. The word "final" used there means that the order is a

(1) (1935) I. L. R. 63 Cal. 136. (2) (1905) 2 C. L. J. 306.

(3) (1907) I. L. R. 34 Cal. 677.

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non-appealable one. *Matangini Debi* v. *Girish Chunder Chongdar* (1); *Hiralal Mukerji* v. *Premamoyee Debi* (2). In the case of *In the Matter of the Petition of Hadjee Abdoollah. Reasut Hossein* v. *Hadjee Abdoollah* (3), the donee, upon the refusal of a sub-registrar to register a deed of gift, the execution of which was denied, applied to the Zilla Judge under section 73 of the Indian Registration Act of 1871 for an order on the Sub-Registrar to register it. The Zillah Judge, Mr. Taylor, after taking evidence, came to the conclusion that execution had not been proved. He, accordingly, refused the application. An application for review on the ground of discovery of new and important evidence was made to his successor-in-office, Mr. Craster, and was granted. In revision, the High Court set aside the order granting review, on the ground that the Zillah Judge had no jurisdiction to review an order passed by him and, thereupon, an appeal was taken to Her Majesty in Council. Sir James Colvile first pointed out that the order of the Zillah Judge either granting or refusing the application in such proceedings was final so far as that court was concerned, and, although passed not in a suit but in a miscellaneous proceeding of a summary nature, was to all intents and purposes a decree as defined in the Civil Procedure Code. He then noticed the provisions of section 38 of Act XXIII of 1861, which defined the procedure to be followed by the Zillah Judge in such cases. That section is in the following terms:—

> That the procedure described by Act VIII of 1859 (Civil Procedure Code) shall be followed as far as capable in all miscellaneous cases and proceedings which after the passing of the Act shall be instituted in any court.

Sir James Colvile then remarked as follows:—

> This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the Registration Act the whole procedure of Act VIII of 1859, including a power of admitting a review.

It is urged that the view that I am taking is inconsistent with the judgment of the Bombay High

(1) (1903) I. L. R. 30 Cal. 619.
(2) (1905) 2 C. L. J. 306.
(3) (1876) I. L. R. 2 Cal. 131; L. R. 3 I. A. 221.

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Court in the case of *Framros Dosabhai* v. *Dalsukhbhai Fulchand* (1). I do not think so. That case is, as I shall indicate later on, a peculiar case, but, even if the observations made therein by Macleod C.J. be held to be laying down general principles of interpretation, I should say that, regarded as such, they are inconsistent with the observations of the Judicial Committee in *Reasut Hossein's* case (2), a case not cited before the learned Judges of the Bombay High Court, and so should be discarded.

In that case, however, a landlord instituted proceedings under Chapter VII of the Presidency Small Causes Courts Act for recovery of possession of property in the possession of a sub-tenant. The Bombay High Court had held in the past that such proceedings are not suits. The second judge of the Small Causes Court, Mr. Tyabjee, ordered the sub-tenant to vacate. The sub-tenant thereafter applied for review on the ground of discovery of new evidence. The application for review was rejected, the judge holding that he had no such power. The High Court was moved and Macleod C.J., in the course of his judgment and in construing section 48 of the Presidency Small Causes Courts Act, made the following observations: —

"I think that that section means that in the proceedings themselves under the chapter the provision of the Code shall apply as far as possible, that is to say, until an order is made granting or dismissing the application, and while any further proceedings which might become necessary in execution of the order are being taken. To go a step further, by stating that any other provisions of the Code with regard to appeals or reviews apply, would not, I think, be warranted by the words of the section.

Section 48, which is in Chapter VII, runs thus:—

"In all proceedings under this chapter, the Small Cause Court shall, as far as may be and except as herein otherwise provided, follow the procedure prescribed for a court of first instance by the Code of Civil Procedure.

It was pointed out in that case that the proceedings under Chapter VII are summary proceedings and do not finally determine the rights

(1) (1920) I. L. R. 45 Bom. 972, 980. (2) (1876) I. L. R. 2 Cal. 131; L. R. 3 I. A. 221.

of the parties, for a party aggrieved can file a suit in the High Court, and the words "so far as may be" used in the section have in view the summary nature of the proceedings. The words "except as herein "otherwise provided" have in contemplation the rules framed by the High Court under section 9 (*1*) of the Act. It was pointed out that the provisions of section 114 and Order XLVII of the Civil Procedure Code do not apply to suits instituted in Presidency Small Cause Courts, they being expressly excluded by section 8 and Order LI of the Civil Procedure Code, and the High Court of Bombay had not made provisions for review of judgments in such suits in the rules framed under section 9 (*1*) of the Presidency Small Causes Courts Act. Fawcett J., who agreed with Macleod C. J. in discharging the Rule, in my judgment, sounded the correct note, when he said that, when applications for review are not admissible in *suits* filed in the Presidency Small Cause Court, it would be unreasonable to hold that such applications are admissible in summary proceedings in the same court taken under chapter VII of the Act. He rightly said that the provisions of section 8 and Order LI of the Civil Procedure Code furnished the clue to the interpretation of section 48 of the Presidency Small Causes Courts Act and that the legislature never intended by that section to confer a power of review in cases coming under Chapter VII. Having regard to these special circumstances, I do not think that the decision given in *Framroz Dosabhai's* case (1) on the construction of section 48 of the Presidency Small Cause Courts Act lays down any general principles of interpretation or can be invoked to interpret rule 5 of the rules framed by the Local Government under section 44 of the Bengal Municipal Act. For these reasons I hold that the District Judge had power to review his order passed under section 37 of the Bengal Municipal Act, and I must discharge the Rule, subject to one variation in the

(1) (1920) I. L. R. 45 Bom. 972.

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order made on the 16th May, 1935. The learned District Judge had allowed Rs. 80 as pleader's fee to the opposite party No. 1. Mr. Haldar, when he dismissed the opposite party No. 1's application, allowed against him Rs. 16 only as pleader's fee. None of the parties were responsible for the way the proceedings took. It was all due to the delay in the transmission of the letter of the Local Government, wherein it had expressed its opinion on the nature of the offence of which the petitioner had been convicted. In these circumstances, I am of opinion that it would be proper to allow to the opposite party the sum of Rs. 16 only as pleader's fee. Subject to this modification, the order of Mr. Hattiangadi dated the 16th May, 1935, is affirmed and this Rule is discharged with costs. Hearing fee one gold mohur.

Rule discharged.

A. K. D.