

their security. They are, however, not entitled to recover such costs as are attributable to their unsuccessful contentions upon the issue of stoppage *in transitu*. These costs we assess at one-third in each Court.

We, therefore, reverse the decree of the lower Court and decree that the defendants do pay to the plaintiffs the sum of Rs. 1,828-14-0 with interest thereon at 6 per cent. per annum and two-thirds of the costs of this suit throughout. The respondents must assign to the appellants the Rs. 602-10-7 in the hands of the Collector of Customs.

Decree reversed.

Appellants' solicitors:—Messrs. *Craigie, Blunt & Caroe*.

Respondents' solicitors:—Messrs. *Crawford, Brown & Co.*

K. MCI. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE
MATTER OF SARAFALLY MAMOOJI.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE
MATTER OF JAFFER JUSUB.

*Specific Relief Act (I of 1877), section 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), sections * 33 and 34.*

A Municipal election petition having been lodged with the Chief Judge of the Small Causes Court, the latter unseated two of the successful candidates

* Section 33. (1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may, at any time, within fifteen days after the result of the election has been declared, apply to the Chief Judge

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and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as

of the Small Cause Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, have, according to the results declared by the Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.

(2) If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the said election and against whose election no cause of objection is found, shall be deemed to have been elected.

(3) The said Chief Judge's order shall be conclusive.

(4) If he sets aside an election or if, when he declares a person who has been declared elected disqualified for being a Councillor, there is no other candidate who can be deemed to have been elected, proceedings for filling the vacancy or vacancies shall be taken under section 34.

(5) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election.

Section 34. (1) If from any cause no Councillor is elected at any general election, the retiring Councillor or Councillors shall, if willing to serve, be deemed to be re-elected.

(2) If, in any such case the retiring Councillor is not willing to serve, or some of the retiring Councillors are willing to serve and some are not, or

if, in the case of an election to fill a casual vacancy, no Councillor is elected, or

if, in the case of any election, an insufficient number of Councillors are elected,

the Commissioner shall, without delay, inform the Corporation of the circumstances, and thereupon the Corporation, so far as it is constituted, may appoint a duly qualified person to fill the vacancy, or each vacancy, as the case may be, and, if the Corporation shall fail within fifteen days after receipt of such information to appoint a person as aforesaid, the Commissioner shall appoint another day for holding a fresh election.

(3) A fresh election held under this section shall be held subject in all respects to the same provisions as if it were an election to fill a casual vacancy.

elected." He declined to inquire further into the claims of any other candidate or to declare any other candidate elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so.

The two highest of the other unsuccessful candidates thereupon obtained rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (2) above mentioned.

Held, that the case fell within the general principle referred to in *Ex parte Milner*(1) that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue.

Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected; there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34.

An application under section 33 (1) should name the persons whose election is objected to.

At the triennial general election of Municipal Councillors held in January 1910 fifteen candidates presented themselves to contest the eight vacancies in the Mandvi Ward. Eight candidates were declared by the Municipal Commissioner duly elected. A petition was shortly afterwards lodged with the Chief Judge of the Small Causes Court, under section 33 of the Municipal Act (Bom. Act III of 1888), praying for the setting aside of the election of these eight Councillors, or of one or more of them, on the ground of personation, coercion and undue influence. The inquiry resulted in the Chief Judge setting aside the election of two of the eight Councillors, namely, those standing 3rd and 6th respectively on the list returned by the Municipal Commissioner. Proceeding under the latter part of section 33 (2)

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of the Act, the Chief Judge held that only one candidate could in any event fulfil the conditions therein set out, and that, as objection existed against that candidate—in this case, number 9 on the list—, no other could be declared elected. The two vacancies thus caused were later filled by the Corporation under the provisions of section 34. On 13th June 1910 on the petition of Jaffer Jusub, who stood 10th on the list of candidates, Macleod, J., granted a rule *nisi* to issue to the Chief Judge to show cause why he should not proceed to direct under section 33 that the petitioner be deemed to have been duly elected. A similar rule was granted on the petition of Sharafally Mamooji, who stood 11th on the list. The two rules were consolidated and argued together.

Kemp (with him *Jardine*, Acting Advocate General) appeared for the Chief Judge of the Small Causes Court to show cause.

Section 45 of the Specific Relief Act provides that the Act required to be done must be clearly incumbent on the public officer. But here the Act is not in any event incumbent on the Chief Judge without further inquiry. The High Court has no power to interfere where the Judge has exercised his discretion in a matter within his jurisdiction. Even if it has the power it will not use it in such cases. It will only interfere where the Judge has wrongfully refused to perform his duty and not where he has gone wrong in performing it: see *Clifton v. Furley*⁽¹⁾, *In re Milner*⁽²⁾ and *The Queen v. The Judge of Pontypool County Court*⁽³⁾. This case must be distinguished from *In re Brighton Sewers Act*⁽⁴⁾, where the Judge refused to perform his duty. In *In re Bowen*⁽⁵⁾ it was held that the construction of a statute was within the jurisdiction of the County Court Judge, and even if his construction was erroneous a prohibition could not issue. Here the case is even stronger. Not only is the matter decided by the Chief Judge within his jurisdiction, but it is within his exclusive jurisdiction. The Act which created the right claimed by the petitioners also laid down their remedy. The whole point is fully dealt with

(1) (1861) 7 H. N. 783.

(2) (1894) 63 L. J. Q. B. 702.

(3) (1851) 15 Jur. 1037.

(4) (1882) 9 Q. B. D. 723.

(5) (1851) 15 Jur. 1196.

in *Bhaishankar v. Municipal Corporation of Bombay*⁽¹⁾. The judgment of Jenkins, C. J., in that case went much further than the actual decision, and is entirely against the petitioners. In any case the Chief Judge's construction of section 33 (2) is not only correct, but the only possible construction. Any other reading makes the word 'next' superfluous. Only one candidate can have the next highest number of valid votes, and the fact that there is cause of objection against him cannot release other candidates from fulfilling the first condition. The section does not enable, much less compel, the Chief Judge to go down the list till he comes to a candidate against whom no objection exists. The supposed intention of the legislature cannot be read in when the words are clear: *Vestry of St. John's, Hampstead v. Cotton*⁽²⁾. Lastly, the interference of the High Court where it lies, is purely discretionary, and many considerations arise as to the use of that discretion: see *The Queen v. Church Wardens of All Saints, Wigan*⁽³⁾. Such a rule, if granted, would lead in future to delay and uncertainty. In every election petition the Chief Judge must decide numerous points of-law, and all these might be disputed in the same way. This is an indirect appeal, where no appeal lies.

Jardine, Acting Advocate General, appeared for the Municipal Commissioner.

The only interest of the Commissioner in this case is that the section should be read aright. The Court should bear in mind that the construction of the Act has not come before it as *res integra*, and even though mistaken should not be interfered with lightly, especially if a reasonable interpretation has been given. The petitioners here are in reality appealing. They have also been guilty of delay. Such an application as this ought to have been made at the earliest possible moment. Had the Corporation known of this petition, they would have refrained from filling the vacancies until they knew the result. But as it is, the vacancies have both been filled. Finally, the rule cannot be made absolute in its present form. The Court, if it decides to interfere, will have to give directions to the Chief Judge. Must the inquiry

(1) (1907) 31 Bom. 604.

(2) (1886) 12 A. C. at p. 6.

(3) (1876) 1 A. C. at p. 620.

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be re-opened, or must he decide, as to the validity of votes and causes of objection, on such evidence only as has been adduced?

Setalvad, for the petitioners, in support of the rule.

There was no undue delay. The petitioners applied at the earliest opportunity,—the first day of term. The Corporation would probably have filled the vacancies in any case, as, otherwise after fifteen days they would have lost their right to do so under section 34. The cases cited with regard to the jurisdiction and discretion of the High Court to interfere are all in my favour. They all show that this Court will interfere where the lower Judge has refused to perform his duty. The duty of the Chief Judge in this case was, according to section 33 (2), to declare the petitioners elected. This he wrongfully refused to do. He had jurisdiction and refused to entertain it. The case of *Bhaishankar v. Municipal Corporation*⁽¹⁾ only decided that a suit would not lie in a matter in which the Chief Judge's order was conclusive. It has no application here. The Chief Judge's construction of the section is wrong. It is not necessary to give it such a narrow meaning even if such meaning is possible, and it was obviously not the intention of the legislature. The weakness of that reading is apparent when its alleged effect in restricting the Chief Judge to the consideration of one candidate could be nullified by the filing of a series of petitions. For I submit that it would be so nullified. The Chief Judge in his judgment has not found any cause of objection against the petitioners, and it is therefore clearly incumbent on him to declare them elected. The order should be that he should proceed according to law.

MACLEOD, J. :—In January last the triennial election of eight Councillors for B Ward Mandvi to the Municipal Corporation of the City of Bombay was held according to the provisions of the City of Bombay Municipal Act III of 1888. There were fifteen candidates and the result of the poll was duly declared by the Municipal Commissioner under section 28 (p) of the Act. Under section 28 (q) the first eight candidates were deemed to be elected.

A petition was then presented under section 33 of the Act by one Husenbhai Abdulabhai Laljee to the Chief Judge of the

(1) (1907) 31 Bom. 604.

Small Causes Court praying that the whole election or the election of the eight Councillors or of one or more of them might be set aside and a scrutiny held. The fifteen candidates and the Municipal Commissioner were made respondents. The Chief Judge held an inquiry and set aside the election of Lakhamsey Nappoo and Khimji Hirji Kayani who occupied the 3rd and 6th positions amongst the successful candidates.

The Chief Judge then came to the conclusion that under section 33 (2) he was only empowered to consider the claim of Fazulbhai Joomabhai Laljee, the candidate obtaining the next highest number of votes to the candidates returned as elected, to be held to be deemed to have been elected, but as he held that a valid cause of objection existed to Fazulbhai being declared elected he declined to direct that Fazulbhai should be deemed to be elected.

He further held that as there was no other candidate according to the interpretation he placed on the section who could be deemed to be elected, proceedings for filling up the two vacancies would have to be taken under section 34 of the Act.

Sarafally Mamooji, who stood tenth on the list as notified by the Commissioner, then presented a petition to this Court under section 45 of the Specific Relief Act asking for an order that the Chief Judge do proceed to direct under section 33 of the Bombay Municipal Act that the petitioner shall be deemed to have been duly elected and for such further and other relief as the circumstances of the case might require.

On the 13th June I granted a rule against the Chief Judge and directed that notice should be given to the Municipal Commissioner and also to Sir Jamsetji Jeejeebhai and Dr. Rajabally V. Patell who had been appointed by the Municipal Corporation purporting to act under section 34 to fill the vacancies caused by the decision of the Chief Judge. The rule was argued before me on the 23rd June. Mr. K. Kemp appeared to show cause on behalf of the Chief Judge; Mr. Jardine, Acting Advocate General, appeared to watch the proceedings on behalf of the Municipal Commissioner while the two gentlemen above mentioned had intimated to the petitioner that they did not intend to take any part in the proceedings.

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It was first contended by Mr. Kemp that the Court had no jurisdiction to entertain the petitioner's application. Now under section 45 of the Specific Relief Act the High Court of Bombay may make an order requiring any specific act to be done or forbore within the local limits of its Ordinary Original Civil Jurisdiction by any inferior Court of Judicature, provided that (a) 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 such specific act and (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such Court in its public character. Rule 530 of the Bombay High Court Rules prescribes the manner in which the application should be made. The Small Causes Court is an inferior Court of Judicature within the local limits of its Ordinary Original Civil Jurisdiction, and the petitioner's franchise has been injured by the Chief Judge refusing to consider his claim to be deemed to have been elected. Therefore if I am of opinion that it was clearly incumbent on the Chief Judge under section 33 to consider the petitioner's claim, I have jurisdiction to direct the Chief Judge to do so.

I may here deal with the contention that the petitioner has been guilty of delay so as to disentitle him to relief.

The Chief Judge delivered his judgment on the 13th April. The petitioner obtained a certified copy of the judgment on the 23rd April. The High Court vacation had then commenced and the petition was presented on the first day the Court sat after the vacation. It is suggested that it should have been presented during the vacation, but the petitioner was under no obligation to do so, and I think he was perfectly justified in waiting until the Court re-opened after the vacation. Then Mr. Kemp urged that the Chief Judge had exercised his discretion in a matter wholly and exclusively within his jurisdiction and that acting on well-known principles this Court would not interfere. But in this case it is not a question of discretion, the Chief Judge has said: "As I read section 33 the legislature has given me no power to consider the claim of any of the remaining candidates to fill these two

vacancies except the claim of No. 9." If he had said, "I have the power but I decline to exercise it in favour of any of the unsuccessful candidates," his decision would have been conclusive.

This case falls within the general principle referred to in *Ex parte Milner*⁽¹⁾ that where an inferior tribunal improperly refuses to enter upon a complaint, a mandamus will issue. And see *The Queen v. The Judge of the Pontypool County Court*⁽²⁾, where the High Court refused to interfere with the decisions of the County Court Judge, as, in the words of Wright, J., "he had not really declined jurisdiction. He might or might not have made a mistake but it could not be said he had refused to entertain case."

Lastly, it was suggested that even if I differed from the Chief Judge I should not give directions on the ground of public policy as the success of the petitioner in this case might lead to applications of a frivolous nature being made to this Court. That may be a reason why this Court will not interfere when the lower Court has exercised its discretion but when jurisdiction has been declined it is a matter of public policy that a subject should not be lightly deprived of a franchise to which he is entitled by law.

I now come to the merits of the case. What are the powers and duties of the Chief Judge under section 33 of the Bombay Municipal Act which has been materially altered by Bombay Act V of 1905? Within fifteen days after the result of an election being declared any person enrolled in the Municipal election roll may apply to the Chief Judge (1) if the qualification of any person declared to be elected for being a Councillor is disputed or (2) if the validity of any election is questioned for certain reasons mentioned or for any other cause. It is open to argument whether the word 'election' means the election proceedings as a whole, or the election of an individual candidate. This question was discussed by Sir Lawrence Jenkins, C. J., in *Bhaishankar v. Municipal Corporation of Bombay*⁽³⁾ but in the

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(2) (1894) 63 L. J. Q. B. 702

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opinion of the learned Chief Justice it mattered little which view prevailed. I should be inclined to think that neither view is wholly correct.

An objection to the election proceedings as a whole must include an objection to each of the individual candidates. An objection to the election of a particular candidate may involve an inquiry into the whole of the election proceedings as regards that candidate. What does seem clear from the wording of sub-section (2) is that an application under sub-section (1) should name the persons whose election is objected to.

The powers of the Chief Judge under sub-section (2) were changed by the amending Act and in order to prescribe the procedure to be followed in consequence of that change the following words were added to sub-section (1) : "If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates, who, although not declared elected, have, according to the results declared by the Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate."

It was open, therefore, to the applicant in the Small Causes Court to ask for a declaration that No. 15, for instance, should be deemed to have been elected, in which case he was bound to make Nos. 9 to 14 parties to his application. I do not understand, however, the last words of the sub-section 'as against the said candidate.' The applicant would not be proceeding against the particular candidate he wished to be declared elected, and it would seem more in agreement with the context if the sub-section ended as follows :—'as against the successful candidate or candidates the validity of whose election is being questioned.'

Sub-section (2) enacts what the Chief Judge is to do when an application is made under sub-section (1). He has to make such inquiry as he may deem necessary and—

1. If he finds that the election was a valid election and that the person whose election is objected to is not disqualified he shall confirm the result of the election;

2. If the Chief Judge finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void.

3. If the Chief Judge finds that the election is not a valid election he shall set it aside.

The words "so far as concerns the person whose election is objected to" appearing in the act before the amendment have now been omitted. It may be they were considered superfluous, but whether the Chief Judge declares a person's election null and void on the ground that he is disqualified or sets aside an election as not valid, in either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the election, and against whose election no cause of objection is found shall be deemed to have been elected.

The Chief Judge dealing with this part of sub-section (2) says in his judgment :

"The last part of clause 2 of section 33 seems to contemplate only one candidate coming in in the event of one or more of the successful candidates being unseated by the Court, that one candidate being the gentleman with the next highest number of votes to the candidates returned as elected provided no cause of objection exists against him. Hence if the election of the whole eight successful candidates were set aside the Court would only have power to declare the ninth candidate elected in place of the eight returned candidates and if any cause of objection existed as to him nobody could be declared elected."

Later on he says:

"As the elections of the third and sixth respondents have been set aside the question to be considered is whether any cause of objection can be urged against the ninth respondent who in the ordinary course and who alone under section 33 (2) can be declared elected in place of the unseated candidates."

Whatever the section may contemplate, the Court must give effect to its plain grammatical meaning and, with all due deference to the learned Chief Judge, that meaning is perfectly clear. Under section 33 (2) of the Act as it stood before it was amended by Bombay Act V of 1905 the Chief Judge, if he set aside an election, had no power to fill the vacancy so created. It was

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only in the case of a person's election being held null and void on the ground that he was disqualified for being a Councillor that the Chief Judge could direct that the candidate, if any, with the next highest number of votes after the person disqualified or after all the persons who were returned as elected should be deemed to be elected. I am clearly of opinion that under that section the Chief Judge had power to fill up any number of vacancies caused by the election of candidates being declared null and void so far as the number of unsuccessful candidates allowed in order of votes obtained by them. However that may be the amendments, introduced by Act V of 1905, leave no room for ambiguity. It is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected but the candidate with the next highest number of valid votes and against whose election no cause of objection is found. The Chief Judge in stating what the section in his opinion contemplated has omitted to notice the word 'valid.' No doubt the Chief Judge would be entitled to presume that all the votes in favour of a candidate as declared by the Commissioner were valid but if a vacancy has to be filled all the unsuccessful candidates are open to attack and the last on the list may prove to be the one with the next highest number of valid votes.

The object of the latter portion of sub-section (1) added as above mentioned by Bombay Act V of 1905 now becomes clear. The change in sub-section (2) has enabled an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected and if the applicant in this case had applied for a declaration in favour of No. 15 he was bound, as I have pointed out above, by sub-section (1) to make Nos. 9 to 14 parties of his application. As far as I can gather no such declaration was asked for but all the candidates were made parties to the application. If the Chief Judge could only consider whether No. 9 should be deemed to be elected or not, the latter portion of sub-section (1) expressly added by the amending Act would be meaningless.

Then is there anything in the section which can be held to limit the power of the Chief Judge to filling up one vacancy

only, when he has set aside the election of more than one of the successful candidates? Under section 13 of the General Clauses Act words in the singular shall include the plural and *vice versa* provided there is nothing repugnant in the subject or context.

The section has been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected; therefore I see nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was suggested that the Chief Judge might have to direct that candidates with a very small number of votes should be deemed to have been elected. That is a matter for the legislature and not for the Court, but I may point out that it would be possible for this to occur even if the view of the Chief Judge was correct and only the claim of the next man out could be considered.

In my opinion, therefore, it was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies.

I direct accordingly that the Chief Judge do proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection is found should be declared to be deemed to be elected. If only one qualifies, or none qualifies, proceedings for filling the vacancy or vacancies will have to be taken under section 34.

My decision in no way interferes with the discretion of the learned Chief Judge. It does not lie within his discretion to refuse to exercise duties clearly imposed upon him by statute when by such refusal the franchise of some person has been injured.

Attorneys for the petitioner :—Messrs. *Thakurdas & Co.*

Attorneys for the Municipal Commissioner :—Messrs. *Crawford, Brown & Co.*

Attorneys for the Chief Judge :—Messrs. *Little & Co.*

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