

## ORIGINAL CIVIL.

Before McNair J.

SHARFUDDIN AHMAD

v.

SHAMSUL HUQ.

1940

May 8, 9, 10,  
13, 15.

**Election petition**—*Recount and scrutiny—Particulars of votes rejected—  
Calcutta Municipal Act (Ben. III of 1923), ss. 46, 47.*

The Calcutta Municipal Act does not contemplate a recount and scrutiny of votes. An order for recount cannot be obtained in an election petition under ss. 46 and 47 of the Act.

To obtain an order for recount, specific instances with particulars of votes rejected must be given.

## ELECTION PETITION.

This was a petition by an unsuccessful candidate in the Calcutta Municipal election for an order that the ballot papers in relation to the election be recounted and the rejected ballot papers be re-examined and for a declaration that the election of the respondent was invalid. The reliefs he claimed were based on the following grounds:—

(i and ii) The respondent was not eligible for nomination and in consequence his nomination was invalid.

(iii) The appointment of the returning officer was objectionable.

(iv to ix) The election of the respondent was vitiated by corrupt practice within the meaning of Part I, Sch. II, of the Act.

(x) The respondent's election was materially affected by improper reception of votes.

(xi) The respondent's election was materially affected by refusal of votes particulars whereof were—

(a) Six or more ballot papers though valid were rejected.

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(b) Votes cast in favour of the petitioner at polling stations other than those of the constituency from which the respondent was elected and properly transferred were not counted.

(c) Refusal of the returning officer to afford opportunity for inspecting ballot papers in accordance with rule 42(c) of the Government order for conduct of elections.

(d) The returning officer refused to place the ballot papers face upwards contrary to established practice.

*B. C. Ghose and P. B. Mukharji* for the respondent. I raise a preliminary objection by way of demurrer, namely, the petitioner is not entitled to a recount.

1. Right of recount and scrutiny is not available under the Calcutta Municipal Act. Where the right of recount is claimed, such right must be specifically and expressly conferred by the statute, which alone creates and regulates rights in respect of an election. Right of scrutiny is given in s. 39 of the Bengal Municipal Act. Right of scrutiny is necessarily implied where a general right to complain against under return is given by statute, as for instance in s. 5 of the English Parliamentary Elections Act, 1868 (31 & 32, Vict. c. 125). Calcutta Municipal Act significantly excludes any such or similar provision and, therefore, such a right should not be given in respect of an election held under the Calcutta Municipal Act.

2. Right of recount and scrutiny is a counterpart of a simultaneous right to claim a seat. If the Court cannot declare the person who gets the larger number of votes on recount and scrutiny to be duly elected, the right of recount is useless. Under the Calcutta Municipal Act the Court has no power

to declare a person elected to seat. *Mitchell v. J. C. Dutt* (1); *Halifax Borough Case* (2).

3. Sections 46 and 47 of the Calcutta Municipal Act do not specify a claim for a recount as one of the grounds on which an election petition can be tried. The words "improper reception or refusal of a vote" in those sections unmistakably indicate a specified vote. It is open to the aggrieved petitioner to challenge certain specified votes and seek to set aside an election on that ground, but that does not entitle him to a general recount and scrutiny so that he may have a roving inspection of the ballot papers.

*S. C. Bose, Barwell and Jyoti P. Mitter* for the petitioner. Right of recount is not a substantive right, but an adjective right in aid of a claim to set aside the election and, therefore, need not be specifically provided for in the Act.

The English law or statute has nowhere clearly or expressly conferred the right of recount to a petitioner and yet the English Courts or election tribunals have consistently recognised and granted this right to an aggrieved petitioner. The English Ballot Act, 1872, has nowhere provided expressly for a right of recount.

To deny the right of recount is to reduce the law relating to election petitions to an absurdity. In a case where the returning officer deliberately miscounts and declares a person elected, who has got lesser number of votes than his rival, is there no remedy? I say s. 46 of the Calcutta Municipal Act makes ample provision. It provides for the case where "the validity of any election is questioned..... for any other cause".

I further rely on the passages in Hammond's "The Indian Candidate and Returning Officer" at p. 173: "A petition for recount or scrutiny should ordinarily only be presented in case of a very narrow majority" and at p. 174: "A petition for

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(1) (1927) I. L. R. 55 Cal. 173.

(2) (1893) 4 O'M. &amp; H. 203.

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"recount of votes where it is believed that recounting "has been carelessly done": *Madura* Case (1); *Tanjore* Case (2); *M. Lakshumanayya v. S. Rajam Ayyar* (3).

Right to a declaration of seat is not inseparably linked to a right of recount. The procedure of recount is open to every petitioner in an election dispute.

*Ghose*, in reply. In *Madura* and *Tanjore* cases the petitioners had the right to claim the seats. There is no such right here.

McNAIR J. This is a petition by the defeated candidate in Mahomedan constituency Taltala, Ward No. 14, who polled 304 votes.

The respondent who was elected polled 312 votes, and his election was published in the "Calcutta Gazette" on April 4.

A preliminary question has been argued by way of demurrer, namely, whether the petitioner is entitled to a recount, and by a recount is meant not merely the counting of votes to check the arithmetic of the returning officer, but a scrutiny as well to review his finding as to the validity of the ballot papers.

In the earlier paragraphs of the petition it is alleged that the appointment of the returning officer was open to objection and that he was guilty of malpractices.

The first three grounds have been abandoned, but Mr. Bose for the petitioner states that he abandoned ground No. 3 so far as it related to the appointment of the returning officer, but did not intend to abandon his contention that the returning officer had been a party to divers malpractices and breaches of the relative rules.

(1) (1924) *Hammond's Election Cases*, p. 501.

(2) (1921) *Hammond's Election Cases*, p. 674.

(3) [1930] A. I. R. (Mad.) 195.

In ground No. (xi), further charges have been made against the returning officer that he improperly refused certain votes. Ground (xi), sub-para. (b) has been abandoned.

Sub-paras. (c) and (d) purport to be particulars of improper refusal of votes. They are in fact vague allegations that the returning officer did not allow the inspection contemplated by the rules and that the returning officer did not observe what the petitioner alleges to be the established practice of placing the ballot papers face upwards on the table.

The petition is supported by an affidavit of Syed Mahomed Yusuf, who states that six ballot papers [presumably those referred to in Ground (xi), sub-para. (a) of the petition], which were valid and in favour of the petitioner, were improperly rejected and that the returning officer refused to give the petitioner or his representative reasonable opportunity to inspect the ballot papers and refused to recount them when requested to do so.

These apparently constitute the alleged malpractices and the breaches of the rules on which the petitioner still seeks to rely.

Two questions have been argued: (1) whether relief by way of a recount is contemplated by the Calcutta Municipal Act and (2) if such relief is permissible, do the facts alleged justify a recount?

There is no doubt that the Calcutta Municipal Act does not contain any provision which enables an unsuccessful candidate to claim the seat, and so far as I have been able to discover from the decided cases both in England and in India, a recount is always coupled with scrutiny and the right to recrimination, on the result of which the unsuccessful candidate may be declared duly elected.

It is equally clear that the English Acts and Rules dealing with elections, and the various Indian Acts of a similar nature to which my attention has been directed, other than the Calcutta Municipal Act, give

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the unsuccessful candidate the right to claim the seat if the circumstances justify it.

Mr. S. C. Bose relies on s. 47 (1) (c) of the Calcutta Municipal Act, which provides, so far as is material, for the avoidance of the election if there has been improper reception or refusal of a vote, and the question arises whether that provision contains the same principle and by implication empowers the Court to embark on the procedure of a recount.

The provisions of that Calcutta Municipal Act relating to elections have been drafted somewhat differently to the provisions of other Acts dealing with the same subject and the difficulty of construing ss. 46 and 47 has been referred to in previous decisions of this Court.

Section 46 provides that if the validity of an election is questioned by reason of a corrupt practice, or the improper rejection of a nomination, or the improper reception or refusal of a vote or for any other cause, an application may be made to the High Court.

Section 47 provides that if the High Court is satisfied on certain specified points, the election is null and void. Some difficulty has been experienced in ascertaining what are those points owing to exceptions imported by reference to s. 46. Provisions of a somewhat similar nature are contained in the English and Indian Acts and Rules, but in every case they contain a further provision entitling the defeated candidate to claim the seat. This additional provision is of importance, for all the decided cases and the extracts from the text books to which I have been referred, are dealing with acts and rules which enable the seat to be claimed, and the claim to the seat can be confined to a recount.

The question then resolves itself into the following: Is the right to a recount a right which is so closely linked to the claim to the seat, that when the legislature excluded from the Calcutta Municipal

Act the right to claim the seat, it also excluded the right to a recount?

Admittedly this Court, sitting as an election Court, exercises a special jurisdiction which is the creature of statute, and the rights of the parties must be found within the four corners of the statute, and no right which is not so found can be imported.

By s. 47(1)(c) of the Calcutta Municipal Act, the election is void if it has been materially affected by improper reception or refusal of a vote, and it is argued that the Court cannot form an opinion as contemplated by the section unless it investigates the charges under this head and one of the most expeditious ways of investigating the charge is by a recount. True, that method is a convenient form of procedure, which might be adopted, if permitted, but it is not the only form of procedure by which the result can be obtained, and the question for determination is whether the Calcutta Act empowers the Court to adopt it.

Mr. Bose for the petitioner argues that the right to a recount is a right entirely separable from the claim to the seat and a form of procedure to which every petitioner in an election dispute is entitled. In support of this argument he refers to "The Indian Candidate and Returning Officer" by Sir Laurie Hammond which was published in 1923. On p. 174, the learned author says: "From the above and a perusal of the rules quoted it will be seen that there are five kinds of election petitions." The third kind, under heading "C", which the learned author mentions, is "A petition for recount of votes where it is believed that the recounting has been carelessly done".

Rule 34 of the Electoral Rules referred to in Hammond's "The Indian Candidate and Returning Officer", gives the specific right to the candidate to claim the seat, and the extract from Sir Laurie Hammond's book on which Mr. Bose relies is dealing

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entirely with election petitions in which the petitioner has the right to claim the seat.

Reliance is placed on the *Madura* Case (1) where a recount was allowed.

Reliance is also placed on the *Tanjore* Case (2) where a recount was refused.

It is argued that in neither of these cases is it apparent that the seat was claimed. The reports are only fragmentary and in neither case do they state fully the relief sought. In the circumstances, that question remains at large, and to that extent the reports cannot be said to support Mr. Bose's argument.

And again, it must be remembered that in each of these cases the petitioner had a right under the relevant act to claim the seat.

Mr. B. C. Ghose, for the respondent, in support of the argument that the legislature has withheld in the Calcutta Act the right to a recount has contrasted the provisions of the Bengal Municipal Act of 1932 with the similar provisions of the Calcutta Municipal Act as amended up to 1939.

Sections 46 and 47 of the Calcutta Act, he argues, correspond to ss. 36 and 38 of the Bengal Act, but the Bengal Act by s. 38 entitled the Court, in addition, to hold a scrutiny and computation of votes and to declare as a result of such scrutiny, the candidate who has been duly elected.

Although Mr. Bose has nominally confined his argument to a recount, he admits that by a recount he does not mean to confine the procedure to a mere arithmetical check of the returning officer's figures. It implies, in addition, the careful checking of ballot papers and all the complicated procedure of a scrutiny and recrimination.

In my view, no such procedure can be allowed unless it is clear from the Act itself that such was

(1) (1924) *Hammond's Election Cases*, p. 501.

(2) (1921) *Hammond's Election Cases*, p. 674.



the intention of the legislature, and I can find no such provision in the Calcutta Municipal Act which even suggests that such was the intention.

If a recount were to be ordered, each party would be entitled to check the ballot papers and to have deducted from his opponent the votes which were held to be improperly admitted or rejected.

Pandit Nanak Chand, in his recent text book on the law and practice of elections and election petitions at p. 553, observes on the authority of the *Haliḥax* Case (1)—

A petition which claims a seat for a defeated candidate may be presented solely on the ground of scrutiny and recount.

And he continues :—

It is obvious that unless the petitioner claims to be duly elected, there can be no petition for scrutiny or recount. A right to ask for this relief only arises when the seat is claimed. Therefore, where the petitioner claims to have received a majority of lawful votes, a scrutiny of votes must take place in order to ascertain the truth of the allegation made.

The procedure of scrutiny and recounts appears to me to be inseparably linked to the claim to the seat. It enables a Court to review the decision of the revising officer as to the admissibility of the ballot papers with the object of further enabling the Court (as for instance under the provisions of s. 39 of the Bengal Municipal Act) to declare the candidate who is found to have the greatest number of valid votes in his favour to have been duly elected.

That power is not granted by the Calcutta Municipal Act, and, in my opinion, the right to a recount is also withheld. This by no means deprives the Court of the power under s. 47 to investigate the proper reception or refusal of a vote. That is part of the investigation in every case of personation or plural voting.

The second question is whether, assuming that a recount could be ordered, there were circumstances present which would justify such an order in the present case.

In my opinion there are not.

I have already referred to the manner in which the alleged malpractices of the returning officer have been set out in the petition.

(1) (1893) 4 O.M. & H. 203.

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According to the English practice as outlined in Fraser's "Law of Parliamentary Elections and Election petitions", the petitioner in order to obtain a scrutiny must claim the seat and must also give particulars.

The rule in regard to particulars was set out in the *Tanjore Case* (*supra*) and has been followed in a number of subsequent election cases. In the *Tanjore Case*, although the election was declared void, the prayer for a recount was refused. The Commissioners, in dismissing the application for a recount said:—

It rested on the nebulous allegation of the agents about the counting of batches of votes twice over and we therefore refused to grant an application of that nature on such slender materials. It is well established law that a recount will only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence.

Now what are the particulars given here? If ever there were nebulous allegations, they appear in this petition.

In ground (iii) there is a general charge of malpractices introduced in what was apparently particulars of a charge of illegal appointment of the returning officer.

Ground (xi) refers to the improper rejection or refusal of a vote and Mr. Bose for the petitioner now seeks to link it with the vague charge of malpractice alleged in the abandoned ground No. (xii).

Particulars in sub-paras. (c) and (d) of ground No. (xi) have not been given and I am not prepared to allow this matter to be agitated in the absence of specific grounds, and as stated in the *Tanjore case* reliable *prima facie* evidence.

The majority is admittedly a narrow one, namely, eight votes but that is only one of the fences which the petitioner would have to negotiate.

Sub-paragraphs (c) and (d) of ground (xi) are far too vague to justify a serious inquiry and they are deleted.

Sub-paragraph (a) alleges the illegal rejection of six votes. Again, no particulars are given other than those contained in the affidavit of Mahomed Yusuf.

Mr. Bose has argued, on the authority of the *Punjab North* Case (1), that in India the practice differs from that prevailing in England, and that the petitioner cannot be expected to furnish any definite particulars until he has scrutinised the ballot papers.

The Commissioners in the case of *Punjab North* sought to distinguish the *Tanjore* Case on the ground that there the recount was only asked for in the course of the inquiry, whereas in the case they were considering, the petition itself was chiefly for a scrutiny and recount. The recount claimed here is merely a method of obtaining evidence in support of a number of serious charges of which the petitioner has not given particulars.

Reference has also been made to *M. Lakshumanayya v. S. Rajam Ayyar* (2), a decision by a Judge of the Madras High Court on a revision petition from the decision of a Subordinate Judge. The learned Judge points out that in revision his sole duty was to see that the lower Court had not acted without jurisdiction and that there was no material irregularity.

In the course of his judgment he does, however, consider the principles and the evidence, on which the lower Court came to its decision, and he states :—

An overstrict insistence that an application should be supported by evidence of miscounting is therefore unwarrantable.

That remark is undoubtedly *obiter*, but it comes to no more than this that in each case the Court must consider the facts alleged and decide whether in the circumstances there are grounds for thinking that a miscount took place.

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(1) Hammond's Election Cases, p. 567.

(2) [1930] A. I. R. (Mad.) 195, 196.

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It is obviously undesirable that what have been termed "nebulous allegations" should be made for the sole purpose of obtaining a general scrutiny of the ballot papers.

It is true that the petitioner is not entitled in India to inspect the ballot papers without an order of Court, but he has some power of inspection while the votes are being counted.

While it is not expected that the precise particulars required by the English procedure should be given before a scrutiny, it is expected that there should be some specific instances and the Court in each case must decide whether the instances given would justify further consideration of the matter by way of scrutiny or recounting.

In the present instance the petitioner had sufficient inspection to know that the votes alleged to have been improperly rejected, were valid and were in favour of the petitioner, but he does not state whether the ballot papers to which he refers were marked "Rejected" as provided in para. 42(c) of the Government order; nor does he state whether the correctness of the rejection was questioned at the time or whether the grounds for rejection were recorded.

Were I of opinion that a recount was permissible under the Act, I should still hold that no recount should be ordered in this case for, in my opinion, the vagueness of the allegations would not in any event justify such an order.

The preliminary question is answered accordingly and a recount is refused.

*Petition dismissed.*

Attorney for petitioner: *S. C. Laha.*

A. C. S.