APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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June 4.

U PO THIN AND FOUR
v.
N. N. BURJORJEE AND TWO.*

*Specific Relief Act (I of 1877), s. 45 (b)—Commissioners appointed to hear Council election petitions are persons holding public office—*Bonâ fide *interpretation of election rules by Commissioners whether High Court can question.*

Held, that the Commissioners appointed by His Excellency the Governor to hear Council election petitions under the Burma Electoral Rules are persons holding a public office of a temporary nature and if they refuse to do a specific act clearly incumbent on them, affecting the property, franchise or personal right of a person, the High Court can enforce the action. Under those rules, however, the Commissioners are the sole authority to interpret any question arising on the construction of the rules, and those rules do not give any other authority power to question that decision, whether it be right or wrong, so long as it is *bonâ fide*. The High Court can only interfere if such decision was so wrong and so perverse as to amount to a refusal to exercise a jurisdiction clearly given by the rules. Neither the rules nor any general provision of law give the High Court either by way of revision or appeal any power to review the Commissioners' decision. Consequently the Commissioners' decision on their construction of the rules that substituted parties in place of the returned candidate whose election was challenged by an unsuccessful candidate, could not show that such candidate himself was guilty of corrupt practices, could not be questioned by the High Court, whether right or wrong.

Alcock Ashdown & Co. v. *Chief Revenue Authority of Bombay*, 47 Bom. 742 ; *M. C. Nandi* v. *P. C. Mitter*, 51 Cal. 279—*referred to.*

The facts of the case are set out in the judgment of the Bench reported below.

May 13. Mr. Justice Chari, dealing with the case on the Original Side, stated in his judgment, *inter alia*, that in England the Courts do not issue a *mandamus* to the Crown, nor will they issue a *mandamus* to a servant of the Crown unless there is a legal duty imposed on him to perform acts, the performance of which the applicant seeks to enforce. *Queen* v.

* Civil First Appeal No. 163 of 1927, arising of Civil Miscellaneous Case No. 80 of 1927 on the Original Side.

Secretary of State for War (1). So far as the Indian High Courts are concerned, the prerogative writ of *mandamus* has been abolished and they can only act by virtue of the statutory powers conferred on them. It is incumbent on the Court to see how far an order, though issued to a subordinate servant of the Crown, does, in effect, though indirectly, seek to bind any of the high officers of the Crown who are exempted from the jurisdiction of the High Court by virtue of clause (*f*) of section 45 of the Specific Relief Act. This Court is precluded from issuing an order that would bind the Governor in Council indirectly, for instance by issuing a contrary order to a Government officer who has received a specific order from the Governor in Council. But not so where the officer is acting in discharge of legal duties of a public nature in which the public or individual members of the public are interested.

The Government of India Act places all election matters under the control of the Governor as a *persona designata*—as a high officer of the State fit to be entrusted with such functions—and not as Governor in Council, the representative of the Crown. But even assuming that the Governor is the representative of the Crown in election matters, the election commissioners appointed by him are judicial officers to form a tribunal for a special purpose, who as such have to perform judicial functions exercising their own judgment and independent discretion and they hold a "public" office. Hence, but for the circumstance that the election commissioners form a superior tribunal, an order can issue from the High Court to them if the other conditions specified in the Act are satisfied.

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(1) [1891] 2 Q.B.D. 326.

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Assuming that the election commissioners are amenable to the jurisdiction of this Court, is the act complained of one which calls for interference on the part of this Court ? It is well settled that where an inferior tribunal has a discretion and refused to exercise that discretion it can be compelled to use its discretion in a fair and impartial manner though it cannot be compelled to exercise it in a particular way. In this case, as the question to be decided was the construction of certain rules in the course of inquiry, it was within the jurisdiction of the commissioners. Where it was alleged that on a wrong construction of the provisions of the rules a returning officer rejected the nomination of a candidate and an application was made to the High Court to direct the returning officer to include the petitioner's name as a candidate, the Court refused to interfere with the returning officer's decision as he had applied his mind and decided the point. *M. C. Nandi* v. *P. C. Mitter* (1). That case is distinguishable from the present case in which as a result of the construction put upon the provisions of the rule the election commissioners have refused to proceed with a portion of the enquiry and so in effect declined jurisdiction. If an inferior tribunal declines jurisdiction taking a mistaken view of its own powers then it is certainly open to this Court to see if that tribunal has rightly declined jurisdiction and for that purpose to consider whether the rules have been rightly construed. The election commissioners have not given any final adjudication as the returning officer did in the Calcutta case but have in the course of the enquiry refused, in effect, to exercise a jurisdiction on the ground that they had none. The Court

(1) (1923) 51 Cal. 279.

would construe the rules itself to see if they have properly declined jurisdiction.

His Lordship declined however to interfere with the decision of the election commissioners on the ground that they were a superior tribunal against whom it was not proper for this Court to exercise its discretionary powers. The tribunal could claim no superiority or even equality with the High Court created by His Majesty's Letters Patent, but its superiority would be judged by the functions it performs, the powers with which it is entrusted and the personnel of which it is composed. It can only be composed of persons who should be eligible for the office of a Judge of the High Court or who is such Judge. It has been held that the Central Criminal Court, in which sometimes Judges of the High Court and sometimes Recorders and other inferior Judges preside, is a superior Court to which the King's Bench Division will not issue a *mandamus*. *Reg.* v. *Judges and Justices of the Central Criminal Court* (1).

The judicial interpretation of the words "franchise," "personal right" and the words occurring in section 45 of the Specific Relief Act, was neither clear nor consistent. His Lordship was of opinion that neither the "franchise" nor any "personal right" of the petitioners was injured by the act of the commissioners. The petition was dismissed.

Petitioners appealed.

Munshi for the appellants. The election commissioners have refused to exercise a jurisdiction vested in them. The commissioners' decision come to this—that if a person was second at a poll, he

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(1) [1883] 11 Q.B.D. 479.

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could accuse the successful candidate of corrupt practices and, if he proved it, get his seat, although he himself was guilty of corrupt practices. If the commissioners construed the rules wrongly, the High Court could set them right. Petitioners had a right to have a voice in the selection of their representative in the Legislative Council, and the electoral rule 41 was framed with a view to preserve and fortify such right. The High Court's decision would not affect any prerogative of the Governor.

A. Eggar (Government Advocate) for the respondents. The "franchise" of the appellants alleged to be endangered is the franchise of voting for the election of members of the Legislative Council, which was not affected by the proceedings. The "personal right" of the appellants was presumably their claim as parties substituted under Rule 41 to have the benefit of the recriminations and the deposit made by their predecessor under Rule 42. The right (if any) is subject to the Burma Electoral Rules which give exclusive jurisdiction to the commissioners. The claim depends on the construction of the rules. The commissioners were asked by the appellants to construe the rules and they have done so. They have not refused to exercise their jurisdiction; they have construed the rules and have decided against the appellants. There is no appeal against that decision. Rule 36 (2) (*a*) read with Rule 31 gives the commissioners exclusive jurisdiction to deal with all matters arising out of the election petition which is under enquiry; and Rule 48 indicates that the construction of the rules relating to such enquiries is within the power of the commissioners. There is no ground for action by the High Court by way of *mandamus*.

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RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from a judgment of the Original Side of this Court rejecting the appellants' application for an order under section 45 of the Specific Relief Act, 1877, directing the respondents, who are Commissioners for the hearing of an election petition filed by Mr. Ba Tin, Advocate, against the return of Mr. Maung Gyee, Advocate, at a bye-election on the 23rd November 1926 for the West Rangoon Urban General Constituency, to do a certain act.

We are satisfied that the Commissioners are persons holding a public office of a temporary nature and as their place of sitting is in the City of Rangoon, the specific act which the appellants require to be done falls within the local limits of this High Court's ordinary Original Civil Jurisdiction.

Section 45 lays down five requisites or conditions precedent to the grant of the order applied for. For the present case, we are only concerned with the first two of those requisites : "(*a*) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act ; (*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character."

From the second of these conditions precedent, the appellants must satisfy us that it was clearly incumbent on the Commissioners to do the specific act which they ask this Court to order them to do. If it is not clearly incumbent on the Commissioners by reason of the ambiguity or uncertainty of the Burma Electoral Rules, then we are clearly of opinion that appellant's application must be dismissed. These

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rules have been framed by the Governor-General in Council with the sanction of the Secretary of State in Council under the powers conferred by sections 72A and 129A, of the Government of India Act.

As mentioned in the judgment appealed from, there were only two candidates at the election which took place on the 23rd November 1926. On the 3rd of January 1927, the unsuccessful candidate, Mr. Ba Tin, presented a petition under Rules 32 and 33 praying that the election of Mr. Maung Gyee be declared void and in the same petition under Rule 34 claiming a declaration that he himself had been duly elected. On the 5th February, Mr. Maung Gyee gave notice to the Commissioners in pursuance of Rule 42 that he intended to give evidence to prove that the election of Mr. Ba Tin would have been void if he had been the returned candidate and a petition had been presented complaining of his election, and it has been found by the trial Judge that he complied with the conditions prescribed by the rules, the most important of which are the particulars with names, dates and places prescribed by Rule 33. On the 19th of February, Mr. Maung Gyee gave notice to the Commissioners that he would take no part in the proceedings before them. The Commissioners, regarding this as a notice that he did not intend to oppose the petition, gave notice of this fact in the *Burma Gazette* on the 12th of March last. The present appellants then applied to be substituted in place of Mr. Maung Gyee, and the Commissioners on the 28th March passed an order to that effect.

An issue then arose between the parties as to whether the appellants had merely the right to oppose the petition to render Mr. Maung Gyee's election invalid, or could also give evidence to prove that the election of Mr. Ba Tin would have been

void if he had been returned candidate and a petition had been presented complaining of his election. On the 4th of April, the Commissioners passed an order drawn up by Mr. Mosely and concurred in by the President and Mr. Kyaw Htoon and after a consideration of the several relevant Rules 41, 42 and 34, they came to the conclusion that the appellants could not give evidence to prove that the election of Mr. Ba Tin would have been void if he had been the returned candidate and if a petition had been presented complaining of his election.

We are satisfied from reading Rule 48 and Rule 36 (2) (*a*) together that the Commissioners were the sole authority to interpret any question arising on the construction of the rules and those rules do not give any other authority power to question that decision. Neither do the rules nor any general provision of law give this Court either by way of revision or appeal any power to review that decision.

In these circumstances, we are in full agreement with the late Chief Justice of Bengal (Sir L. Sanderson) in the case of *M. C. Nandi* v. *P. C. Mitter* (1) :—" The Returning officer in my judgment considered the question which was for his determination and in considering that question, he had to put an interpretation upon the rules to which I have referred. He may have put a wrong interpretation upon them or he may have put a right interpretation upon them. In these proceedings it is not for us to say whether he was right or whether he was wrong. To my mind it is clear that he did not usurp a jurisdiction which he did not possess. He did not refuse a jurisdiction which was vested in him. Nor is it suggested that

(1) (1923) 51 Cal. 279 at p. 292.

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he was actuated by any *mala fides* or extraneous circumstances. The result is that in my judgment this Court should not interfere in these proceedings and under those circumstances. In my opinion, that point alone is sufficient for the disposal of the appeal."

Applying these remarks to the present case, it is not for us to decide whether the Commissioners' ruling was right or wrong. On that question we express no opinion. But was it so wrong and so perverse as to amount to a refusal to exercise a jurisdiction clearly given by the rules? To decide this question a more detailed reference to the rules is necessary. Rule 41 on which the appellants base their claim runs as follows :—" If before the conclusion of the trial of an election petition the respondent dies or gives notice that he does not intend to oppose the petition, the Commissioners shall cause notice of such event to be published in the Gazette, and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted for such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the Commissioners may think fit." There is nothing in this rule nor in any of the preceding ones which gives the right of bringing cross charges against the petitioner. This right is given in the next Rule 42, the side title of which is " Recrimination when seat claimed." The rule runs :—

" 42. (1) Where at an enquiry into an election petition any candidate, other than the returned candidate, claims the seat for himself, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate

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and a petition had been presented complaining of his election :

" Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of the publication of the election petition under clause (*b*) of sub-rule (2) of Rule 36, given notice of his intention to the Commissioners and made the deposit and procured the execution of the bond referred to in Rules 35 and 36 respectively.

"(2) Every notice referred to in the proviso to sub-rule (1) shall be accompanied by the statement and list of particulars required by Rule 33 in the case of an election petition and shall be signed and verified in like manner."

This rule lays down certain stringent limitations on the right of recrimination. The words " any other party" in the rule might at first sight mean any elector. Both learned advocates, however, say that the reading of this rule with Rule 34 confines it to any other candidates who were nominated at the election and who have to be joined as respondents in case the petitioner petitions under Rule 34. The further conditions on which recrimination is permitted are that notice must be given to the Commissioners within fourteen days from the date of the publication of the election petition, a deposit must be made and a bond executed in accordance with Rules 35 and 36, and the notice must be accompanied by a statement and list of particulars such as is required by Rule 33 in the case of an election petition. No provision is made in Rule 42 giving persons substituted under Rule 41 the right of recrimination without having observed the several conditions prescribed in Rule 42 and it is obvious that persons

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substituted at a late stage of the proceedings could not possibly fulfil the conditions prescribed in Rule 42. It would be impossible to contemplate that the intention was to compel the successful candidate, or, as the case may be, his fellow respondents, to give at an early stage very precise particulars with name, date and place of the incidents complained of and relieve those substituted at a late period from any such obligation and so enable them without notice to spring upon the petitioner any evidence that they might choose. This was apparently the contention put before the Commissioners on behalf of the appellants. The only reasonable way that the appellants' argument could be urged on these rules is that Rule 41 comtemplates their being allowed to step completely into the shoes of the respondent for all purposes and to take advantage of all that he has already done. This argument is in keeping with the vague general terms of Rule 41, but in order to fit in with this reading, Rule 42 needs to be considerably stretched. We know that the respondent, Mr. Maung Gyee, has demanded the return of his deposit. If this has been returned, there is clearly no provision for allowing substituted parties to make a fresh deposit. The same thing applies to the execution of the bond referred to in Rules 35 and 36, and, most important of all, the statement and list of particulars accompanying the respondent's notice have been signed and verified by him and on his withdrawal are in fact withdrawn, and there is no provision for their being signed and verified afresh by the appellants on their being substituted.

It has been urged that it would be ludicrous to allow electors to be substituted as respondents merely to oppose a petition to declare an election void and not allow them to show that the petitioner

himself had been guilty of corrupt practices. There is a good deal of force in this contention, and the answer to it may be that the rule-making authority did not contemplate a case where the elected member, after having filed particulars of recrimination, withdraws entirely from the proceedings. But whatever the reason may be, we are not concerned with what the rules ought to be, but only with the rules as they now exist, and while on a broad reading of the rules it might not have been impossible for the Commissioners to have allowed the appellants to recriminate and put them on such terms as to signing and verifying the several particulars given by the respondent and making the necessary deposit and executing the necessary bonds contemplated by Rule 42, we cannot hold, as the rules now stand, that the construction put upon them by the Commissioners was unreasonable, much less so perverse and wrong as to amount to a refusal to exercise a jurisdiction clearly given.

This is sufficient for the purpose of disposing of this appeal. Had it not been so, a grave question would have arisen under proviso (*a*) of section 45 as to whether the petitioners had a franchise or personal right in the matter, but in the view we take, it is not necessary to decide this matter.

With regard to the ground of the learned trial Judge's decision, we need only say this : Had we been satisfied that the Commissioners refused to do what was clearly incumbent on them and that the appellants' franchise or personal right was injured by their refusal, we would not have hesitated to have issued the order applied for, by reason of their status or eminence. We think that the learned Judge in his distinction between the Governor in Council and the Governor in his personal official

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capacity has not clearly borne in mind the provisions of section 110 of the Government of India Act, but, while this Court could not issue an order in the nature of a *mandamus* to the Governor, there is, in our opinion, nothing to prevent it issuing such an order to persons, though eminent, holding a public office (see *Alcock Ashdown & Co.* v. *Chief Revenue Authority of Bombay*) (1).

For the reasons given we consider that the appeal fails and must be dismissed, with costs ten gold mohurs.

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Before Mr. Justice Brown.

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June 6.

S.N.V.R.S. SUBRAMANIAN CHETTYAR

v.

N.L.M. CHETTYAR FIRM AND TWO.*

Civil Procedure Code (Act V of 1908), O. 21, r. 90—Whether an auction-purchaser is a person whose interests are affected by the sale.

Held, that an auction-purchaser is a person who is entitled to make an application under Rule 90 of Order 21 of the Code of Civil Procedure, to set aside a sale on the ground that he was misled by the sale-proclamation and consequently a suit by him will not lie.

Birj Mohun Thakur and another v. *Rai Umanath Chowdhry and others*, 20 Cal. 8 ; *Ravinandan Prasad* v. *Jagarnath Sahu*, 47 All. 479—*referred to.*

Banerji—for Appellant.

Patker—for 1st Respondent.

BROWN, J.—The 1st respondent to this appeal obtained a mortgage decree against the 3rd respondent and in execution of that decree a certain

(1) (1923) 47 Bom. 742.

* Civil Second Appeal No. 497 of 1926.