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and commission was issued in his favour on certain conditions. Therefore, in our opinion, this decision does not deal with the question as to what powers the Court has under O. XXVI, r. 15, but it proceeds more upon the inherent powers of the Court to grant a concession in favour of a party subject to certain conditions.

Therefore, we are of the opinion that the view taken by the learned Judge as to his jurisdiction under O. XXVI, r. 15, was right. The revision application accordingly fails and the rule must be discharged with costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

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 Nov. 10

NARAYAN MARUTI MOHAKAR v. DISTRICT JUDGE, KOLABA AND OTHERS.*

Bombay District Municipal Act (Bom. III of 1901), ss. 15, 13, 22—Person below twenty-one years of age elected councillor—Election petition to District Judge—District Judge setting aside election and declaring petitioner to be duly elected—Decision of District Judge beyond jurisdiction—Sole authority of Collector to declare seat vacant and order fresh election—Scheme of s. 15—Order of District Judge challenged—Constitution of India, art. 226.

Where a person having been elected a councillor is disqualified under s. 15 (1) (c) of the Bombay District Municipal Act, 1901, by reason of his being less than twenty-one years of age, the only competent authority which can declare that he is so disqualified is the Collector and not the District Judge. The District Judge has no jurisdiction to decide whether any disqualification attaches to the councillor under s. 15; his jurisdiction is confined to dealing with election petitions. An election petition by its very nature must be restricted to bringing before the Court either a male-practice or a corrupt practice or an irregularity that takes place in the course of the election. If there is no irregularity in the conduct of the election, and a question arises whether a councillor properly elected is disqualified by reason of s. 15, then the jurisdiction to decide the question is conferred solely upon the Collector. If the Collector holds that the councillor is disqualified, he must declare the seat to be vacant and thereupon a by-election takes place under s. 18.

On the petitioner being declared to be the duly elected councillor of the Panvel Municipality, the opponent filed an election petition

* Special Civil Application No. 1528 of 1952.

before the District Judge of Kolaba for setting aside the election on the ground that the petitioner was below twenty-one years of age at all material stages of the election. The District Judge exercising his power under s. 22 of the Bombay District Municipal Act, 1901, held the election of the petitioner to be void and declared the opponent to be the duly elected councillor. The petitioner applied under art. 226 of the Constitution of India and challenged the decision of the District Judge:—

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Held, that the petitioner having been duly elected at the election, s. 15 of the Act came into operation with the result that the only competent authority which could declare a vacancy was the Collector;

that the District Judge by declaring the opponent to be elected had taken away the right of the constituency to have a by-election and to elect a person of their confidence;

that, therefore, the order of the District Judge must be set aside.

The jurisdiction of the District Judge on an election petition made under s. 22 of the Bombay District Municipal Act, 1901, is much wider than deciding cases specified in sub-s. (3) (a) and (3) (b) thereof. The powers of the Judge are set out in sub-s. (2) and not in sub-ss. (3) (a) and (3) (b) of the section; the effect of sub-s. (2) which limits his powers by providing that the powers are subject to the provisions of sub-s. (3), is that in the two cases referred to in sub-ss. (3) (a) and (3) (b) it is obligatory upon him to set aside the election in one case and to declare a particular candidate elected in the other. Apart from these two cases, the District Judge has also the power to pass an order confirming or amending the declared result of the election, or of setting the election aside. But the power of the District Judge to pass any such order arises provided an election itself is challenged or disputed on the ground that something had happened in the course of the election which would justify the petition and entitle the Judge to pass the necessary order contemplated by s. 22 (2).

APPLICATION under art. 226 of the Constitution of India for a writ of *certiorari* for quashing the order passed by B. V. Manjeshwar, Esquire, District Judge of Kolaba, at Alibag.

Narayan Maruti Mohakar (petitioner) was a voter in Ward No. III of the Panvel Municipality and his name appeared on the Municipal Election Roll. He and one Ramkrishna Gangaram Bhatankar (opponent No. 2) offered themselves as two candidates for one seat which was reserved for Harijans at the triennial election of the Municipality which was held on June 10, 1952. On June 12, 1952, the petitioner was declared duly elected. Thereafter the opponent No. 2 filed an election petition under s. 22 of the Bombay District Municipal Act, 1901, to the District Judge of Kolaba at Alibag on the ground that the petitioner was less than twenty-one years of age at the date of the preparation and publication of the Electoral Roll as also at the date of the filing of nominations and the date of the election.

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The learned Judge held that the petitioner was born on September 2, 1931, and was under age at all the material dates. Therefore, on August 12, 1952, he set aside his election and declared the opponent No. 2 to be duly elected Councillor for the seat.

On September 10, 1952, the petitioner applied under art. 226 of the Constitution of India for a writ of *certiorari* against the District Judge (opponent No. 1) for quashing his order and a writ of *mandamus* against the opponent No. 2 and the Municipality (opponent No. 3) by directing them to accept the petitioner as the duly elected councillor.

The petition was heard.

P. S. Joshi, for the petitioner.

A. A. Adarkar, for opponent No. 2.

B. N. Gokhale, for opponent No. 3.

Chagla C. J. A very interesting question arises on this petition as to the law of election applicable to the District Municipal elections. The petitioner is a Harijan and he and opponent No. 2 offered themselves as two candidates for one seat which was reserved for Harijans in Ward No. III of the Panvel Municipality for the triennial election of the Municipality of Panvel which was held on June 10, 1952. The votes were counted on June 12, 1952 and the petitioner secured 395 votes as against 342 secured by opponent No. 2. Accordingly the petitioner was declared duly elected. Opponent No. 2 then filed an election petition before the District Judge who set aside the election of the petitioner on the ground that the petitioner was not 21 years of age at all material times. The learned Judge held that the petitioner was born on the September 2, 1931 and hence he was below the age of 21 and therefore, he held the election of the petitioner void and declared opponent No. 2 to be the duly elected councillor.

Now, Mr. Joshi for the petitioner contends that the District Judge had no jurisdiction to entertain this election petition and to set aside the election. The jurisdiction of the District Judge to deal with election petitions arises under s. 22 of the Bombay District Municipal Act. Sub-s. (1) provides that if the validity of any election of a councillor is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within ten days after the date of the declaration of

the result of the election, apply to the District Judge of the District within which the election has been or should have been held, and then sub-s. (2) provides for the holding of an inquiry by a Judge and further provides that such Judge may, after such inquiry as he deems necessary, and subject to the provisions of sub-s. (3), pass an order confirming or amending the declared result of the election, or setting the election aside. Sub-s. (3) (a) gives the power to the Judge to set aside the election where a candidate has committed a corrupt practice for the purpose of the election and sub-s. (3) (b) gives the power to the Judge to hold a scrutiny of votes and after holding such scrutiny, to declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. Sub-s. (4) defines what is a corrupt practice. Now, the contention of Mr. Joshi is that the jurisdiction of the District Judge on the election petitions is confined only to two cases; one, the case of corrupt practice dealt with in sub-s. (3) (a) of s. 22 and the other, the scrutiny of votes under sub-s. (3) (b) of s. 22, and Mr. Joshi says that it was not competent to the District Judge to set aside the election on the ground that a councillor is not qualified to be elected by reason of his age. Mr. Gokhale on behalf of the Municipality, on the other hand, contends that the jurisdiction of the District Judge is much wider than deciding cases specified in sub-ss. (3) (a) and (3) (b) of s. 22. In our opinion, Mr. Gokhale seems to be right because the powers of the Judge are really set out in sub-s. (2) of s. 22 and not in sub-ss. (3) (a) and (3) (b) of s. 22 and when sub-s. (2) limits his powers by providing that his powers are subject to the provisions of sub-s. (3), all that it means is that in the two cases referred to in sub-ss. (3) (a) and (3) (b) it is obligatory upon him to set aside the election in one case and to declare a particular candidate elected in the other. But apart from those two cases, the District Judge has the power to pass an order confirming or amending the declared result of the election, or setting the election aside. But it must be borne in mind that the power of the District Judge to pass any such order arises provided an election itself is challenged or disputed on the ground that something had happened in the course of the election which would justify the petition and which would entitle the Judge to pass the necessary order contemplated by s. 22 (2). Now, in this particular case the second opponent's grievance before the District Judge was that the

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petitioner was not qualified to be a councillor by reason of his age. Turning to those provisions of the Act, s. 12 provides for qualifications for enrolment on the roll as voters and for candidates for election and one of the qualifications is that the candidate or the voter must have attained the age of 21 years on the first day of January of the year for which the Municipal Election Roll is being prepared and s. 13 deals with the publication of Election Roll and s. 13A provides that a person shall not be qualified to be elected a councillor unless he is enrolled in the Municipal Election Roll. When we turn to the Bombay District Municipal Election Rules, 1950, they provide an elaborate procedure for preparing the Municipal Election Roll and after the procedure is carried out under r. 10 a copy of the Election Roll signed by the Registration Officer shall be the Municipal Election Roll. Now, it was open to any interested party to challenge the right of the petitioner to be on the Municipal Election Roll. No objection was taken to his right to be on that Roll and under the rules the Municipal Election Roll became final and conclusive. On that happening the petitioner had a right to vote in the Municipal election and also to stand as a candidate. Having been elected at the election, s. 15 came into operation and that section provides that no person may be a councillor (and the material sub-cl. is) who is less than 21 years of age and sub-s. (1A) of s. 15 provides that if any person is elected or nominated as a councillor in contravention of the provisions of sub-s. (1) his seat shall, subject to the provisions of sub-s. (1B), be deemed to be vacant and sub-s. (1B) gives the power to the Collector to decide whether a vacancy has occurred under sub-s. (1A) or not. Then sub-s. (2) provides for a disqualification occurring during the term for which a person has been elected or appointed a councillor and sub-s. (3) provides that there would be a vacancy if a disqualification attaches to a councillor subsequent to the election and in that case the competent authority to decide whether there was a vacancy or not is the Collector. Now, in this particular case it is clear that the petitioner having been elected a councillor is disqualified by reason of s. 15 because he was elected in contravention of the provisions of sub-s. (1) and as he is disqualified the only competent authority which can declare that he is disqualified and declare a vacancy is the Collector. Mr. Gokhale's contention is that the jurisdictions of the District Judge and the Collector in this behalf are concurrent, that it is open to the District Judge to hold that the petitioner was disqualified and

it would ultimately be for the Collector to declare that there is a vacancy. It is not possible to take that view because a vacancy in a seat can only take place provided there is an election or a nomination. The whole scheme of s. 15 is that after there is a proper election if it is found that a disqualification attaches to a particular councillor, the Collector is given the power to declare the seat of that councillor vacant. So far as the election is concerned, the election has been perfectly proper. It has been in accordance with the rules. The petitioner was qualified to stand as a candidate by reason of the fact that he was on the Municipal Election Roll. But for s. 15 his seat would never have become vacant and s. 15 does not deal with anything that happened in the course of the election. It deals with the disqualification which attaches to a councillor on his being elected. No jurisdiction is conferred upon the District Judge to decide whether any disqualification attaches to the councillor under s. 15. His jurisdiction is confined to deal with election petitions and an election petition by its very nature must be restricted to bringing before the Court either a mal-practice or a corrupt practice or an irregularity that takes place in the course of the election. There is one other important aspect of the matter to which attention might be drawn. Under s. 18 when a vacancy has occurred a by-election has to be held. The learned District Judge exercising his power under s. 22 has held the election of the petitioner to be bad and has declared the second opponent to be elected. By doing so he has taken away the right of the constituency to have a by-election and to elect such person as the constituency has confidence in. Therefore, the consideration of s. 18 makes it clear what the scheme of the Act with regard to election petitions and vacancies is an election takes place and an election can be challenged before the District Judge; he has a right to set aside the election; he has a right to confirm the election and he has a right to amend the result of the election. That is his exclusive jurisdiction. If there is no irregularity in the conduct of the election, the question arises whether a councillor properly elected is disqualified by reason of s. 15. This jurisdiction is conferred solely upon the Collector. If the Collector holds that the councillor is disqualified, he must declare the seat to be vacant and on the seat being declared vacant a by-election takes place under s. 18. Mr. Gokhale on behalf of the Municipality has asked us not to interfere with the decision of the District Judge as his finding is based on facts and his finding has not

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been seriously challenged. We cannot accede to that application because if we were to do so, we would uphold an order which declares the second opponent elected, whereas the law requires that there should be a by-election at which the voters should have a right to go to the election again and to vote for a person in whom they have confidence.

We must, therefore, set aside the order of the District Judge. The rule will be made absolute with costs. Opponent No. 2 to pay the petitioner the costs of this petition. He must also pay the costs of the election petition. No order as to costs against the Municipality.

Rule absolute.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

1952
 Nov. 27

GOVIND WAMAN SHANBHAG (ORIGINAL DEFENDANT NO. 3), APPELLANT v. MURLIDHAR SHRINIVAS SHANBHAG AND OTHERS (HEIRS OF ORIGINAL PLAINTIFFS NOS. 2 AND 3 AND DEFENDANT NO. 1), RESPONDENTS.*

Transfer of Property Act (IV of 1882), s. 10—Term in compromise decree restraining alienation—Term contrary to law—Whether decree becomes nullity.

A compromise decree which contains a term contrary to law is not for that reason a nullity.

Where, therefore, one of the terms of a compromise decree is opposed to the provisions of s. 10 of the Transfer of Property Act, 1882, in that it imposes an absolute restraint on alienation, the decree notwithstanding the term is binding between the parties unless it is set aside by appropriate proceedings.

Lakshmanaswami Naidu v. Rangamma,⁽¹⁾ and *Rai Kumar Singh v. Abhai Kumar Singh*,⁽²⁾ dissented from.

C. H. Kinch v. E. K. Walcott,⁽³⁾ *Pirojshah v. Manibhai*,⁽⁴⁾ *Cowasji v. Kisandas*,⁽⁵⁾ *Chhaganlal v. Bai Harkha*,⁽⁶⁾ *Basangouda v. Basalingappa*,⁽⁷⁾ and *Waman Vishwanath v. Yeshwant Tukaram*,⁽⁸⁾ referred to.

Great North-West Central Railway v. Charlebois,⁽⁹⁾ and *Kishandas Shivram Marwadi v. Nama Rama Vir*,⁽¹⁰⁾ distinguished.

* Second Appeal No. 874 of 1949.

⁽¹⁾ (1902) 26 Mad. 31.

⁽²⁾ [1929] A. I. R. P. C. 289.

⁽³⁾ (1911) 13 Bom. L. R. 649.

⁽⁴⁾ (1935) 38 Bom. L. R. 593.

⁽⁵⁾ [1899] A. C. 114.

⁽²⁾ [1948] A. I. R. Pat. 362.

⁽⁴⁾ (1912) 36 Bom. 53.

⁽⁶⁾ (1909) 11 Bom. L. R. 345.

⁽⁷⁾ (1947) 50 Bom. L. R. 688, (F.B.).

⁽¹⁰⁾ (1911) 35 Bom. 190.