APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

SHANKAR NANASAHEB KARPE, PETITIONER *v.* THE RETURNING OFFICER OF THE ROHA SUDHAGAD CONSTITUENCY, AND ANOTHER, RESPONDENTS.* 1951 Dec. 4

Representation of the People Act (XLIII of 1951), ss. 36, 80, 84, 105 and 170—Dispute relating to election—Whether term "election" includes any stage of election—Jurisdiction of Civil Courts, whether ousted—Constitution of India, Arts. 226, 327, 328 and 329 (b)—Writ of Mandamus—Whether Writ can be issued at any stage of election.

The whole object of the Constituent Assembly in enacting Part XV of the Constitution and the whole object of Parliament in putting on the Statute book the Representation of the People Act, 1951, was to set up a machinery whereby elections would take place, as far as possible, within the time-schedule laid down and without interference or interruption by proceedings in a Court of law.

The scheme of the Representation of the People Act, 1951, is to give a sort of finality to different stages of the election and to provide that all matters arising during the election and all disputes relating to the election should be determined and adjudicated upon after the election is over by means of an election petition to be decided by an Election Tribunal.

The obvious object of enacting Art. 329 (b) of the Constitution is to exclude the jurisdiction of Civil Courts with regard to the matters enumerated in that sub-clause and if the subject falls under Art. 329 (b), the High Court has no jurisdiction to issue a Writ under Art. 226 with regard to that subject-matter, because Art. 226 is controlled by Art. 329.

Reading the expression "election" in its context, both in Art. 329 and in juxta-position with Arts. 327 and 328 and in its setting in Part XV of the Constitution, "election" is not merely the ultimate decision or the ultimate result. "Election" is every stage from the time the notification for elections is issued till the result is declared, and even perhaps if there is an election petition, till the decision of the Election Tribunal. What is prohibited by Art. 329 (b) is the calling in question any one aspect or stage of the election.

A writ of mandamus is ordinarily issued to a public officer in order to compel him to discharge his statutory obligations, and before a Court would issue such a writ it must ascertain what the statutory obligations of the public officer are and whether he has failed to discharge those obligations. A petition for mandamus does not constitute the Court which issues the writ a Court of appeal from the decision of the public officer against whom the writ is intended to be directed.

* Civil Application No. 1795 of 1951.

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A writ of mandamus is a high prerogative writ. The Court issues a command in order to remedy a grave error or to set right injustice, and the Court would never issue such a command unless it is certain that the command would be respected and carried out. A Court issuing a prerogative writ should never put itself in a position where its command is likely to be set at naught by another Tribunal which may have to deal with the matter.

Application under Art. 226 of the Constitution.

The petitioner, Shankar Nanasaheb Karpe, filed his nomination papers as a candidate for election to the Bombay Legislative Assembly from Roha-Sudhagad (Kolaba District) Constituency which was declared to be held on January 7, 1952. In all, six persons had put in their nomination papers in the said Constituency of whom Rajaram Chandorkar, opponent No. 2 was one. At the time of the scrutiny of the nomination papers opponent No. 2 objected to the nomination of the petitioner on the ground that the petitioner was a Government Contractor and therefore disqualified from being a member of the State Legislature in view of s. 7 (*d*) of the Representation of the People Act, 1951. Opponent No. 2 contended that the petitioner had purchased certain forest coups from the Government and hence he was a Government contractor. The petitioner stated by way of reply to the said objection that s. 7 (*4*) of the said Act could not be a bar to his candidature inasmuch as he had no share or interest in any contract for the supply of goods to, or for the execution of any works or their performance of any services undertaken by the Government.

The Returning Officer held that the petitioner had a concern with Government and rejected the petitioner's nomination paper on November 27, 1951. The list of valid nominations was to be published on November 30, 1951.

On November 29, 1951, the petitioner applied to the High Court under Art. 226 of the Constitution for a Writ of Mandamus or other appropriate writ directing the Returning Officer to include the petitioner's name in the list of valid nominations and for an interim injunction restraining him from preparing and publishing a list of valid nominations till the final disposal of the matter by the High Court.

The application was heard.

K. N. Dharap with *M. M. Virkar,* for the petitioner.

M. P. Amin, Advocate General with *H. M. Choksi,* Government Pleader, for opponent No. 1.

Purshottam Tricumdas and *S. P. Mehta,* for opponent No. 2.

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CHAGLA C. J. This is a petition for a writ under Article 226 of the Constitution against the Returning Officer of the Kolaba District, alleging that the Officer has wrongfully rejected the nomination paper of the petitioner for the ensuing election to the State Assembly, and for an order upon him directing him to include the petitioner's name in the list of valid nominations. The Advocate General who appears for the Returning Officer has taken a preliminary objection and the objection is that this Court has no jurisdiction to entertain this petition.

In order to understand and appreciate the objection raised it is necessary to look at the Representation of the People Act, 1951, which deals with elections to all the Legislatures in the Union of India. Under s. 17 notifications for elections to State Legislative Assemblies had to be issued by the Governor of the State. Under s. 20 Returning Officer for each constituency had to be appointed by the Election Commission in consultation with Government of the State in which the constituency is situated. S. 30 lays down a time schedule for making nominations, scrutiny of nominations, withdrawal of candidatures and the dates on which the poll should take place. S 33 lays down the requirements for a valid nomination. S. 36 deals with scrutiny of nominations, and sub-s. (*2*) provides that the Returning Officer shall examine the nomination papers and shall decide all objections which may be made to any nomination and may either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination on the various grounds which are set out in that sub-section; and sub-s. (*4*) provides that the Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character; and sub-s. (*6*) provides that the Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection. S. 37 deals with withdrawal of candidature, and s. 38 deals with publication of nominations and it casts a duty upon the Returning Officer, immediately after the expiration of the period within which candidatures may be withdrawn under sub-s. (*1*) of s. 37, to prepare and publish a list of valid nominations in such manner as may be prescribed. Part VI deals with disputes regarding elections, and Chapter III of that Part deals

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with trial of election petitions, and s. 30 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of this Part. S. 84 lays down that a petitioner may claim any of the following declarations: (*a*) that the election of the returned candidate is void; (*b*) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected; (c) that the election is wholly void. S. 100 lays down the grounds for declaring election to be void, and the material ground which we have to consider in this case is the ground set out in sub-cl. (c) which is that the result of the election has been materially affected by the improper acceptance or rejection of any nomination. If the Tribunal is of the opinion that any of the grounds set out in the section exists, then the Tribunal shall declare the election to be wholly void. The section also empowers the Tribunal to declare the election of the returned candidate to be void on the grounds set out in sub-s. (2). S. 105 makes the orders of the Tribunal final and conclusive; and s. 170 ousts the jurisdiction of the civil Courts and provides that no civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed by this Act in connection with an election. Therefore, the scheme of the Act is to give a sort of finality to different stages of the election and to provide that all matters arising during the election and all disputes relating to the election should be determined and adjudicated upon after the election is over by means of an election petition to be decided by an Election Tribunal.

Now, it is perfectly clear that s. 170 by itself would not oust the jurisdiction of this Court to issue writs under art. 226 of the Constitution. The right of this Court to issue writs is conferred upon it by the Constitution, and so long as the Constitution itself does not provide to the contrary and so long as Art. 226 is not amended or altered, no legislation either of Parliament or of the State Legislature can affect the jurisdiction of this Court to issue writs under Art. 226. Therefore, we must turn to the Constitution to see whether there is any provision there which prevents this Court from issuing a writ of mandamus if a proper case has been made out on this petition for the issue of a writ. Turning to the Constitution, matters in relation to election are dealt with in Part XV of the Constitution. Article 324 provides for the appointment of an Election Commission

in which are to be vested superintendence, direction and control of elections. Article 325 deals with the preparation of a general electoral roll for every territorial constituency. Article 326 deals with adult suffrage, and then we come to art. 327 which provides:—

"Subject to the provisions of this Constitution Parliament may from time to time by law, make provision with respect to all matters relating to or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

And art. 328 confers similar power upon the Legislature of a State in so far as provision in that behalf has not been made by Parliament. Then we come to the last article in that chapter, art. 329, which provides that

"Notwithstanding anything in this Constitution—(and the material clause is sub-cl. (*b*),—no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Therefore, the obvious object of enacting art. 329 (*b*) was to exclude the jurisdiction of civil Courts with regard to matters enumerated in that sub-clause, and the jurisdiction of Courts is excluded notwithstanding anything in the Constitution. Therefore, if the subject falls under art. 329 (*b*), then this Court would have no jurisdiction to issue a writ under art. 226 with regard to that subject-matter, because art. 226 is controlled by art. 329, and to the extent that the Constituent Assembly has excluded the jurisdiction of Courts in election matters referred to in art. 329 (*b*), the power of the High Court to issue writs has been taken away. Undoubtedly, to the extent that art. 329 (*b*) ousts the jurisdiction of Courts it must be strictly construed. But in construing it strictly we must not lose sight of the relationship that article has to the other articles that appear in the same chapter, viz., Part XV of the Constitution. It is rather significant that although in the Seventh Schedule legislative competence was conferred upon Parliament by entry 72 of List I with regard to elections and upon State Legislatures by entry 37 of List II, Parliament thought it necessary expressly to confer legislative power upon Parliament and State Legislature

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with regard to elections in arts. 327 and 328. The reason for so doing is to find a place in the Constitution for a series of articles which deal with elections in all their aspects, and Part XV constitutes a self-contained Code dealing with election matters. Therefore, arts. 327 and 328 leave it to Parliament and to State Legislature to legislate with respect to all matters relating to or in connection with elections, and then we come to art. 329 which excludes the jurisdiction of civil Courts.

The contention of the petitioner is that under art. 329 (*b*) the exclusion of the jurisdiction of civil Courts is restricted to questioning the result of election. The argument is that an election petition can only be presented after the result of the election is announced, and as the result of election has not been announced and as a matter of fact election has not been held, no question of presenting an election petition arises and no question of calling in question the election also arises, and therefore to the extent that what is being challenged in this petition is the wrongful refusal of the nomination paper of the petitioner, the case does not fall under art. 329 (*b*). The real and substantial question that arises for our determination is, what is the interpretation that we must place upon the expression "election" used in art. 329 (*b*). Does "election" mean the result of the election as a result of counting of votes, or has "election" a wider connotation? In our opinion, reading the expression "election" in its context, both in art. 329 and in juxta-position with arts. 327 and 322 and in its setting in Part XV, "election" must bear a wider meaning than the very limited restricted meaning of the result of an election or the counting of votes. "Election" has the same meaning as the expression used in arts. 327 and 328, viz., matters relating to or in connection with election. "Election is not merely the ultimate decision or the ultimate result. "Election" is every stage from the time the notification is issued till the result is declared, and even perhaps if there is an election petition, till the decision of the Election Tribunal. It is one whole continuous integrated proceeding and every aspect of it and every stage of it and every step taken in it is a part of the election, and what is prohibited by art. 329 (*b*) is the calling in question any one aspect or stage of the election. The expression "except by an election petition" does not point to the period when it can be called in question; it rather points to the manner and the mode in which it can be called in question; and art. 329 (*b*) provides that the only way any matter relating to or in connection with an election can be called in

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question is by an election petition, which could be presented to such authority and in such manner as may be provided for by law passed by the appropriate Legislature. Therefore, when we are dealing with an election matter, we have to turn to the law passed by the appropriate Legislature in order to find out what that law lays down as to the manner in which the election matter can be called in question, and if that law provides that it could be challenged by an election petition, then it can only be done by that mode as indicated by that legislation. If this be the correct construction, then there can be no doubt that nomination of candidates, scrutinizing of nominations, and decision as to whether a nomination paper is valid or not, are all part and parcel of an election. They are stages and important stages of an election which ultimately leads up to its final consummation in a poll being held and votes being taken and the result being declared.

Now, the Representation of the People Act does provide for challenging an improper rejection of a nomination paper. Under s. 81 a petition may be presented on any one or more of the grounds set out in s. 100, and therefore it is open to the petitioner after the election is over to challenge the result of the election by bringing into question the wrongful rejection by the Returning Officer of his nomination. If, therefore, Parliament has provided the manner in which this particular question should be determined, the jurisdiction of this Court to deal with that matter even by a writ under art. 226 has been taken away under art. 329. A rather impressive argument was advanced before us that the right which the petitioner is claiming to assert before us is a different right from the one which he would be able to assert after the election is over and by means of an election petition. It is urged that what the petitioner is complaining of is the violation of his right to stand as a candidate at the election and to seek the suffrage of his fellow citizens. That right he can only assert at this stage and it is only this Court that can give him relief. The right which he will be able to assert after the election is not the same because it would not be sufficient for him to establish that his nomination was improperly rejected. He would have further to establish that the election had been materially affected by such rejection. I must frankly confess that I find it difficult to visualise how any Tribunal can possibly come to a conclusion that when a candidate's nomination paper has been improperly rejected it

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does not materially affect the result of the election. How the electors would have voted and what the result of the election would have been if the petitioner had been a candidate would be entirely a matter of speculation and no Tribunal, however well versed in election matters, could ever decide whether the result of the election would not have been different if the petitioner had stood as a candidate. Therefore, in our opinion, whatever the case may be when a nomination paper has been improperly accepted, as far as wrongful rejection of a nomination paper is concerned, substantially the right of the petitioner is safeguarded under the Representation of the People Act.

But, in our opinion, even assuming our jurisdiction to issue a writ under art. 226 had not been affected by art. 329, this is not a proper case for the issue of such a writ. A writ of mandamus —and that is the only proper writ which can be issued in this case—is ordinarily issued to a public officer in order to compel him to discharge his statutory obligations, and before a Court would issue such a writ it must ascertain what the statutory obligations of the public officer are and whether he has failed to discharge those obligations. In this case the statutory obligation of the Returning Officer is to scrutinize the nominations, and after examining the nomination papers to decide all objections and after deciding the objections either to refuse or accept the nomination, and if he refuses the nomination, then under s. 38 he must prepare and publish a list of nominations in which the rejected nominations cannot appear because the list can only be of nominations which he has held to be valid nominations. This is not a case where the Returning Officer has refused to decide the objections raised to the nomination. He has decided as he is bound to do under the statute. The objection taken is in substance that his decision is erroneous and that he should have decided not in the manner that he has done but in favour of the petitioner. Therefore, what the Court is called upon to do on this petition for a writ of mandamus is to do something which the public officer under the statute has to do, viz., to take away the decision from the Returning Officer, put itself in the position of the Returning Officer, give a decision on the objection, and direct the Returning Officer to give effect not to his own decision but to the decision of the Court. In our opinion this is not the function of a writ of a mandamus. A petition for mandamus does not constitute the Court which issues the writ a Court of appeal from the decision of the public officer against

whom the writ is intended to be directed. But what the petitioner wants us to do in this case is to constitute ourselves into a Court of appeal. However the petition may be worded, in effect the challenge is to the decision of the Returning Officer on the ground that that decision is erroneous in law and we as a Court of appeal should correct that decision and come to a contrary one. Not only are we not asked to direct the Returning Officer to act according to law, but we are really being asked to call upon the Returning Officer to act contrary to law, because the Representation of the People Act under which the Returning Officer functions directs him to decide the objection, to give effect to his decision, and to publish the list of nominations in accordance with his decision. If we were to issue a writ in this case, we would ask him not to act according to his decision, not to publish the list as laid down by statute, but to substitute our decision for his and to give effect not to his decision but to our decision. Therefore, far from this writ compelling the public officer to act in accordance with law it would force him to act contrary to the clear provisions of the Representation of the People Act.

There is another objection also to the issue of a writ of mandamus, which is equally serious. A writ of mandamus is a high prerogative writ. The Court issues a command in order to remedy a grave error or to set right injustice, and the Court would never issue such a command unless it is certain that that command would be respected and carried out. Looking to the scheme of the Representation of the People Act, it is quite possible that our decision and our command, which may take the form of a writ of mandamus, may be set at naught by another Tribunal which may have to deal with the same matter. If, for instance, we were to take the view in this case that the rejection of the petitioner's nomination paper was an improper one, it would be perfectly competent to the Election Tribunal, if an election petition were to be filed after the election, to take a contrary view and come to the conclusion that the nomination paper of the petitioner was rightly rejected by the Returning Officer and the Election Tribunal would thereupon act upon that view of the law. Now, a Court issuing a prerogative writ should never put itself in a position where, as I said before, its command is likely to be set at naught.

Mr. Purshottam pointed out that if we took this view, grave injustice may be done, serious errors may be perpetrated, and

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the citizen would be without any remedy and the Courts would be helpless. It seems to us that the whole object of the Constituent Assembly in enacting Part XV and the whole object of Parliament in putting on the statute book the Representation of the People Act was to set up a machinery whereby elections would take place as far as possible within the time schedule laid down and without interference or interruption by proceedings in a Court of law. It is hardly necessary to emphasise the importance of elections to a democracy, and it might lead to serious consequences if elections were unduly postponed. Therefore, the object was to postpone all matters of controversy, all disputes and all differences till after the elections had gone through according to the time schedule. We do not conceal from ourselves the fact that in giving effect to Part XV of the Constitution and the Representation of the People Act we may in some cases cause hardship, inconvenience and even perhaps injustice. But looking to the larger interest of the State and to the proper functioning of a democratic Constitution we do not think that the interpretation we are putting upon art. 329 and the scheme of the Representation of the People Act is inconsistent with or contrary to the larger interest of the people of this country.

We may also point out, though it strictly does not arise, that the jurisdiction of the Court has not been wholly taken away with regard to election matters. Mr. Purshottam made a point that even the Election Tribunal may act in any manner it likes and the Court would have no control over the Tribunal. In this connection it may be pointed out that the power of superintendence given to the High Courts over Tribunals is to be found in art. 227 and the only exemption is in favour of a Court or Tribunal constituted by or under any law relating to the armed forces. So presumably an Election Tribunal, set up if necessary after the election, would be subject to the superintendence of the High Court under art. 227. Mr. Purshottam said that on our view of the interpretation of art. 329 (*b*) even if the Tribunal were to act without jurisdiction or were to assume jurisdiction which it did not possess, we would have no right to interfere. That is not our interpretation of art. 329 (*b*). All that we lay down is that to the extent that the merits of an election matter are concerned our powers have been taken away, but our powers have not been taken away to compel a Tribunal which is set up to decide those matters acting with jurisdiction and not in excess of the powers conferred upon it by statute. What

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the petitioner in this petition wants us to decide is a matter directly connected with the election and affecting the merits of the question, and it is in this context that we come to the conclusion that our power under art. 226 to issue a writ has been taken away under art. 329 (*b*) of the Constitution. We also hold that even if we had the power, this is not a proper case where a writ of mandamus should be issued.

The result is that the petition fails and is dismissed. No order as to costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Vyas.

1951 Oct. 10

THE DHULIA-AMALNER MOTOR TRANSPORT, LTD., AMALNER (ORIGINAL DEFENDANT NO. 17), APPELLANT *v.* RAYCHAND RUPSI DHARAMSI SHET AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1-16), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), s. 100—Second appeal—Construction of document, not a document of title, whether point of law —Indian Partnership Act (IX of 1932), s. 43—Whether a mere proposal to dissolve a partnership amounts to notice of dissolution—Indian Companies Act (VII of 1913), s. 23—Incorporation of Company—Company, a person different from the shareholders—Motives of promoters irrelevant to determine the legality or otherwise of incorporation—Indian Trusts Act (II of 1882), s. 67—Whether relationship of Company with third persons fiduciary.

The question of construction of a document, which is not a document of title or otherwise the direct foundation of rights, is not a question of law that can be raised in second appeal.

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* Second Appeal No. 805 of 1949 with Second Appeal No. 829 of 1949.