

Banwari Dass vs Summer Chand And Ors on 13 February, 1974

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Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, V.R. Krishnaiyer

PETITIONER:

BANWARI DASS

Vs.

RESPONDENT:

SUMMER CHAND AND ORS.

DATE OF JUDGMENT 13/02/1974

BENCH:

SARKARIA, RANJIT SINGH

BENCH:

SARKARIA, RANJIT SINGH

KRISHNAIYER, V.R.

CITATION:

1974 AIR 1032

1974 SCR (3) 358

1974 SCC (4) 817

ACT:

Delhi Municipal Corporation Act, 1957--Ss. 17 and 19--Scope of--Words and phrases--Meaning of 'have been' land being'--Recrimination--Election--Petition to declare election void and to declare the petitioner elected--Returned candidate if can plead that petitioner was guilty of corrupt practice.

HEADNOTE:

The appellant and the respondent contested election to a ward in the Municipal Corporation of Delhi in which the appellant was declared elected. Respondent no. 1 filed an election petition challenging the appellant's election on the ground of corrupt practice and prayed that he be declared duly elected under s. 19(1)(c) of the Corporation Act. The appellant on the other hand contended that since the respondent was guilty of corrupt practices he, had

become disentitled to be declared elected. The Election Tribunal held that the appellant was not entitled to raise such a plea. On appeal the High Court held that in the absence of a specific provision in the Corporation Act corresponding to s. 97 of the Representation of People Act, 1951 the returned candidate was not entitled to recriminate on the grounds contained in s. 17 of the Corporation Act.

Section 9(1)(d) of the Corporation Act enacts that a person shall be disqualified for being chosen as, and for being, a councillor, or alderman if he has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty of any corrupt practice. . . . Section 17 enacts the grounds on which the election could be declared void. One of such grounds in s. 17 (1) (a) is that "on the date of his election a returned candidate was not qualified or was disqualified to be chosen as a councillor." On the question whether in an election petition under the Act for getting an election declared void and for a further declaration that the petitioner himself had been duly elected, the returned candidate is entitled to plead and prove that the petitioner was guilty of corrupt practice in the election in question, and was therefore not entitled to be declared as duly elected.

Dismissing the appeal to this Court,

HELD : (1) There is no provision in the Corporation Act corresponding to s. 97 of the Representation of People, Act expressly giving a right of recrimination to the returned candidate. The effect of the word "being" in the opening sentence of s.9(1) appears to have been largely off-set by the use of the words "to have been guilty" in cl.(d). The meaning of the phrase "have been" is "immediately prior to a specific time". If the phrase "found to have been guilty" in s.9(1)(d) is construed in the context of cl.(a) of s.17(1), then it will mean "found to have been guilty at the time of election, and immediately preceding the election." The right to recriminate cannot be legitimately spelled out of s.9(1)(d) without doing violence to its language or unduly stretching it. [364 F]

(2) The inquiry of the District Judge, who is the election tribunal, at the trial of an election petition is limited to the investigation of those matters only which will enable him to make the orders specified in s.19(1). But where in a composite petition relief is claimed that the petitioner be declared elected in place of the returned candidate, the District Judge is to investigate if either of the two conditions for the grant of a further declaration specified in s.19(2) is made out namely : (a) whether in fact the petitioner received a majority of the valid votes, or (b) whether the petitioner would have but for the votes obtained by the returned candidate, obtained a majority of the valid votes. In such a composite position apart from rebutting the allegations made against him in the petition all that the returned candidate can further show is that the

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petitioner did not in fact receive the majority of valid votes and is therefore, not entitled to the further declaration of his due election. In the absence of a provision specifically conferring such a right, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, -he could not be granted the declaration of his due election because he had committed corrupt practices. Such plea and proof will, in reality, be in the nature of a counterattack, not necessary for legitimate defence. [365 C]

(3) In the light of the well-established principles the court cannot bridge the gap or supply this apparent omission in the Corporation Act with regard to a returned candidate's claim to recriminate, by importing principles of common law or equity, the maxim casus omissus et oblivioni datus disposition communis juris relinqitur being in-applicable to the construction of election statutes. A right to file an election petition or a recriminatory petition being a mere creature of statute, unknown to common law, the appellant' in the absence of a clear statutory provision, is not entitled to recriminate on any of the grounds mentioned in s. 17. [366 D]

(b) If the failure to comply strictly with the requirements of a statutory provision as to recrimination precludes the returned candidate from recriminating, a fortiori, in the absence of such a statutory provision in an election law, the returned candidate has no right to recriminate. [367 D]
P. Malai Chami v. M. Andi Ambalas & Ors. A.I.R. 1973 S.C. 2077 and Jabar Singh v. Genda Lal [1964]6 S.C.R. 54, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 893 of 1973. From the judgment and order dated the 18th April, 1973 of the Delhi High Court in Letters Patent Appeal No. 289 of 1972.

L. M. Singhvi, S. S. Dhanduja and K. B. Rohatgi, for the appellant.

O. P. Malhotra, Sat Pal, K. N. Sehgal and N. S. Das Behl, for respondent No. 1.

The Judgment of the Court was delivered by SARKARIA, J. The principal question that falls to be determined in this appeal on certificate, is : whether in an election petition under the Delhi Municipal Corporation Act, 1957 (for short, the Corporation Act), for getting an election declared void and for a further declaration that the petitioner himself had been duly elected, the returned candidate is entitled to plead and prove that the petitioner was guilty of corrupt practice in the election in question, and was therefore not entitled to be declared as duly elected ?

The material facts bearing on this question may now be stated The elections to the Delhi Municipal Corporation were held on May 2, 1973. Appellant, Benarsi Dass and Sumer Chand, Respondent 1 and others contested the election from Ward No.

51. The appellant secured 3974 valid votes as against 3882 valid votes obtained by Respondent 1. The appellant was declared duly elected.

Respondent 1 filed an election petition under S. 15 of the Corporation Act before the Election Tribunal (District Judge) to challenge the election inter alia on the ground of corrupt practices particularised in para 9 of the petition. Apart from getting the election of the returned candidate declared void, the election-petitioner prayed that he be declared duly elected to the Municipal Corporation under S. 19(1) (c) of the Corporation Act.

In his written statement, the Returned Candidate raised some preliminary objections (which have not been pressed before us) and traversed the allegations in the election petition. He further pleaded under the caption "Additional Pleas" that since the petitioner was guilty of the corrupt practices, particularised in the written statement he had become disentitled to be declared elected.

The District Judge held that the appellant was not entitled to plead and prove in reply to the election petition that the petitioner was also guilty of corrupt practices. To impugn those orders of the District Judge, the appellant moved the High Court by a writ application under Article 226 of the Constitution. The learned Single Judge who tried the application negated the contention of the appellant and dismissed the writ application with these observations :-

"The petitioner may show that the Respondent No. 1 did not obtain a majority of valid votes. This is the legitimate defence. But he cannot go further and show that even if the Respondent No. 1 has obtained a majority of votes, the Respondent No. 1 is not entitled to be declared to be duly elected candidate because he committed corrupt practices. An election petition to declare the election of a returned candidate void lies only when the election is notified and published under S. 14 of the Act. Since the election of the Respondent No. 1 has not been so published under section 14 of the Act, the petitioner does not have the right to challenge, it by proving corrupt practices against Respondent No. 1".

Aggrieved, the appellant carried an appeal under cl. 10 of the Letters Patent to the Division Bench of the High Court. The Bench dismissed the appeal holding that in the absence of a specific provision in the Corporation Act corresponding to s. 97 of the Representation of the People Act, 1951, the Returned Candidate is not entitled to recriminate on the grounds contained in s. 17 of the Corporation Act. It was noticed that if at all there was a conscious omission in the Corporation Act, about the Returned Candidate's right to recriminate, the Court was not empowered to supply that omission. The High Court, however, granted the certificate under Article 133(1) of the Constitution. Hence this appeal.

According to the relevant statutory provisions in Chapter 11 of the Corporation Act, the Councillors are chosen by direct election on the basis of adult suffrage from various wards into which Delhi has been divided. The normal term of office of a Councillor is four years from the date of publication of the result of his election. The persons entitled to vote at election of Councillors are the persons registered, by virtue of the provisions of the Constitution and the Representation of the People Act, 1950 as voters at elections to the House of the People for the area comprised in a ward.

According to section 8 :

"a person shall not be qualified to be chosen as a Councillor unless his name is registered as an elector in the electoral roll for a ward".

Section 9 lays down disqualifications for membership of Corporation. Its material part reads :

"9(1) A person shall be disqualified for being chosen as, and for being, a councillor, or alderman--

(a) to (c) x x
x
(d) if he has, in proceedings for

questioning the validity or regularity of an election, been found to have been guilty of--

(i) any corrupt practice, or

(ii) any offence punishable under section 171E or section 171F of the Indian Penal Code or any offence punishable under section 29 or clause (a) of sub-section (2) of section 30 of this Act, unless a period of five years has elapsed since the date of the finding or the disqualification has been removed either retrospectively or prospectively by the Central Government.

(e) to (1) x x
x"

Section 14 enjoins that the names of all persons elected as councillors or aldermen shall, as soon as may be, after such election, be published by the Commissioner in the Official Gazette. Sections 15 to 21 relate to disputes regarding elections. The mandate of s. 15(1) is that no election of a councillor or alderman shall be called in question except by an election petition presented to the court of District Judge, Delhi within 15 days from the date of the publication of the result of the election under s. 14. Sub-s. (2) provides :

"An election petition calling in question any such election may be presented on one or more of the grounds specified in section 17--

- (a) by any candidate at such election
- (b) (i) in the case of an election of a Councillor, by an elector of the ward concerned;
- (ii) in the case of an election of an alderman, by any councillor."

Its sub-section (4) requires that "An election petition-

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (a) shall, with sufficient particulars, set forth the ground or grounds on which the election is called in question; and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure 1908, for the verification of pleadings."

The relief that may be claimed by the petitioner is indicated in s. 16(1) which says :

"A petitioner may claim-

- (a) a declaration that the election of all or any of the returned candidates is void, and
- (b) in addition thereto, a further declaration that he himself or any other candidate has been duly elected."

Section 17 indicates the grounds on which an election can be declared void. One of such grounds vide clause (a) of S. 17(1) is "that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen as a councillor or, as the case may be, as an alderman under this Act". Another ground in clause (b) is of corrupt practices committed by a returned candidate or his agent or other person with his consent. Section 18 applies the Code of Civil Procedure, 1908 to the trial and disposal of an election petition "as far as it can be made applicable". Section 19 enumerates the nature of orders which the District Judge can make at the conclusion of the trial of an election petition. It reads "19(1) At the conclusion of the trial of an election petition, the court of the District Judge shall make an order-

- (a) dismissing the election petition; or
 - (b) declaring the election of all or any of the returned candidates to be void; or
 - (c) declaring the election of all or any of the returned candidates to be void and the petitioner and any other candidate to have been duly elected.
- (2) If any person who has filed an election petition has, in addition to calling in question the election of the returned candidate, claimed declaration that he himself or any other candidate has been duly

elected and the court of the district judge is of opinion--

(a) that in fact the petitioner or such other candidate received a majority of the valid votes, or

(b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes, the court shall, after de- claring the election of the returned candidate to be void, de-

clare the petitioner or such other candidate, as the case may be, to have been duly elected."

Section 21 says :

"(1) An order of the court of the district judge on an election petition shall be final and conclusive.

(2) An election of a councillor or an alderman not called in question in accordance with, the foregoing provisions shall be deemed to be good and valid election."

The provisions of ss. 9,15(1), 16(1), 17(1), 19(1), 19(2) of the Corporation Act are more or less parallel to those in Sections 9A, 18, 84, 101, 98 and 100 of the Representation of the People Act, 1951 (for Short the, People Act) respectively. It will be seen that a provision corresponding to S. 97 of the Representation of the People Act, 1951 is conspicuous by its absence from the Corporation Act, though the latter enactment was placed on the statute book in 1957.

Dr. Singhvi, learned Counsel for the appellant, vehemently contends that a right to plead and prove that the election- petitioner himself was guilty of corrupt practice and, as such, was disqualified to be declared to have been duly elected has been given by S. 9(1) (b) of the Corporation Act to the returned candidate. Section 9, it is maintained, applies to all stages of an election petition, and, if at the time of granting relief in an election petition, a returned candidate can show that the petitioner had committed corrupt practices in the election in question, then the court will not grant him the declaration that lie has been duly elected. Stress has been laid on the word 'being' in section 9(1) (b). Learned Counsel further maintains that in interpreting the provisions of the Corporation Act, two principles have to be, kept in view. The first is *ubi jus ibi remedium* (where there is a right, there is a remedy). The argument is that once it is conceded that the returned candidate has a right to plead that the petitioner had incurred any of the disqualifications enumerated in S. 9, he cannot be debarred from leading evidence to substantiate that plea. It is contended that if the returned candidate is not permitted to lead evidence to establish Such a counter-allegation, in defence, to a composite election petition of this nature, he will be left without any remedy because S. 21 (1) will make the order of the District Judge in the petition final and conclusive, while sub-s. (2) of the same section will bar any other procedure for impeaching the election of the election- petitioner on the ground that he has committed a corrupt practice. It is added the remedy provided in S. 33 will also be not open to the returned candidate after the decision of the election petition. In any case, the remedy in S. 33(3) is too circuitous, The second principle relied on by the Counsel is the Mischief Rule as enunciated in *Heydon's case*(1), that the court should make such construction as shall

suppress the mischief, and advance the remedy. The main object of these statutory provisions, it is urged, is to ensure (1) (1584) 3 Co. Rep.

purity of the elections, and if the returned candidate is not allowed to expose the corrupt practices committed by the election-petitioner, himself, it would defeat that object of the statute.

The other grounds of appeal have not been pressed before us. Mr. O. P. Malhotra, learned Counsel for the respondents, submits that in clause (d) of s. 9(1), the words "to have been" read together with clause (a) of s. 17(1) put it beyond doubt that this particular disqualification must have been incurred or in existence at the date of the poll or election. The, plea sought to be established by the returned candidate, according to the Counsel, is a plea of recrimination, and the Corporation Act does not contain any provision analogous to s. 97 of the People Act, giving him such a right. The only remedy of the returned candidate, says the Counsel, is to avail of the machinery of S. 33 (3). In approaching the matter under consideration, we must first appreciate the true nature of the plea set up by the returned candidate. What the appellant seeks is in substance, a right to give evidence to prove that the election of the election-petitioner would have been void on account of corrupt practices committed by him in the election, if he had been the returned candidate and a petition had been presented calling in question his election. Although Dr. Singhvi is reluctant to style this plea as one of recrimination, the nature of the plea or the right claimed is too obvious to be concealed. To all intents and purposes, it is a plea of recrimination of the type mentioned in S. 97 of the People Act, 1951. It is in the nature of a counter-petition on the ground of corrupt practices under clause (b) of S. 17(1) and not on the ground of the petition-or being disqualified at the date of the election, which is a distinct and separate ground under clause (a) of s. 17(1).

There is no provision in the Corporation Act corresponding to S. 97 of the People Act, expressly giving a right of recrimination 'co the returned candidate. The question therefore, is; Can such a right be legitimately spelled out of s.9(1) (d)? The entire argument of Dr. Singhvi has been built upon the edifice of the word "being" in the opening sentence of s.9(1). But the effect of the word "being" appears to have been largely off-set by the use of the words "to have been guilty" in clause (d). Stroud's Judicial Dictionary gives the meaning of the phrase "have been" as "immediately prior to a specific time". In *Re storie*,⁽¹⁾ a scheme for the management of the Charity declared that the boys should be chosen from those boys "who shall have been three years at the Free School". A complaint was made that an undue election had been made. On appeal, Lord Justices Knight Bruce and Turner, construing the scheme, held that only those boys were eligible "who had been three years at the school at the time of, and immediately preceding the election"- (Emphasis supplied).

In the instant case, also, if the phrase "found to have been guilty" in s.9(1) (d) is construed in the context of clause(a) of s.17(1), then (1) (1861) 30, L. J. Ch. 193:

on the analogy of *Re Storie*, it will mean "found to have been guilty at the time of the election, and immediately preceding the election Thus a right to recriminate cannot be legitimately spelled out of S. 9 (1) (d) without doing violence to its language or unduly stretching it.

The above interpretation fits better in the general scheme of the Corporation Act. As will be apparent from s.19, quoted earlier, the tribunal i.e. the District Judge can pass only three kinds of final orders indicated in clauses

(a), (b) and (c) of sub-section (1) of that section. The District Judge's inquiry at the trial of an election petition is, therefore, limited to the investigation of those matters only which will enable him to make the orders specified in s.19(1). But, where in a composite petition, like the one in the present case, relief is claimed that the petitioner be declared elected in place of the returned candidate, the District Judge is to investigate if either of the two conditions for 'the grant of a further declaration, specified in s. 19(2) is made out. That is to say, he has to confine his enquiry to the determination of either of these two questions namely : (a) whether in fact the petitioner received a majority of the valid votes, or

(b) whether the petitioner would have but for the votes obtained by the returned candidate, obtained a majority of the valid votes. Rule 68(1) of the Rules framed under the Corporation Act, defines 'valid vote' as "every ballot paper which is not rejected under Rule 67 shall be counted as one valid vote". The concept of validity of votes is different from that of corrupt practices defined in s. 22 on the basis of which an election petition can be instituted.

In such a composite petition, apart from rebutting the allegations made against him in the petition, all that the returned candidate can further show is that the petitioner did not in fact receive the majority of valid votes and is therefore, not entitled to the further declaration of his due election. In the absence of a provision specifically conferring such a right, the returned candidate cannot allege and prove further that even if the petitioner had obtained a majority of valid votes, he could not be granted the declaration of his due election because he had committed corrupt practices. Such plea and proof will, in reality, be in the nature of a counter-attack, not necessary for legitimate defence.

Having seen that there is no provision in the Corporation Act which specifically or by inevitable implication gives to a returned candidate a right to recriminate, the further question to be determined is : Whether the court is competent to provide this *casus omissus* by invoking the maxim *ubi jus ibi remedium* or Mischief Rule or other principles of common law ?

It appears to us that the answer to this question must be in the negative.

This Court has repeatedly held that 'an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown to common law and the court possesses no common law powers.' Statutory provisions of election law are to be, strictly construed and its requirement strictly observed. In *P. Malai Chami v. M. Andi Ambalam and ors.*,⁽¹⁾ this Court speaking through Alagiriswami J., again pointed out (1) A. 1. R. 1973 S. C. 2077.

-L954Sup.CI/74 .lm15 "Courts in general are averse to allow justice to be defeated on a mere technicality. But in deciding an election petition, the High Court is merely a tribunal deciding an

election dispute. Its powers are wholly the creature of the statute under which it is conferred the power to hear election-petitions."

It must be remembered-to use the oft-quoted words of Grover j. in Taunton's case(1)-

"that although the object of the statute by which the election tribunals were created was to prevent corrupt practices, still the tribunal is a judicial, and not an inquisitorial one, it is a court to hear and determine according to law, and not a commission armed with powers to enquire into and suppress corruption."

In the light of these well-established principles, it is clear that the court cannot bridge the gap or supply this apparent omission in the Corporation Act with regard to a returned candidates claim to recriminate, by importing principles of common law or equity, the maxim *casus omissus et oblivioni datus dispositioni communis juris relinquitur* being inapplicable to the construction of election statutes. A right to file an election petition or a recriminatory petition which, in substance, is a counter-election- petition, being the mere creature of statute, unknown to common law, the appellant, in the absence of a clear statutory provision, is not entitled to recriminate on any of the grounds mentioned in section 17.

We do not think it necessary to notice all the authorities cited at the bar or to dilate on this point further. We will close the discussion by referring to *Jabar Singh v. Genda Lal*(2), wherein Gajendragadkar C.J. clarified the nature of the right of recrimination thus "There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that S. 100 as well as s. 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that s. 97 comes into play. Section 97 (1') thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to, be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of s. 97(1), therefore, is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the (1) 20 M & H. p. 74.

(2) [1964] 6, S. C. R. 54 counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by S. 97(1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner .and within the time specified by S. 97(1) proviso and s.97(2). if the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petition. In such a case, an enquiry would be held under s. 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry a declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with ,alternative claim, but in doing so, the returned candidate will .not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate." (emphasis

supplied) Although the above observations were made in a case under the People Act, but the principle enunciated therein applies with greater force to the problem in hand. If the failure to comply strictly with the requirements of a statutory provision as to recrimination, precludes the returned candidate from recriminating, a fortiori, in the absence of such a statutory provision in an election law, the returned candidate has no right to recriminate. For the foregoing reasons, we would affirm the view taken by the Division Bench of the High Court in regard to the returned candidate's claim to recriminate. Before parting with this judgment, we will like to emphasise the desirability of making a clear provision, corresponding to s. 97 of the People Act, 1951 in the Corporation Act specifically conferring a right of recrimination on the returned candidate in an election-petition in which the petitioner, in addition to getting the election of the returned candidate declared void, seeks a further declaration that he or some other candidate has been duly elected. One of the primary objects of these provisions relating to corrupt practices, is to ensure purity of the elections. If corrupt practices committed by the returned candidate are abhorrent to that object, so are the corrupt practices indulged in by the petitioner or any other candidate and his agent in favour of whom the further declaration of the due election is claimed. What is sauce for the goose is sauce for the gander. According to the learned Counsel for the Respondent, the returned candidate would be entitled to get the petitioner disqualified by moving the Commissioner under s. 33 which inter alia provides that "if any question arises as to whether a councillor or an alderman has become subject to any of the disqualifications mentioned in s. 9, the Commissioner shall refer the question to the District Judge of Delhi for his decision and the decision of the District Judge shall be final. Assuming-not holding-that s. 33 provides for impeaching the election of a candidate declared duly elected under s. 19 (1) (c) , on the ground of corrupt practices committed by him, the remedy provided appears to be cumbersome, circuitous and dilatory in-

volving multiplicity of proceedings. The duplication of judicial proceedings by compelling the aggrieved petitioner to start a fresh challenge against the respondent after the formality of his being made councillor is published, not only defeats the object of an early determination regarding the purity of the election but also renders the proceeding ineffective for the very reason of the long delay. Again, the time that may be taken for the reference to the District Judge under s. 33 and the time consumed for the preliminaries before a trial begins or gains momentum can all be eliminated if there is provision, as in the Peoples' Representation Act, for recrimination. We express the hope that the Commissioner, in the event of a challenge being made to the respondent's election on the ground of corruption, will not delay a reference to the District Judge who certainly will, go into the legal and factual questions involved on which we pronounce no opinion. In the result, the appeal fails and is dismissed with costs. P.B.R. Appeal dismissed.