District Court has exercised its discretion under section 5, Limitation Act, in a capricious or arbitrary manner. We, accordingly, confirm the decree of the lower appellate Court with costs.

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Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

CHUNILAL MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, v. KIRPASHANKAR BHAGVANJI (ORIGINAL DEFENDANT), RESPONDENT.*

1906. *September* 18.

Municipality—Election of Councillor—Bye-election—Officer appointed to receive nomination papers—Return by the officer of plaintiff's nomination papers—Suit for injunction and declaration—Malice.

The plaintiff, who was a councillor of Surat Municipality, disabled himself from continuing to be a councillor by virtue of clause (*b*) (*ii*) of sub-section (2) of section 15(1) of the District Municipal Act (Bom. Act III of 1901) for having acted as a councillor in a matter in which he had been professionally interested as a pleader on behalf of a client. On the plaintiff being thus unseated, a vacancy was created and a bye-election was ordered to be held. The defendant was the officer appointed by the Collector to receive nomination papers for the bye-election. The plaintiff, who was duly qualified by

* Second Appeal No. 68 of 1906.

(1) Clause (*b*) (*ii*) of sub-section (2) of section 15 of the District Municipal Act (Bom. Act III of 1901):

(2) If any councillor during the term for which he has been elected or appointed—

(*a*) * * * * *

(*b*) acts as a councillor in any matter

(*i*) * * * * *

(*ii*) in which he is professionally interested on behalf of a client, principal or other person, or

(*c*) * * * * *

(*d*) * * * * *

(*e*) * * * * *

he shall be disabled from continuing to be a councillor, and his office shall become vacant.

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section 12(1) of the District Municipal Act (Bom. Act III of 1901) to be a candidate, was nominated as a candidate by duly qualified electors. The officer appointed to receive the nomination papers received the papers of the plaintiff's nomination, and having heard the plaintiff, returned his nomination papers on the ground that he, having been disabled, could not stand as a candidate at the bye-election to fill up a vacancy created by himself.

The plaintiff thereupon brought a suit against the officer for an injunction that the defendant should enter the plaintiff's name in the list of candidates to be published by the defendant and for a declaration that he was duly qualified to appear as a candidate. The plaintiff subsequently claimed damages in lieu of injunction.

The first Court found that the plaintiff was not entitled to an injunction, but it awarded to him damages to the extent of Rs. 150 owing to the defendant's wrongful act.

On appeal by the defendant the Judge reversed the decree and dismissed the suit on the ground that malice on the part of the defendant was necessary to such a suit and that no such malice was proved.

Held, confirming the decree on second appeal by the plaintiff, that in the absence of malice no such suit could lie against the defendant.

SECOND appeal from the decision of W. T. Baker, Acting District Judge of Surat, reversing the decree of J. E. Modi, First Class Subordinate Judge.

The plaintiff was at a general election of members for the Surat Municipality duly elected as a councillor in February 1904. Subsequently there was an election suit in which the plaintiff was pleader for the applicant. The plaintiff in connection with that suit acted as a Municipal councillor and gave his opinion as councillor in that matter. He was, therefore, under sub-section 3 of section 15 of the Bombay District Municipal Act (Bom. Act III of 1901) declared by Government as disabled

(1) Section 12 of the District Municipal Act (Bom. Act III of 1901):

12. Subject to the provision of section 13 and to the qualifications mentioned in section 15 and sub-sections (3) and (6) of section 22 as regards candidates, and in section 21 as regards voters,

(*a*) * * * * *

(*b*) * * * * *

(*c*) every Advocate of the High Court and every pleader holding a sanad from the High Court, and

(*d*) * * * * *

(*e*) * * * * *

shall be qualified as a candidate, and to be entered in the list of voters for the said district.

from continuing to be a councillor by virtue of clause (*b*) (*ii*) of sub-section 2 of section 15 of that Act for having acted as a Councillor in a matter in which he had been professionally interested on behalf of a client. A vacancy was thus created on the plaintiff being so unseated and a bye-election was ordered to be held on the 24th August 1904 to fill up the casual vacancy. The plaintiff, who as graduate of the Bombay University and as a pleader of the High Court, was duly qualified under section 12 of the Bombay District Municipal Act (Bom. Act III of 1901) to be a candidate, was so nominated by duly qualified electors. The defendant was the officer appointed by the Collector to receive the nomination papers under rule 13, paragraph (1) of the District Municipal Election Rules [1], and the papers ralating to the plaintiff's nomination were handed over to the defendant on the 12th August 1904, by the plaintiff as required by the notification issued by the Collector. He received the papers and after hearing the plaintiff, the next day returned the papers to the plaintiff with a letter stating that the plaintiff having been disabled, he cannot be allowed to fill up the vacancy caused by himself. As the time to receive the nomination papers was to expire on the 17th August 1904, the plaintiff brought the present suit on the 15th August asking for an injunction that the defendant should enter the plaintiff's name in the list of candidates to be published by the defendant, and for a declaration that the plaintiff was duly qualified to appear as a candidate at the bye-election and at any other election that may be held to fill up that vacancy. The plaintiff's prayer for a temporary injunction was refused as the defendant published the list of candidates on the 18th August 1904 without including the plaintiff's name. The plaintiff subsequently asked for damages in lieu of injunction.

(1) Rule 13, para. (1) of the District Municipal Election Rules :

13. (1) Every person who desires or is willing to become a candidate for a Municipal Commissionership must be nominated in writing for this purpose by two persons entitled to vote at the election for such Municipal Commissionership, and the nomination paper must bear an endorsement signed by the nominee signifying his willingness to serve, if he should be elected, and be delivered to the officer appointed by the Collector for this purpose, at least seven days before the date fixed for the election.

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The defendant answered, *inter alia*, that he being a Government officer the Court had no jurisdiction to entertain the suit under section 32 of the Civil Courts' Act (XIV of 1869), that the plaintiff having omitted to give notice under section 424 of the Civil Procedure Code (Act XIV of 1882), the suit was not maintainable, that as the orders passed in the suit would not be binding on the defendant the suit should fail, that no cause of action was disclosed against the defendant in his private capacity, that the Court cannot interfere with the defendant's exercise of the discretion vested in him by law, that the plaintiff's nominators having failed to satisfy the defendant that the plaintiff was duly qualified, the defendant's action was justifiable, that the plaintiff was not duly qualified as a candidate and that no declaration could be granted against the defendant, he being in no way interested in denying the plaintiff's status and having in his personal capacity not denied or affirmed anything about that status.

The Subordinate Judge found that the suit was not barred either under section 32 of the Civil Courts Act (XIV of 1869) or under section 424 of the Civil Procedure Code (Act XIV of 1882), that there was a cause of action for the suit and it was maintainable with respect to the relief in damages and not with respect to injunction, that the plaintiff was duly qualified and that the defendant acted wrongfully and was liable in damages. He, therefore, passed a decree awarding to the plaintiff Rs. 150 for damages. The following are extracts from his judgment:—

Now what occurred in the plaintiff's case is this. There were 3 nomination papers in his favour signed by eleven nominators in all. These papers were delivered by the plaintiff himself as a candidate to the defendant on the 12th August, and there was a discussion between the plaintiff and the defendant as to the eligibility of the plaintiff. There was one voter present just outside the defendant's office room, but the defendant did not express any wish to call up any of the nominators. Next day he sent back the papers to the plaintiff with a letter stating the grounds on which he declined to receive his nomination. The time to receive such nomination expired on the 17th, while the present suit for an injunction was filed on the 15th.

The proper thing for the defendant to do was to have kept the papers with himself, and after hearing the nominators on the 19th, to have published his list of candidates in which he was at liberty to include the plaintiff's name or to omit it.

There is no doubt that the defendant ought to have given the nominators an opportunity of appearing before him and satisfying him on the questions, the burden of proof regarding which rested on them; if they had thus the onus on them, they ought also to have had the right to meet it. The privilege of naming their own candidate required no less protection than the candidate's privilege of getting a chance of election. The electors ought each and every one of them to have been called upon to vindicate their nominee's right, and last of all the plaintiff had every right to get his nominators heard in his interest. His himself pleading his own cause was nowhere allowed by the election rule and did not satisfy that rule.

As the nominators were at liberty to send the nomination papers in any way, and not to be personally present when the papers were handed over to the defendant, I have already remarked upon this. The defendant, it seems, was bound to have kept the papers and to have called upon the nominators to argue the case. It may be said that the plaintiff should have waited till the 19th to see if the defendant was going to include his name in the list or not, though the defendant had returned the nomination papers. It may be said that the plaintiff and his nominators should have gone again to the defendant before the 17th and presented the papers again. I think that the defendant's decision communicated in his forwarding letter precluded all idea of this sort of attempt to bring him round.

Thus, then, it is clear that the defendant had committed a grave irregularity. But now comes the question of his responsibility for it and this is not an easy question to answer, especially as neither party has brought before the Court full and satisfactory precedents on the point.

* * * * * *

In Addison on Torts (6th edition) it is said: "The functions of a returning officer are not wholly ministerial, but are partly judicial and are partly ministerial, and a judicial officer cannot be made responsible for an erroneous or wrong judgment when he has acted *bonâ fide* in the matter of which the law gives him cognizance" (page 652).

I think this suffices to prove defendant's liability. Though not a Judge, he had quasi-judicial powers. He has exercised them in a way not at all justified by law. We do not care what conclusion he has come to, but he has come to this conclusion without making the necessary inquiries from the parties concerned, namely, the eleven nominators.

* * * * * *

I hold the defendant has acted wrongfully and is liable in damages to the plaintiff. Next I have to consider the amount of damages to be allowed to the plaintiff. The actual expenses the plaintiff has incurred in connection with this suit, if they be reasonable, may fairly be allowed, as the direct loss caused by the defendant's wrong.

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Plaintiff paid Rs. 75 to a Bombay barrister for this suit and Rs. 50 to his pleader here. I allow these sums as reasonable ones. He says he lost an engagement in a criminal case. I do not think that a direct damage. Also I would not allow his travelling expenses to Bombay. There was no need of personally going to Bombay to get counsel's opinion. So I allow him Rs. 75 *plus* Rs. 50 = 125 under the first head.

I think Rs. 25 quite enough for the damage to his franchise right.

On appeal by the defendant the Judge reversed the decree and dismissed the suit, holding that there was no cause of action against the defendant. The Judge was of opinion that the plaintiff was qualified to stand as a candidate but the defendant's action was *bonâ fide* and there was no malice on his part. The reasons of the Judge were as follows :—

The plaintiff is a graduate of the Bombay University and a High Court pleader. He is admittedly a qualified candidate and was elected, but he was subsequently disabled under sub-section 2, clause *b* (*ii*) of section 15 of the Act. It is argued on behalf of the appellant that he was not a competent candidate at the bye-election held to fill the vacancy thus caused. I do not, however, think that section 15 can be read in this manner. It is argued that disqualifications refer to those impediments to becoming a candidate which arise before the election and disabilities are those which arise afterwards. There is, however, a wider distinction than that, for a councillor may become disqualified after his election. It is argued that "disabled from continuing to be a councillor" means disabled for the unexpired portion of the term for which he is elected. I can, however, see no warrant for reading these words into the section.

On reading the section it will appear that disqualifications bar any one from becoming a councillor either permanently, *e.g.*, females, or until the happening of a certain event, *e.g.*, *conduction* (*sic.*) by Government in the case of conviction, discharge in the case of uncertificated bankrupts, and so on. Hence in the case of disqualifications the impediment is either permanent or terminable at a period which can be understood from the context. In the case of disabilities no such limit can be inferred and the law provides none. There appears to me to be no warrant whatever for inferring that the limit is to be till the next general election. The law does not say so. All it says is that the person so disabled shall not continue to be councillor and his office shall become vacant. The provisions of the law are fulfilled when his office becomes vacant, and if he is re-elected he cannot be said to contravene the law, which only says he shall not continue to be a councillor without vacating office. A person, who is unseated and has to go through a fresh election, does not continue to be a councillor. There is an interval in his occupation of the office, and when he returns, he returns under a fresh electoral mandate. In my opinion this is the proper interpretation of the section, which only contemplates that a person disabled

shall vacate his seat and be compelled to undergo a fresh election. It is quite unnecessary to read into the law words which are not there. If it had been intended to prohibit the re-election of a disabled councillor till the next general election, this would have been presumably stated in the Act. But there is nothing to that effect. I would therefore hold that there is nothing in the law which prohibits a councillor disabled under paragraph (*b*) of sub-section 2 of section 15 from again becoming a councillor and *a fortiori* from being a candidate for the seat he has vacated. It is true that a person becoming disqualified after election is also disabled from continuing to be a councillor, but his case must be considered in the light of the disqualifications mentioned in the first portion of the section. There is to my mind a clear distinction between the case of a person labouring under one of the disqualifications mentioned in the first portion of the section and the case of a person disabled by one of the causes mentioned in paragraphs (*b*), (*c*), (*d*), (*e*) of sub-section 2 of section 15, and I am unable to see that a person falling under any one of these heads is prohibited from again standing for the seat vacated by him.

The law requires that his seat should be vacated. This has been done in the present case, and the plaintiff being admittedly qualified under section 12 has a right to stand as a candidate for the seat rendered vacant by his own disability.

* * * * *

It appears the plaintiff presented his nomination papers himself on 12th August 1904, and defendant states he had some discussion at the time with the plaintiff, as he told the plaintiff that he felt some doubt about his disability. He told the plaintiff he would consider the matter and would let him know his decision the next day. Next day the papers were returned to plaintiff with a letter stating that the defendant refused to receive his name. I am of opinion that there being admittedly some doubt in defendant's mind as to plaintiff's eligibility, and the papers being put aside for consideration till the next day, it was the duty of the plaintiff's nominators under rule 13 to satisfy the defendant. I do not think that the defendant's omission to call them can be construed as a "conscious violation of the law," and if his interpretation of the rule is wrong I cannot hold that it is more than an honest error of judgment. It has not been alleged that there is any ill-feeling between the parties which would lead defendant to do anything he could to prevent plaintiff from becoming a candidate. Why should it be presumed that because defendant put a particular interpretation on the law that therefore he was consciously violating it? The Sub-Judge thinks that a single glance at the rules would have shown defendant that he was bound to call the nominators. The rule does not to my mind show anything of the kind. Nor can I agree with the Sub-Judge in holding that the nominators were not given an opportunity of justifying their choice since the papers were not returned till the next day and it was known to the plaintiff that his qualification was doubted by the defendant. He could have told his nominators. It is not alleged that the nominators went to the defendant and

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he refused to hear them. I would therefore hold that the facts disclose no malice and all the quotations in the Sub-Judge's judgment from Pollock on Torts, &c., will show that an officer exercising quasi-judicial functions cannot be made responsible for an erroneous or wrong judgment if he acts *bonâ fide*.

In my opinion the defendant's action was not erroneous, but if it were he is protected, as it does not appear that he was not acting *bonâ fide*. There is no malice as there was in *Ashby* v. *White*[1]. If the defendant's view was wrong, he acted *bonâ fide* in pursuance of what he believed to be the duties of his office, and therefore he would not be liable to any action, certainly not to any action for damages (*cf. Sabhapatisingh* v. *Abdul Gaffur*, I. L. R. 24 Cal., p. 107 at p. 114).

The plaintiff preferred a second appeal and the defendant filed cross objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

L. A. Shah appeared for the appellant (plaintiff).

M. B. Chawbal (Government Pleader) appeared for the respondent (defendant).

JENKINS, C. J.:—Though several questions are raised in this suit and have been decided in the lower Courts, we think there is only one on which we ought to express an opinion; and that is, whether the present suit lies.

The acting District Judge has held that it does not, and he has come to that conclusion because in his opinion malice is necessary to such a suit, and he holds that there is no malice.

The case appears to us to be one to which the language of Lord Chief Justice Abbott in *Cullen* v. *Morris*[2] is peculiarly applicable. It may be said here, as it was said there, that "the returning officer is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever ....., the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he

(1) 1 Smith's L. C. 240 (11th Edn.). (2) (1819) 2 Stark 577 at p. 587.

became liable to an action. It has been urged that Lord Holt, who with great honour to himself once filled this seat, intimated his opinion that the mere refusal of the vote of a person entitled to vote, would give the party a right to sue the returning officer. Whether he ever did say so or not, we do not certainly know, for the reports of that case are very imperfect. No one entertains a greater veneration for that learned Judge than I do, but if he did so express himself, I am bound to deliver my opinion that he was mistaken."

In our opinion it would be unreasonable to hold that an officer, who had to perform the functions allotted to the defendant, was liable to a suit because he made a mistake in good faith in determining questions that arose for his decision. We do not say that the defendant did make a mistake, for in the view we take that question does not arise for our decision. But assuming that he made a mistake, still we think that in the absence of malice no suit can lie against him.

For these reasons the decree of the lower appellate Court must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

TYEB BEG MAHOMED (ORIGINAL DEFENDANT), APPLICANT, *v.* ALLIBHAI MANGALJI (ORIGINAL PLAINTIFF), OPPONENT.*

1906. *September* 18.

Presidency Small Cause Courts' Act (XV of 1882), chap. VII—Civil Procedure Code (Act XIV of 1882), sec. 108—Presidency Small Cause Court—Proceedings in ejectment—Ex parte order—Power to set aside.

The Small Cause Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantiated.

Per JENKINS, *C. J.*:—It is erroneous to suppose that section 108 of the Code of Civil Procedure has no application to proceedings under chapter VII of the Presidency Small Cause Courts' Act.

* Application No. 201 of 1906 under the extraordinary jurisdiction.