SARAT CHANDRA RABHA AND OTHERS

v.

KHAGENDRANATH NATH AND OTHERS.

1960

October 27.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Election Dispute—Disqualification—Conviction by Court—Rejection of nomination paper—Remission of sentence by Government, if operates as reduction of sentence by Court—Inference of consent to corrupt practice from proved facts, if a mixed question of fact and law—Representation of the People Act, 1951 (43 of 1951), ss. 7(b), 100(1)(b)—Code of Criminal Proceedure (Act V of 1898), s. 401.

The appellant's nomination paper for election to the Assam Legislative Assembly was rejected by the Returning Officer on the ground of disqualification under s. 7(b) of the Representation of the People Act, 1951, in that he had been convicted and sentenced to three years' rigorous imprisonment under s. 4(b) of the Explosive Substances Act (VI of 1908) and five years had not expired after his release. The appellant had applied to the Election Commission for removing the said disqualification but it had refused to do so. The appellant's sentence was, however, remitted by the Government of Assam under s. 401 of the Code of Criminal Procedure and the period for which he was actually in jail was less than two years. The Election Tribunal held that the nomination paper had been improperly rejected and set aside the election but the High Court taking a contrary view, dismissed the election petition.

Held, that the High Court was right in holding that the appellant was disqualified under s. 7(b) of the Representation of the People Act and that his nomination paper had been rightly rejected. That section speaks of a conviction and sentence by a Court and an order of remission of the sentence under s. 401 of the Code of Criminal Procedure, unlike the grant of a free pardon, cannot wipe out either the conviction or the sentence. Such order is an executive order that merely affects the execution of the sentence and does not stand on the same footing as an order of Court, either in appeal or in revision, reducing the sentence passed by the Trial Court.

Venkatesh Yeshwant Deshpande v. *Emperor*, A.I.R. 1938 Nag. 513, distinguished.

Ganda Singh v. *Sampuran Singh*, (1953) 3 E.L.R. 17, overruled.

Held, further, that an inference as to whether a successful candidate was a consenting party to the corrupt practice under

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s. 100(1)(b) of the Act from facts found on evidence was a question of fact and not a mixed question of fact and law.

Mecnakshi Mills, Madurai v. *The Commissioner of Income-tax, Madras*, [1956] S.C.R. 691, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 375 of 1959.

Appeal from the Judgment and Order dated the 12th August, 1958, of the Assam High Court in First Appeal No. 11 of 1958.

L. K. Jha and *Sukumar Ghose*, for appellants Nos. 1 to 3.

G. S. Pathak and *Naunit Lal*, for respondents Nos. 1 and 2.

1960. October 27. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This is an appeal on a certificate granted by the Assam High Court in an election matter. An election was held in the double-member constituency of Goalpara to the Assam Legislative Assembly. Nomination papers were filed on the 19th January, 1957, by a number of persons including Aniram Basumatari (hereinafter called the appellant). He was a candidate for the seat reserved for scheduled tribes. The nomination paper of the appellant was rejected by the returning officer on the ground that he was disqualified under s. 7(b) of the Representation of the People Act, No. XLIII of 1951, (hereinafter called the Act). The polling took place on February 25, 1957, and Khagendranath and Hakim Chandra Rabha were elected, the latter being a member of a scheduled tribe. Thereupon an election petition was filed by an elector challenging the election of the two successful candidates on a number of grounds. Of these grounds, however, only two are now material, namely, (1) that the nomination paper of the appellant was wrongly rejected, and (2) that a corrupt practice was committed by the successful candidates inasmuch as voters were carried on mechanically propelled vehicles to the polling booths. The election tribunal held on the first point that the nomination

paper of the appellant had been improperly rejected. On the second point it held that the corrupt practice alleged had not been proved. In the result, the election was set aside. Thereupon there was an appeal by the two successful candidates to the High Court. The High Court was of the view that the nomination paper of the appellant was properly rejected; further on the question of corrupt practice the High Court agreed with the conclusion of the tribunal. In the result the appeal was allowed and the election petition was ordered to be dismissed. There was then an application to the High Court for a certificate to appeal to this Court which was granted; and that is how the matter has come up before us.

The main contention on behalf of the appellant is that the High Court was wrong in coming to the conclusion that the nomination paper of the appellant was properly rejected under s. 7(b) of the Act. That provision lays down that a person shall be disqualified for being chosen as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State if he is convicted by a court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. The appellant in this case was convicted under s. 4(b) of the Explosive Substances Act No. VI of 1908, and sentenced to three years' rigorous imprisonment on July 10, 1953. The nomination paper in this case was filed in January 1957 and the election was held in February 1957 and therefore five years had not elapsed since his release. But though the appellant was sentenced to three years' rigorous imprisonment, his sentence was remitted by the Government of Assam on November 8, 1954, under s. 401 of the Code of Criminal Procedure and he was released on November 14, 1954. The contention of the appellant before the election tribunal was that in view of this remission his sentence in effect was reduced to a period of less than two years and therefore he could not be said to have incurred disqualification within the meaning of s. 7(b). This contention

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was accepted by the tribunal and that is why it held that the nomination paper of the appellant was improperly rejected. When the case came to be argued in the High Court on behalf of the successful candidates, two arguments were addressed in support of the plea that the nomination paper of the appellant was properly rejected. In the first place, it was urged that in view of the provisions of Articles 72, 73, 161 and 162 of the Constitution read with s. 401 of the Code of Criminal Procedure, the State Government had no authority to remit the sentence of the appellant; and secondly even if the remission was properly granted it would not affect the sentence imposed by the Court, though the appellant might not have had to undergo part of the sentence after the date of the remission order. The High Court did not decide the question as to the power of the State Government to grant remission in this case as it had not full materials before it because the matter was not raised before the tribunal, though it was inclined to the view that the State Government might not have such power. But the High Court was of the opinion that a remission of sentence did not have the same effect as a free pardon and did not have the effect of reducing the sentence passed on the appellant from three years to less than two years, even though the appellant might have remained in jail for less than two years because of the order of remission.

What s. 7(b) lays down is that there should be a conviction by a court in India for any offence and a sentence of imprisonment for not less than two years in order that a person may be disqualified for being chosen as a member of either House of Parliament or of Legislative Assembly or of Legislative Council of a State. In terms, therefore, the provision applies to the case of the appellant for he was convicted by a court in India and sentenced to imprisonment for more than two years. Further the period of five years had not expired after his release. The appellant had applied to the Election Commission for removing the disqualification but it had refused to do so. The main question therefore that falls for consideration is

whether the order of remission has the effect of reducing the sentence in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by the trial court to the extent indicated in the order of the appellate or revisional court.

Now it is not disputed that in England and India the effect of a pardon or what is sometimes called a free pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man: (See Halsbury's Laws of England, Vol. VII, Third Edition, p. 244, para 529). But the same effect does not follow on a mere remission which stands on a different footing altogether. In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's "Constitutional Law" on the effect of reprieves and pardons *vis-a-vis* the judgment passed by the court imposing punishment, at p. 176, para 134:—

"A reprieve is a temporary suspension of the

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punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable,' observed Justice Sutherland, 'To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment'."

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. Therefore the terms of s. 7(b) would be satisfied in the present case and the appellant being a person convicted and sentenced to three years' rigorous imprisonment would be disqualified, as five years had not passed since his release and as the Election Commission had not removed his disqualification.

We may now refer to a number of cases on which reliance has been placed on behalf of the appellant. In *Venkatesh Yeshwant Deshpande* v. *Emperor* (1), Bose, J. (as he then was), observed as follows at p. 530:—

"The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension

(1) A.I.R. 1938 Nag. 513.

is separately provided for. In fact, in the case of a pardon in England statutory and other disqualification following upon conviction are removed and the pardoned man is enabled to maintain an action against any person who afterwards defames him in respect of the offence for which he was convicted. That may not apply in full here but the effect of an order of remission is certainly to entitle the prisoner to his freedom on a certain date."

It is urged that if the effect of an order of remission is to wipe out the remitted portion of the sentence altogether it means that the sentence is reduced to the period already undergone and the order of remission has the same effect as an order of an appellate or revisional court reducing the sentence to the period already undergone. That case, however, dealt with a different point altogether, namely, whether a remission having been granted and having taken effect it could be cancelled thereafter. It was in that context that these observations were made. Even so, the learned judge was careful to point out that there was a difference between a pardon and a remission and the effect of an order of remission is to entitle the prisoner to his freedom on a certain date. That case is no authority for the view that the order of remission amounts to changing the sentence passed by a competent court and substituting therefor the sentence of imprisonment already undergone up to the date of release following the order of remission.

Reference was also made to a number of election cases in which the view which has been urged on behalf of the appellant seems to have been taken. We may refer to only one of them, namely, *Ganda Singh* v. *Sampuran Singh* (1), which has specifically dealt with this point. In that case an order was passed by the Maharaja of Nabha granting amnesty to all political prisoners detained or convicted under the Punjab Public Safety Act, 1947, as applied to Nabha State, and releasing them unconditionally. The same order also provided for grant of remission to persons convicted for offences other than political offences on

(1) (1953) 3 E.L.R. 17.

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a certain scale. The successful candidate in that case was sentenced to more than two years' rigorous imprisonment under the Punjab Public Safety Act, as applied to Nabha State, and was thus a political prisoner. He was therefore released before he had served two years imprisonment. The main plank of the election petition in that case was that the successful candidate was disqualified under s. 7(b) of the Act in view of his conviction and sentence and the election tribunal held that remission by government (executive authority) has the same effect as an order passed by a court of law in appeal or on revision and that under s. 7 of the Act the court has to look to the amount of sentence imposed on a person and it made no difference whether the sentence was reduced by a court of law on appeal or by revision or by the powers of the government reserved for it under s. 401 of the Code of Criminal Procedure, as the effect in both cases was the same. We are of opinion that this view is incorrect, though perhaps on the facts of that case the order of the tribunal was right for it seems that political prisoners had been granted a pardon by the Ruler of Nabha and not a mere remission under s. 401 of the Code of Criminal Procedure. We cannot agree that remission by government has the same effect as an order passed by a court of law in appeal or on revision. It is true that under s. 7(b) of the Act one has to look at the sentence imposed; but it must be a sentence imposed by a court. Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by a court is remitted in part under s. 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission. It is also well to remember that

s. 7(b) speaks of the conviction and sentence passed by a court of law; it does not speak of the period of imprisonment actually suffered by the convicted person. The other election cases to which our attention was drawn by the learned counsel for the appellant are similar and they are all in our opinion wrongly decided. We are therefore of opinion that the High Court was right in the view that the nomination paper of the appellant was properly rejected.

The next contention on behalf of the appellant is that both the High Court and the tribunal were wrong in holding that a corrupt practice within the meaning of s. 100(1)(b) read with s. 123(5) had not been proved in this case. The case of the appellant was that voters were carried by mechanically propelled vehicles to the polling booths by Birendra Kumar Nath who was in-charge of the electioneering campaign on behalf of the Congress Party and Bholaram Sarkar who was president of the Primary Congress Committee of Dhupdhara. The successful candidates were both contesting the election as nominees of the Congress Party and therefore these two persons who carried electors in mechanically propelled vehicles to the polling booths did so as agents of the successful candidates and with their consent. The High Court as well as the election tribunal held that though Birendra Kumar Nath and Bholaram Sarkar might be deemed to be the agents of the successful candidates for purposes of the election and though the hiring of mechanically propelled vehicles by the agents for conveyance of electors to polling booths had been proved, there was no proof that this was done with the consent, express or implied, of the successful candidates. The High Court pointed out that consent, express or implied, of the candidates was necessary for purposes of s. 100(1)(b) and was of the view that on the facts proved in this case such consent could not be inferred and the circumstances did not convincingly lead to an inference that the corrupt practice in question was committed with the knowledge and consent of the successful candidates. In view of this concurrent finding of the High Court and the

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tribunal on this question, namely, whether there was consent, express or implied, of the successful candidates to the commission of this corrupt practice, it is in our opinion idle for the appellant now to contend that there was consent express or implied, as required by s. 100(1)(b). The inference whether there was consent or not from the facts and circumstances proved is still an inference of fact from other facts and circumstances and cannot be a question of law as urged by learned counsel for the appellant. Reference in this connection may be made to *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax, Madras*(1), where it was held that a finding of fact, even when it is an inference from other facts found on evidence, is not a question of law and that such an inference can be a question of law only when the point for determination is a mixed question of law and fact. In the present case the only question is whether the corrupt practice was committed with the consent of the candidates, whether express or implied, and the question whether such consent was given in the circumstances of this case is a question of fact and not a mixed question of law and fact and therefore the fiinding of the High Court as well as the tribunal that there was no consent, either express or implied, in our opinion, concludes the matter. There is no force in this point either.

The appeal therefore fails and is hereby dismissed with costs.

Appeal dismissed.

(1) [1956] S.C.R. 691.