63 CWN 682

Calcutta High Court

Case No: Civil Revision Case No. 2622 of 1958

D. (MRS) S. Kazj		APPELLANT
	Vs	
K.K. Chakravarty and Others		RESPONDENT

Date of Decision: May 4, 1959

Acts Referred:
Bengal Municipal Act, 1932 â€" Section 36, 38, 39

Citation: 63 CWN 682

Hon'ble Judges: Sinha, J

Bench: Single Bench

Advocate: S.K. Acharyya and Manas Nath Roy, for the Appellant;Satya Priya Ghose and Somendra Chandra Bose, for the Respondent

Judgement

Sinha, J.
The facts in this case are briefly as follows: the petitioner and the respondents Nos. 2, 4, 5, 6, 7 and 8 stood for election at the

general election of Commissioners of the Darjeeling Municipality, held on the 6th July, 1957. In that election, by the results declared, the petitioner

was one of the parties duly elected. On or about the 15th July, 1957 the respondent No. 2, Lakpa Tshering, who was one of the defeated

candidates, filed an application purporting to be under Sections 36, 38 and 39 of the Bengal Municipal Act, before the District Judge of Darjeeling.

On or about the 22nd July, 1957 the District Judge. Darjeeling, transferred the case to the Subordinate Judge, and the application was numbered

as Election Suit No. 54 of 1957 O.C. Certain sealed ballot boxes and some sealed covers were produced before the learned Subordinate Judge

on the 9th May. 1958 and they were opened. It is said that these were opened in the presence of the lawyers of the parties and the contents noted.

This was done under the order of the learned Subordinate Judge, who later on has admitted that this was wholly irregular. The petitioner charges

that the boxes were opened at 11-30 A.M. in the morning and they were lying about and the ballot papers were put in a sealed cover at about 5

P.M. The suggestion is, of course, that in the intervening period there could be tampering. So far as the learned Subordinate Judge is concerned,

he says in his order No. 34, dated the 21st July, 1958, that he was not sure about the hours, but the ballot papers were counted and tied up in a

bundle and kept under special care till they were sealed up at the end of the day''s proceedings. The learned Subordinate Judge proceeds to say as

follows:

On 3-7-58 the Polling Officer''s report, which has to be shown 10 the Polling Officer, had to be taken out from the sealed cover. But the cover

was resealed without delay. The defendant No. 3 states that the ballot papers had been very much exposed in breach of rules. I do not think there

has been too much of exposure. Any way, no real prejudice has been caused to the defendant No. 3.

I shall presently deal with this aspect of the case again. I now proceed with the enumeration of facts. On the 10th May, 1958 the learned

Subordinate Judge directed that a scrutiny and computation of votes should be made u/s 39 of the said Act. An objection was taken before the

learned Subordinate Judge that this order and the opening of the boxes were erroneously made, because before an order for scrutiny and

computation could be made, a prima-facie case should be shown for doing so. On the 17th May, 1958 the learned Subordinate Judge passed an

order wherein he admitted that his previous order of scrutiny and computation was premature and he permitted both parties to argue the point. The

next important date is the 9th July, 1958. In a somewhat lengthy judgment, the learned Subordinate Judge has enumerated the facts and the issues

that have been raised, and proceeded to consider as to whether, in the facts and circumstances of the case, there should be a counting or

computation of the votes. After ''having dealt with the law on the subject, the learned Subordinate Judge confessed that a satisfactory authority on

the point was wanting, but he came to the conclusion that although a scrutiny and computation cannot be claimed by a candidate as a matter of

course, still on the facts of this case, he came to the conclusion that a computation and scrutiny should be ordered. He has mentioned several

grounds for coming to the conclusion. One of the grounds is that the respondents Nos. 2 and 4 bore the same name ""Tshering"" and while the

names were being called out, the Polling Officer did, in fact, find himself confused. Then the learned Subordinate Judge enumerated the instance of

an old voter who went into the voting apartment but instead of putting his paper into the ballot box, he put it in some other box, with the result that

the ballot paper was lost. The learned Subordinate Judge also mentioned the important fact that the applicant before him had only lost by one vote

and, therefore, it was eminently a case where scrutiny and recounting should be done. Ultimately he ordered a scrutiny and computation in

accordance with the provisions of Section 39 of the Bengal Municipal Act. I might also mention that evidence was taken of certain witnesses

including the Polling Officer. After this, the scrutiny commenced on the 12th July, 1958, and the petitioner in this case withdrew from the scrutiny

and it is a disputed point whether she was present at Darjeeling or not when the actual scrutiny took place. Upon scrutiny, it appears that the result

declared was that so far as the petitioner and the second respondent are concerned, they came to have the same number of votes, whereas some

of the others got an additional vote each.

Since the petitioner and the respondent No. 2 got an equal number of votes, lots were drawn in accordance with the provisions of Section 39, and

the respondent No. 2 became successful. The petitioner has now come up to this Court and in this application she challenges the procedure

adopted by the learned Subordinate Judge and the orders made by him.

2. The first thing that has to be mentioned in this case is the very unsatisfactory nature of the proceedings. As the learned Subordinate Judge himself

admits, the ballot boxes and certain sealed covers were opened prematurely without the determination of the question as to what order should be

made on the application made by the respondent No. 2. Not only were they opened, but it seems that they were kept open during the whole day

and even the learned Subordinate Judge is not sure about the hours, and says that the ballot papers had not been ""very much exposed in breach of

rules"". I fail to understand what this expression means. This, however, is not all. Very peculiar things have happened in the balloting. To start with,

we find according to the report of the Polling Officer that 423 males and 216 female voters voted and 27 ballot papers, consisting of 21 male and

6 females were rejected. We now find that when the boxes were opened, only 26 rejected papers were found. Upon this, the Polling Officer

proceeded to explain that one of the rejected papers consisted of a ballot paper which an old voter put into a different receptacle than the ballot

box, with the result that it was lost and could not be retrieved. According to him all the parties agreed that it would be considered as a rejected

polling paper.

But even so, the figures do not tally. As I have already said, 216 female voters were reported to have voted. It is found now that only 215 papers

were there. This aspect of it has not been satisfactorily investigated at all. According to the learned Subordinate Judge, the explanation is as

follows:

From the Polling Officer''s report it appears that 423 male and 216 female voters voted actually. Including the rejected ballot papers, there should

have been 423 ballot papers of male voters, and 216 ballot papers of female voters in the boxes. But 215 ballot papers of female voters have been

found; apparently, one female voter did not put her ballot in the box, or the number given in the report is incorrect.

3. In my opinion, this is a very unsatisfactory way of dealing with the matter altogether. So far as the Polling Officer is concerned, questions were

asked, but he ultimately stated that the figures given by him were correct. In the background of the fact that a party has lost only by one vote, such

irregularities loom large in the picture, and cannot be ignored. Again, this is not all. According to the note that I find in the file sent down by the

learned Subordinate Judge, which presumably is a note taken when these boxes and packets were opened, the ballot box No. 1 contained 125

white ballot papers meaning male votes, and 75 red ballot papers meaning female votes. These were tied in a bundle but there was one loose white

ballot paper. This seems to be a very suspicious item, which has not been properly investigated. If the ballot boxes were lying open during the

whole day. then it is. quite possible that one ballot paper was introduced surreptitiously. I do not say that such a thing has actually happened, but

the matter ought to be investigated. So far as box No. 2 is concerned, there were 142 male ballot papers and 39 female ballot papers. Coming

now to the ballot box No. 3, I must say that this is full of surprises. According to the note in the file, the white ballot papers, namely, the male ballot

papers are 133+1=134. I have seen the original bundles that have been forwarded here and I find that on the top of the bundle representing Box

No. 3 is written in red pencil 134+1. Opening the bundle I find inside in blue pencil 133, the last letter being altered to 4 making it 134. It is

difficult, therefore, to understand what the figures really were, and how the counting has been done, because there is wide divergence between the

figures given by the Polling Officer and the figures as found according to the note of the learned Subordinate Judge, and what I find now. With

regard to the bundles that have been sent to this Court, I find that so far as the white ballot papers are concerned there is a bundle marked ""1

containing the figure 125. Then, there is a bundle marked ""2"" which bears the figure 142. Finally, there is a bundle marked ""3"", which, as I have

already stated before, was originally marked 133 and altered to 134 and has now been altered to 134+1. There is no loose ballot paper in any

bundle. If the ballot papers had been arranged in accordance with the note of the learned Subordinate Judge as contained in this file, there are

discrepancies which have to be explained. Before I proceed further to arrive at my own decision, I will refer to the position in law under the

relative sections of the Bengal Municipal Act. An application to set aside an election is made u/s 36 of the said Act. If the validity of an election of

a Commissioner is brought in question by any person qualified to vote at the election, such person may file a petition before the District Judge

challenging the election. Where such a petition has been filed u/s 36, the procedure to be followed by the Judge holding the enquiry is laid down in

Section 37. u/s 38, if the Judge after holding an enquiry is satisfied that the candidate has committed any corrupt practices or that the election has

not been a free election or if the result of the election has been materially affected by any non-compliance with the Act or any rules made

thereunder, or by the improper acceptance or refusal of the candidate''s nomination, then he shall set aside the election. I now come to Section 39

which runs as follows:

If, in any case to which section 38 does not apply, the validity of an election is in dispute between two or more candidates, the Judge shall, after a

scrutiny and computation of the votes recorded in favour of each candidate, de-care as many of the candidates who are found to have obtained

consecutively the largest number of valid votes as there are seats to have been duly elected. Every candidate at the election to which the dispute

relates shall be deemed to be a party to such dispute.

Provided that for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by

any person, known or unknown, in giving or obtaining it.

Provided further that if after computation there be an equality of votes among two or more candidates and if the number of seats is less than the

number of such candidates, the Judge shall select one or more among them, as the case may require, by drawing lots.

4. The next Section namely, Section 39A lays down that if the Judge after holding an inquiry u/s 37 is satisfied that no ground exists for setting

aside the election in the manner provided in Section 38 or for modifying it in the manner as provided in Section 39, he shall confirm the election

The question arises as to under what circumstances Section 39 should apply and what should be the procedure. The learned Subordinate Judge

has rightly pointed out that there is no satisfactory decision on the point. He has referred to a Calcutta decision of McNair, J., S. Sharafuddin

Ahmed Vs. Shamsul Huq., , but that case really does not help us because it was a case under the Calcutta Municipal Act, and the learned Judge

held that there was no provision in the Calcutta Municipal Act for holding a scrutiny, and that in this respect there was a distinction between the

Calcutta Municipal Act and the Bengal Municipal Act. Treating it as a matter of first impression, it appears to me that the condition-precedent to

the exercise of power u/s 39 is firstly that the validity of an election must be in dispute between two or more candidates. It would be observed that

u/s 36, the dispute need not be initiated by a candidate, because an application u/s 36 may be brought by any person qualified to vote in the

election, whereas in the case of Section 39 it must be a dispute between the candidates themselves. This point has been confirmed by another

decision of this Court, Binode Behari Chatterjee v. Girindra Nath Roy Choudhury, (2) 389 C.W.N. 500. The second condition is that in the

particular case, Section 38 must not apply. In other words, there must not be grounds like corrupt practices or the other grounds that are

mentioned in Section 38 of the Act. If these conditions exist, then it appears to me from a plain reading of the section that the learned Judge dealing

with the question must proceed to a scrutiny and computation of the votes recorded in favour of each candidate. The word used in the section is

''shall''. It may be questioned as to whether the learned Judge should enter into an investigation as to whether there was a prima facie ground for

scrutiny and computation. I do not see any provision for it in the section itself. The investigations that have to be made in order to make Section 39

applicable, consist of an enquiry as to whether the two conditions mentioned above exist or not. If the election was in dispute between two or

more candidates, and if Section 38 did not apply, then the only thing that could be done to bring that dispute to an end would be to proceed to

count the number of votes obtained by each candidate. In the case of corrupt practices and other serious grounds mentioned in Section 38 read

with section 29, other kinds of investigation have to be made, and other results follow. Section 39 speaks about a simple dispute which does not

involve complicated questions like corrupt practices etc. When one candidate questions the election of another, and is unable to set forth any of the

grounds as mentioned in Section 38 the only remedy that is left open to him is to ask the Court merely to count the votes. That, in most cases,

would be a mechanical process, and it may well be that mistakes have occurred in the counting and indeed in this very case we find that the result

of scrutiny disclosed that the original declaration by the Polling Officer was not correct. In my opinion, therefore, the learned Subordinate Judge

came to the right conclusion in this case that the computation or scrutiny should be ordered. His order dated the 9th July, 1958 in so far as it

orders a scrutiny and computation appears to be correct. I regret to say, however, that I cannot say as much about the proceedings that followed it

or accompanied it. I have already said that a mistake had been committed in opening the ballot box prior to the making of this order, but the defect

does not end there. After the order was made for computation, it seems that the scrutiny was done and the results were declared as mentioned

above. The process of counting u/s 39 is more or less mechanical. Nevertheless, under special circumstances it may become necessary that an

investigation should be held. Supposing a particular ballot paper is found, the genuineness of which is questioned, naturally in the recounting the

learned Subordinate Judge must decide as to whether this was a proper ballot paper or not and whether it should be included in the counting. If

there are discrepancies in the report of the Polling Officer and what is discovered in the ballot box, an investigation should be made as to whether

there was any tampering. As I have pointed out. there are several surprising aspects in this case which have not been properly investigated. For

example, it has not been properly investigated as to why one ballot paper of a female voter should have disappeared. Then again it has not been

properly investigated as to how an extra ballot paper came into the ballot box, although there was a separate bound bundle therein. The likelihood

of an extra ballot paper being surreptitiously introduced should be considered. Finally, as I have pointed out, even now, the numberings on the

different bundles appear to be confusing, and I am not at all satisfied that the scrutiny and computation has been correctly done. The question is,

what is to be done in this case? I have asked the learned counsel on behalf of the petitioner to consider as to what could be done in this application

and he had confessed that there is no other way than to set aside the final order and send it back for recounting. I must here mention that Mr.

Acharyya, on behalf of the petitioner, went a little further and said that his client should be at liberty to question the very order by which the learned

Subordinate Judge ordered the computation and scrutiny. To this, however, I cannot agree.

5. In my opinion, the order dated the 9th July, 1958, ordering the scrutiny should be upheld but all further proceedings should be set aside and/or

quashed by a Writ in the nature of certiorari. As a matter of fact, the learned advocates, on either side have confessed that there seems to be no

other way than having the papers re-counted. The order dated the 12th July. 1958, and all orders made subsequent thereto are also set aside and

quashed by a Writ in the nature of certiorari.

These bundles should now be re-sealed by this Court and sent back to the learned Subordinate Judge, who will now proceed to exercise his

powers u/s 39 of the Act in accordance with law. Inasmuch as the matter has been hanging for a long time, the learned Subordinate Judge should

deal with the matter, expeditiously.

6. The Rule is made absolute. There will be no order as to costs. Let plain copies of the orders handed over to the Court be filed and let them be

kept in the record when filed. Let the Certificate and the receipt filed in Court on 17-3-59 be kept in the record of the case.