
(1954) 11 CAL CK 0014

Calcutta High Court

Case No: Civil Revision Case No. 153 of 1954

Prafulla Kumar Choudhury

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Nov. 25, 1954

Acts Referred:

- Bengal Municipal Act, 1932 - Section 26, 26(1), 50, 553, 554
- Constitution of India, 1950 - Article 226

Citation: 59 CWN 560 : (1956) 2 ILR (Cal) 85

Hon'ble Judges: Das Gupta, J; Bachawat, J

Bench: Division Bench

Advocate: Santosh K. Basu, Purnendu S. Basu and Smriti K. Roy Choudhury, for the Appellant; J. Majumdar and Nani Gopal Das for State of West Bengal and Nani Coomar Chakravarty and Diptikana Bose, for the Respondent

Judgement

Das Gupta, J.

The eight Appellants were declared duly elected in the general election for Commissioners of the Budge Budge Municipality that was directed to be held in March, 1952. There were altogether twelve Commissioners to be elected, one for ward No. I, one for ward No. II, three for ward No. III, four for ward No. IV and three for the remaining ward No. V. The Appellants were declared duly elected as Commissioners for the single seat in ward No. I, for two of the three seats in ward No. II, for the four seats in ward No. IV and for one of the three seats in ward No. V. The four Commissioners that still remained to be elected were: one for ward No. II, one for ward No. III and two for ward No. V. When steps were being taken for election of these four Commissioners, an order was passed by the State Government u/s 553 of the Bengal Municipal Act, superseding the Commissioners of the municipality. The material portion of the order is in these words:

In exercise of the power conferred by Section 553 of the Bengal Municipal Act, 1932 (Ben. XV of 1932), the Governor is, therefore, pleased to declare the Commissioners of Budge Budge Municipality to be incompetent and to supersede them for the period from the date of publication of this resolution in the Calcutta Gazette to March 31, 1953.

2. On March 30, 1953, another order was passed by the Government extending the period of supersession till December 31, 1953. The District Magistrate of 24-Parganas issued a notice in June, 1953, fixing the holding of the general election for all the twelve Commissioners on December 27, 1953, ignoring the fact that eight Commissioners had been duly elected already, though their names had not been published in the Gazette and they had not entered on their offices as Commissioners. Six of these Appellants then brought a suit challenging the legality of the proposed election for all the twelve seats, asking for a declaration that the rights of the eight persons who had been elected as elected candidates, still existed and for consequential orders of injunction.

3. The trial court dismissed the suit; but on appeal the Subordinate Judge decreed the suit and passed orders, the material portion of which is in these words:

It is hereby declared that the rights of the Plaintiffs and pro forma Defendants 4 and 5 were not affected by the order of supersession on the 26th July, 1952, or the order of extension of the same. Let a permanent injunction be issued against Defendants 1, 2, and 3 restraining them from notifying any date for electing 12 fresh members for all the 5 wards of the Budge Budge Municipality and the Defendants be restrained from holding election of 12 members on the 27th December, 1953, as notified. Let a mandatory injunction be issued on the principal Defendants to hold election u/s 26, Rule 41 of the Bengal Municipal Act, for filling up 4 seats, viz., 1 for ward No. I, 1 for ward No. III and 2 for ward No. V and also the names of the Plaintiffs and pro forma Defendants are published u/s 50 of the Bengal Municipal Act.

4. Thereupon the State Government passed orders on December 24, 1953, extending the period of supersession of the Commissioners up to March 31, 1954, stating as the ground for the order that a period of three months approximately will be required for holding the election for four Commissioners in pursuance of the order of the learned Subordinate Judge. Thereafter on December 29, 1953, the District Magistrate, 24-Parganas, issued a notification fixing February 27, 1954, for holding the election of four Commissioners to the four vacant seats.

5. On the application of one Pravat Chandra Sarkar, a voter of the municipality, under Article 226 of the Constitution of India, Sinha, J., has ordered the issue of a writ in the nature of mandamus, commanding in effect, that the election for four Commissioners only should not be held. The material portion of his order is in these words:

The order, therefore, will be that a writ in the nature of mandamus will issue directing the Respondents to forbear from holding a partial election u/s 26 of four seats, but that they are directed to proceed u/s 554 in accordance with law in the light of the observations made herein. If it is decided to reconstitute the Commissioners under Sub-Section 2(ii), the State and the other Respondents are directed to proceed to hold a fresh general election in all the wards of the municipality and for all the seats. The added Respondents are restrained by an injunction from functioning or attempting to function as Commissioners by virtue of their election as mentioned therein. This, of course, does not in any way prevent them from standing at any future election of the municipality.

Inasmuch as a point has been raised about the Respondents being embarrassed by the existence of the decree in Title Suit No. 44 of 1953, I think that I will restrain the added Respondents from executing the decree, inasmuch as all the parties to the Title Suit are also before me. Therefore, I order that the added Respondents be restrained from taking any steps in execution of the decree in Title Suit No. 44 of 1953 in so far as it relates to the holding of an election u/s 26 and/or in so far as it prohibits or orders an election to be held contrary to the directions given by me.

6. The present appeal is directed against the decision of Sinha, J. For a proper consideration of the matter it is necessary to have in view the provisions of Sections 553 and 554 of the Bengal Municipal Act of 1932 which are as follows:

Section 553. If, in the opinion of the State Government, the Commissioners have shown their incompetency to perform, or have persistently made default in the performance of the duties imposed on them by or under this Act or by any other law, or have exceeded or abused their powers, the State Government may, by an order published with the reasons for making it, in the Official Gazette,, declare such Commissioners to be incompetent, or in default, or to have exceeded or abused their powers, as the case may be, and supersede them for a period to be specified in the order:

Provided that except in case of misappropriation of municipal funds or persistent default in the performance of duties by the Commissioners the State Government shall not ordinarily exercise power under this section until action has been taken u/s 553.

Section 554. (1) When an order of supersession has been passed u/s 553, the following consequences shall ensue:

(a) all the Commissioners shall, as from the date of the order, vacate their offices as such Commissioners;

(b) all the powers and duties which may, under the provisions of this Act or any rule or by law made thereunder, be exercised and performed by the Chairman and by the Commissioners whether at a meeting or otherwise, shall, during the period of

supersession, be exercised and performed by such person or persons as the State Government may direct;

(C) all property vested in such Commissioners shall, during the period of supersession, vest in the State Government.

(2) On the expiration of the period of supersession specified in the order, the State Government may-

(i) extend the period of supersession for such further term as it may consider necessary, or

(ii) reconstitute the Commissioners of the municipality by a fresh general election and the persons who vacated their offices under Clause (a) of Sub-section (1) shall not be deemed disqualified for election or appointment u/s 26, or

(iii) reconstitute the Commissioners of the municipality by appointment only for such period as it may consider necessary and the persons who vacated their offices under Clause (a) of Sub-section (1) shall not be deemed disqualified for appointment:

Provided that the State Government may, if circumstances permit, at any time before the expiration of the period of supersession, take action either under Clause (ii) or Clause (iii) of this Sub-section.

7. I have no hesitation in agreeing with Sinha, J., that if the Government decided to take action u/s 554(5)(iii) to reconstitute the municipality by a fresh general election, they were not only entitled to but bound to ignore the result of the general election in which the present Appellants had been elected. It was argued before us-as it had been argued before Sinha, J.- that fresh general election under Sub-clause (ii) of Section 554(2) should be taken to mean a general election held after the general election in which the sitting Commissioners were elected. This argument cannot be accepted. It appears to me clear that fresh general election must be the general election that is directed by the State Government after the decision to reconstitute the municipality by a fresh general election is made. The election that had taken place before the decision to reconstitute the municipality was made cannot be considered a "fresh" general election from the viewpoint of the authority making the decision. The necessary consequence is that if the Government takes the decision to take action u/s 554(2) (ii) the election that had already taken place in 1952 has necessarily to be ignored so that steps for taking fresh general election may be taken. What is the position, however, if the Government does not take such a decision? I am unable to agree that the mere fact that it is open to the Government to decide to hold a fresh general election produces the consequence even before such a reconstitution is made, the election that was held is nullified. It is important to remember that by the order of supersession the Government supersedes the sitting Commissioners. There is no question of superseding the persons who had

been elected, but who had not taken office as Commissioners. Their position as elected candidates continues until reconstitution by a fresh election actually takes place unless the position in law is that the Government must act in accordance with either Clause (i) or (ii) of the provisions of Section 554(2). If after an order of supersession the Government is bound either to order supersession for a further period or to reconstitute the Commissioners of the municipality by a fresh election, the persons who had been elected in a general election before the order of supersession but who had not entered on their offices, would have no opportunity ever to do so.

8. As I read the section, however, the provisions in Section 554(2) that Government may do one of three things as mentioned in the three clauses does not mean that it must do one of these three things. But even, if this was the correct meaning of the section, it is quite clear that it is open to Government to reconstitute the Commissioners of the municipality for a certain period, under Clause (iii) instead of taking any action under Clause (i) or (ii). When action under Clause (iii) is taken the position or the expiry of the period must necessarily be that if as a result of a general election some persons had already been elected they would be entitled to enter on their offices.

9. As I have already said, however, the proper meaning of this section in my view is not that the Government must take any of courses mentioned, but that it is open to them to take any of these three courses and it is equally open to them to take no action under any of these clauses. I can easily imagine the circumstances where it would be very proper for Government to order a further period of supersession or to reconstitute by a fresh general election, or by appointment. But there may be other circumstances, namely, in cases, where the supersession was not on the ground of incompetency but on the ground that the Commissioners have exceeded their powers where it would not be desirable to take any of these three courses. It is in my judgment reasonable to think that the legislature left it to the discretion of the State Government to take action under any of these three clauses but had no intention of compelling them to take any such action.

10. I have come to the conclusion that as the Government was not bound to take action under any of these three courses and as in fact Government had not reconstituted the municipality by a fresh general election, the result of the general election in which the present Appellants were elected was not nullified.

11. What the Government has done is that on December 24, 1953, a week before the supersession already ordered was due to expire, Government directed supersession for a further period and, at "the same time, indicated that elections to the four seats that had not been filled would be held. It was in these circumstances that the District Magistrate issued the notice for holding the election on February 27, 1954.

12. The position, in my judgment, is that the State Government had under the law the option to take any of the three courses mentioned in Section 554(2); but after the Subordinate Judge passed on November 18, 1953, an order restraining the State of West Bengal and the District Magistrate of 24-Pargands from notifying any date for election of 12 fresh members for all the five wards, it was no longer possible for the State Government to take any action under Clause (ii) of Section 554(2), viz., to reconstitute the Commissioners of the municipality by a fresh general election. In these circumstances the District Magistrate, in my opinion, took the only possible course that was open to him in law to take, viz., taking steps for holding election for the four Commissioners only to the four seats which had not been filled in the general election previously held in 1952.

13. In these circumstances the District Magistrate cannot be said to have failed to carry out his duty in accordance with law.

14. I have, therefore, come to the conclusion that there is no justification in law for issuing a writ in the nature of mandamus restraining the District Magistrate from holding election for the four wards.

15. We, accordingly, allow his appeal, set aside the orders passed by Sinha, J., including the order for the issue of a writ in the nature of mandamus and order that the application of Pravat Chandra Sarkar be dismissed. There will be no order as to costs.

16. Let the State Government, the District Magistrate of 24-Parganas and the Administrator of the Judge Municipality be informed of our order by November 26, 1954. Let the substance of our order in any case be communicated to them not later than November 26, 1954.

17. BACHAWAT, J.: In my opinion the power conferred by Section 554(2) is a discretionary power. The State Government is not bound to take action either under Clause (ii) or Clause (iii) of Section 554(2). It is not mandatory on the State Government to reconstitute either by a fresh general election or by appointment u/s 554(2). The court cannot compel performance of a discretionary act particularly so, when such performance is prohibited by a decree of a competent court. In my opinion the order of supersession does not nullify the election of the Appellants as Commissioners. As the general election due to be held on March 8, 1952, was incomplete there was not and there could not be a meeting of the newly formed body of Commissioners and the tenure of office of the Appellants did not commence having regard to Section 56, and Section 554(1)(a), accordingly, can have no application. The applicants did not hold any office, and there can be no question of their vacating their office as Commissioners under that Sub-section.

18. In the general election due to be held on March 8, 1952, the electorate has failed to elect the number of Commissioners to be elected in the manner prescribed by the Act. Accordingly, u/s 26 a second election must take place and under Rule 41 of the

Election Rules, the second election must begin from the stage from which the original election failed with regard to four seats and, therefore, the election with regard to those remaining four seats must now be held.

19. The District Magistrate by his order, dated December 29, 1953, fixing the date of election has performed the statutory duty imposed upon him by Section 26 and Rule 2(1)(b) of the Election Rules. The Administrator appointed u/s 554 in publishing the notice, dated January 7, 1954, has performed the statutory duty imposed upon him under Rule 2(2) of the Election Rules read with Section 554(1)(b).

20. In these circumstances, it is, in my opinion, the correct order not to issue any mandamus, as directed by Sinha, J. I agree with the order passed by my Lord.