

ORIGINAL CIVIL.

Before McNair J.

GIRISH CHANDRA GHOSH

1940
April 29, 30.

v

SUDHIR CHANDRA RAY CHAUDHURI.*

Election petition—*Personation—Plural-councillor—Constituency—Challenge to election of one councillor—Other councillors from that constituency, if necessary parties—The Calcutta Municipal Act (Ben. III of 1923), ss. 46, 47.*

Where in an election petition under the Calcutta Municipal Act, challenging the election of a returned candidate on the ground that he abetted a personator in procuring a voting paper, there was no statement that the returned candidate had knowledge that the person applying for the voting paper was a personator, nor was there any statement that the returned candidate was instrumental in getting the personator to apply for a voting paper, the petition should be dismissed.

A returned candidate, who identified a person to whom the ballot paper had already been delivered, but whose right to vote was challenged, is not guilty of commission of corrupt practice under Sch. II, Part I, para. 3 of the Calcutta Municipal Act.

In an election petition challenging the election of one of two or more councillors to be elected by a constituency, all the councillors elected by that constituency must be joined as parties.

Rathischandra Munshi v. Anulyacharan Ghatak (1) relied on.

ELECTION PETITION.

The facts of the case will appear sufficiently from the judgment.

N. N. Bose and *A. C. Sircar* for the appellants.

B. C. Ghose, *S. C. Bose*, *S. R. Das*, *J. C. Moitra* and *P. B. Mukharji* for the respondent. I take two preliminary objections to this application. First, the petition does not disclose any cause of action. It does not state that the respondent abetted the personator in applying for a voting paper. What is alleged is that

*Election petition.

the respondent identified the alleged personator when he attempted to vote. Under para. 31 of the Government order issued under s. 44 of the Calcutta Municipal Act, 1923, as substituted by the Calcutta Municipal (Amendment) Act, 1939, an elector whose identity was challenged will be required to answer questions mentioned in the said order and in the event of his answer being in compliance with that order he will be supplied with the ballot paper. In this case that procedure was followed and the ballot paper having already been delivered to the alleged personator, before the respondent entered the polling booth, he could not have abetted in procuring a voting paper, and if he did not abet the procuring of the voting paper he was not guilty of corrupt practice of personation, Sch. II, Part I, para. 3 of the Calcutta Municipal Act. The applicants have not stated that the respondent knew that the person whose right to vote was challenged was a personator. Knowledge of the respondent is essential to bring the charge of corrupt practice home to him. *I. J. Cohen v. Bepin Behary Sadhukhan* (1). In the absence of such a statement in the petition or in the affidavits in support thereof the petition should be dismissed.

1940
 Girish Chandra
 Ghosh
 v.
 Sudhir Chandra
 Ray
 Chaudhuri.

Secondly, the application is bad as the other elected candidate has not been made a respondent in this application. Respondent has been elected from Ward No. III, which is a plural-councillor constituency. Two councillors are to be elected and if the election of one of such councillors is void and he is unseated then a fresh election will have to be held in that constituency. The election in such a constituency is a joint election. Under s. 47 (1), if the Court is of opinion that any returned candidate has committed a corrupt practice, his election shall be void and under s. 46 (2) if the Court declares an election null and void a fresh election shall be held. This latter section

1940
*Girish Chandra
 Ghosh*
 v.
*Sudhir Chandra
 Ray
 Chaudhuri.*

contemplates the challenge of the validity of the entire election in a constituency. In the circumstances, if the petitioner succeeds against the respondent, the election of both the returned candidates will have to be set aside. The other successful candidate not being before the Court, the application cannot proceed. *Rathischandra Munshi v. Amulyacharan Ghatak* (1).

N. N. Bose. The charge against the respondent is that he abetted a personator in procuring a voting paper. The respondent could have asked for particulars of the charge. From the facts set out in the petition it could not be said that the ballot paper had been handed over to the personator before the entrance of the respondent. The respondent identified the personator even after the petitioner had stated that he was acquainted with the person who was being personated. Under s. 47 (1), the election of the candidate guilty of corrupt practice shall be void; it does not say that the whole election in that constituency shall be void. Here there is no question of setting aside the entire election and the other successful candidate need not be joined as a party to this application.

B. C. Ghose, in reply.

McNAIR J. This is an application by three voters in Ward No. III of the Calcutta Municipality for an order that the election of Sudhir Chandra Ray Chaudhuri as a councillor for Ward No. III be declared null and void and that such election be set aside and for costs. One of the petitioners, Dr. Ghosh, was a candidate at this election. Ward No. III is Bartala General Constituency, which elects two councillors, and one of the seats is reserved for a member of the scheduled castes. The five candidates polled votes as follows:—the respondent Sudhir Chandra Ray Chaudhuri, 1945; Jogendra Nath Mandal, who is a

member of a scheduled caste, 1039; Radha Nath Das, also a member of a scheduled caste, 717; Dr. Girish Chandra Ghosh, 589 and Mr. Hari Das Saha, 418.

1940
*Girish Chandra
 Ghosh*
 v.
*Sudhir Chandra
 Ray
 Chaudhuri.*
McNair J

The election is called in question on the ground of a corrupt practice within the meaning of Sch. II, Part I of the Calcutta Municipal Act. It is alleged in the petition that, amongst voters on the electoral roll, was one Chuni Lal Bhattacharjya, that on March 28, 1940, the polling day, a fictitious person, alleging himself to be Chuni Lal Bhattacharjya, appeared and attempted to vote as Chuni Lal Bhattacharjya. He was challenged by Banku Behari Ghosh, polling agent of Dr. G. C. Ghosh, and then by Dr. Ghosh himself. Mr. Sudhir Chandra Ray Chaudhuri then entered the polling booth and identified the alleged imposter who was allowed to vote, after filling up the requisite form in which Dr. Ghosh undertook to prove the offence of personation and Mr. Chaudhuri signed as the identifier of the alleged impersonator of Chuni Lal Bhattacharjya. Paragraph 6 of the petition alleges that in the premises a corrupt practice under Sch. II, Part I of the Calcutta Municipal Act was effected by the successful candidate Sudhir Chandra Ray Chaudhuri in—

abetting the personator of the said Chuni Lal Bhattacharjya to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the said impersonator.

The alleged imposter recorded his vote.

The respondent has taken two preliminary objections. He alleges that the petition is incompetent because the proper and necessary parties have not been joined. He also contends that the petition does not disclose any cause of action and that it has failed to set out any corrupt practice which has been committed by the respondent. It is noteworthy that the petition has been signed by Dr. Ghosh, who has verified all the facts stated in the petition as true to his knowledge. In that petition he states that he also relies on his affidavit and on the affidavit of

1940
 Girish Chandra
 Ghosh
 v.
 Sudhir Chandra
 Ray
 Chaudhuri.
 McNaair J.

Banku Bihari Ghosh, who is his polling agent. In para. 4 of the petition, it is stated that Chuni Lal Bhattacharjya, the voter, had been residing for the past five months and was actually residing on March 28, 1940, at Kunda in Deoghar in the Santhal Parganâs and never attended the polling booth. In para. 6 of Dr. Ghosh's affidavit he states—

I learnt on enquiry that Chuni Lal Bhattacharjya left Calcutta about five months back and was staying at Deoghar.

So that apparently what has been stated in the petition as true to Dr. Ghosh's knowledge is in fact derived from information, without any statement as to who was the informant. In paras. 9, 10 and 11 of Dr. Ghosh's affidavit, he sets out at considerable length a long conversation which he had with Chuni Lal Bhattacharjya and with a *sarkâr*, named Jugal, neither of whom has made an affidavit. These allegations, in the absence of any affidavit by the informants, cannot be accepted.

The offence of personation is defined in Sch. II, Part I of the Calcutta Municipal Act, as—

The procuring or abetting or attempting to procure by a candidate or his agent, or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or by a person who has voted once at an election for a voting paper in his own name at the same election.

Nowhere in the petition or in the relevant portion of the affidavit in support is it stated that the respondent knowingly persuaded the imposter to obtain a voting paper. It is contended that the knowledge of the respondent is essential in order that a corrupt practice be proved. This view is supported by authority which I see no reason to disregard. It is also contended that knowledge should be alleged in the petition or affidavits in which the charge is made. It is true that the charge is not a criminal charge though it is possible that the facts if established might result in criminal proceedings. But it is, in my opinion, desirable that the charge

should be set out with all possible particularity specifying the elements which the petitioner undertakes to prove. It must be remembered, however, that the petition must be drafted and presented within eight days and if the nature of the charge is set out with sufficient clarity to enable the respondent to meet it, the Court would have a discretion considering the circumstances of each case to decide whether or not the plea should be allowed. Neither in the facts contained in this petition nor in those facts which are admissible in the affidavit in support is there any suggestion that the respondent knew that the impersonator was not in fact Chuni Lal Bhattacharjya.

There is a general allegation in para. 6 of the petition charging abetment of corrupt practice. I find the greatest difficulty in construing that paragraph. The corrupt practice in one place is stated to be abetting an impersonator to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the impersonator. So far as I can construe this paragraph the charge is that the respondent abetted the impersonator in procuring a voting paper. Looking then at the facts as set out by the petitioner it is quite clear that he did not allege that the respondent abetted the procurement of a voting paper. Paragraph 31 of the Government Order for the conduct of elections under the Act sets out the procedure when an elector whose identity is in doubt asks for a voting paper. The presiding officer or the polling officer may, and, if so required by the candidate or his election agent or polling agent, must put certain questions to the elector, so as, if possible, to establish his identity. If the elector gives the correct answer, he is supplied with a ballot paper. Now in the affidavit, Dr. Ghosh states that he entered the polling booth when his agent was challenging the identity of the alleged impersonator. Dr. Ghosh also challenged his identity and the respondent entered

1940

*Girish Chandra
Ghosh*

v.

*Sudhir Chandra
Ray
Chaudhuri.**McNair J.*

1940
*Girish Chandra
 Ghosh*
 v.
*Sudhir Chandra
 Ray
 Chaudhuri.*
McNair J.

the polling booth "at or about that time." Mr. Banku Bihari Ghosh, Dr. Ghosh's agent, in his affidavit says that he challenged the alleged impersonator, that Dr. Ghosh came in and challenged his right to vote as Chuni Lal Bhattacharjya. Immediately thereafter, says Mr. Ghosh, the candidate Sudhir Chandra Ray Chaudhuri entered and insisted on the presiding officer handing over the ballot paper stating that he was ready to identify the alleged impersonator.

It would appear that the ballot paper had already been delivered to the elector under para. 31 of the Government order but that his right to vote was challenged. If that is so, it cannot be stated that the respondent abetted procuring the ballot paper, and if he did not abet the procuring of the ballot paper, in my opinion, there was no offence under Sch. II, Part I. Schedule II, Part I, para. 3 makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. In Hammond's Indian Candidate and Returning Officer on page 148 it is pointed out that the offence of personation is complete when the person applies for a ballot paper. At the time when the person applied for the ballot paper the respondent was apparently absent.

Learned counsel for the petitioner has suggested that it is not clear from the affidavits that the ballot paper had been handed over to the voter prior to the entrance of the respondent. But on the facts, as set out in the petition and in the affidavit of the petitioner Dr. Girish Chandra Ghosh, that appears to me to be the fact. In any event, I am quite satisfied that the manner in which the charge has been set out in para. 6 of the petition is a charge which no respondent could or should be called upon to answer.

As I have already stated, there is no statement that the respondent had any knowledge that the alleged personator was not Chuni Lal Bhattacharjya, nor is there any suggestion or statement that the respondent

was instrumental in getting the alleged personator to apply for a voting paper in the name of some other person. On these grounds, I am satisfied that the petition should be dismissed.

The second ground which has been argued at some length is that the petition is bad for want of parties. The petition has to be filed within eight days of the publication in the Gazette. No amendment to the petition could now be allowed, and it is argued that the petitioner must in a constituency of this description apply for the entire election to be set aside, that is to say, for setting aside the election of both the candidates and not merely of one candidate. If he applies for the election to be set aside, the elected candidates should both be parties, and one of those elected candidates is not a party to this petition. Reliance is placed in this connection on the decision of an appellate Bench of this Court in *Rathischandra Munshi v. Amulyacharan Ghatak* (1). In that case both the candidates had been joined as parties, and the question arose as to whether the election of the successful candidate No. 2 should be set aside although no fault had been found against him. In the course of his judgment Suhrawardy J. said :—

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 the 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 piecemeal.

Another difficulty.....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.

1940

*Girish Chandra
Ghosh*
v.
*Suahir Chandra
Ray*
Chaudhuri.
—
McNair J.

1940

*Girish Chandra
Ghosh*

v.

*Sudhir Chandra
Ray
Chaudhuri.**McNair J.*

Costello J. who delivered a separate judgment on another point which is not relevant to this enquiry agreed with Suhrawardy J. on this point, and in the result the entire election was set aside.

Learned counsel for the respondent has pointed out that in this case Ward No. III is a constituency for which two persons must be elected and one of them must be from the Scheduled Caste, and he argues, in my opinion with considerable justification, that if one of the elected candidates were to be unseated that there should be a fresh election so that the electors might have an opportunity of deciding who were the two councillors whom they wished to represent them and the way in which they would give their votes.

An argument was also based on ss. 46 and 47 of the Calcutta Municipal Act, which have been the subject of much perplexity and of some comment in the cases which have come before this Court in the past. Many Judges have found the same difficulty, which I find, in trying to place a construction upon these two sections which is consistent with the clauses of both.

Section 46 (1) provides the occasions on which an application may be made to the High Court for hearing an election petition. One of those occasions is "if the validity of any election is questioned." Another is "for any other cause." The section provides that an application may be made to the High Court within eight days, and there follows a proviso which gives certain grounds on which no election may be called in question.

Section 47 provides that if in any proceeding duly instituted under s. 46 the High Court is of a certain opinion, then "the election of the returned candidate shall be void." Various grounds are given in sub-cl. (a), (b) and (c) of s. 47 (1).

Returning then to s. 46. Sub-section (2) provides "if the Court sets aside an election or declares an "election to be null and void, a fresh election

“shall be held.” There is a curious lacuna here, because s. 47 (1) merely provides that if the High Court is of a certain opinion the election of the returned candidate shall be void. It does not provide that the Court shall set aside the election, but s. 46 (2) assumes that the Court may set aside an election or declare an election to be null and void and provides that in that event a fresh election shall be held.

It is argued that section 46 (1) contemplates the challenge of the validity of an election as an entire election to a constituency, that is to say, in Ward No. III, with which we are concerned, the election of two persons. It is then argued that if under s. 47 (1) the Court is of an opinion adverse to the elected candidate, the election of that candidate must be void, and as a consequence set aside. Reliance is then placed on the decision in *Rathischandra Munshi v. Amulyacharan Ghatak* (*supra*) for saying that if the election of one candidate is void then there must be a fresh election in the constituency.

In my opinion, s. 46 (1) must contemplate the challenge of the validity of an election, whether it is an election of one person or of two persons, and where, as in the present instance, there are two candidates, who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh. If that is so, it is obvious that both the candidates who may be affected by an election petition should be parties to it. That has not been done in this case, and that is, in my opinion, a fatal omission.

The petition is dismissed with costs. Costs as of a hearing. Certified for two counsel.

Attorneys for petitioner: *S. C. Biswas & Co.*

Attorney for respondent: *N. N. Kerr.*

Petition dismissed.

A. C. S.

1940
*Girish Chandra
 Ghosh*
 v.
*Sudhir Chandra
 Ray
 Chaudhuri.*
McNair J.