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195 N.Y.S.2d 117

21 Misc.2d 973

Application of Joseph J. REICH, Petitioner,

v.

Anthony J. BOSCO and Joseph E. Van Keuren, individually and as members of the Board of Elections and the Board of Canvassers of Putnam County and Cyril Verrier, individually and as candidate for the office of Councilman in the Town of Kent, Putnam County, during the General Election held therefor on Nov. 3rd, 1959 and Moe Smith and Julius J. Manson purporting to act as and for an alleged County Committee of the Liberal Party in the County of Putnam and Frank Barbarita, as County Chairman of the Democratic Party in and for the County of Putnam, Respondents.

Supreme Court, Putnam County. Westchester County, Special Term, Part I.

Dec. 2, 1959.

Order Affirmed Dec. 21, 1959. See 196 N.Y.S.2d 557.

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[21 Misc.2d 974] Vincent P. Downey, New York City (Robert E. Dempsey, Peekskill, of counsel), for petitioners.

Garbarini & Kroll, New York City (Sol Kroll, New York City, of counsel), for respondent Verrier.

Deutsch & Zucker, New York City (Mendel L. Zucker, and Max Bloom, New York City, of counsel), for respondents Smith and Mason.

SAMUEL W. EAGER, Justice.

By this proceeding, the petitioner Reich seeks to prohibit the respondent Board of Elections of Putnam County, as such and as the

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Board of Canvassers of such county, from counting for the respondent Cyril Verrier those votes cast for him at the November, 1959,

general election for Town of Kent councilman under Row 'C', the alleged Liberal Party Line. The petitioner was the Republican candidate for councilman of said town at such election, and received 1,208 votes at the election. The respondent Verrier was listed on the voting machines as the candidate of the Democratic and Liberal Parties for councilman, and received a total of 1,256 votes, to wit, 1,197 votes under Row 'B' as the Democratic candidate and 59 votes under Row 'C' as the Liberal Party candidate. What the petitioner Reich seeks to do is to void the votes cast for the respondent Verrier under Row 'C', the Liberal Party line, as a result of which he (Reich) would have a majority of the votes, namely 1,208 to 1,197.

Now, it does appear clear that the nomination of the respondent Verrier as Liberal Party candidate for office of councilman of the Town of Kent was improperly effected and void. It appears that Verrier was not a duly enrolled member of the Liberal Party, and that the authorization of his nomination by such Party as required by Election Law, § 137, Subd. 4, was given by an alleged county executive committee of such Party. A certificate of such authorization and a certificate of the nomination by said alleged county executive committee of Verrier as a Liberal Party candidate was filed on

September 28, 1959, with the County Board of Elections. A written acceptance by Verrier, pursuant to Election Law, § 139, and his consent, were also filed with the Board of Elections on September 28, 1959. It appears however, that the alleged county executive committee of the Liberal Party was not duly designated and acting and that it had no standing to authorize[21 Misc.2d 975] or make the nomination. The fact is, that a county committee for the Liberal Party for Putnam County was not duly constituted in that it was not set up by the election in each election district within the county of at least two members, as required by Election Law, § 12. There are 21 election districts in Putnam County, so that a duly constituted county committee of a political party in such county should consist of 42 members. Here, there were elected at the primary election held August 12, 1958, but four county committeemen in the whole county to wit, two each in the two of the three election districts in the Town of Putnam Valley. The Liberal Party did not elect or in any way properly designate to office a single committeeman in the Town of Kent, nor in any of the six towns of Putnam County except the four in the Town of Putnam Valley aforesaid. Thus, there being only four acting members of a county committee of the Liberal Party in and for Putnam County, such committee was never duly constituted. Consequently, its actions as such were null and void, and an alleged executive committee of such county committee had no standing or power to authorize the nomination of a non-party-member or to nominate a candidate for town office and file a certificate of such

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authorization and nomination. Matter of Application of Newman v. Millspaugh, App.Div.1959, 192 N.Y.S.2d 30, affirmed 1959, 7 N.Y.2d 756, 193 N.Y.S.2d 669.

So, here, the placing on the ballots and on the ballot labels on the face of the voting machines of the name of the respondent Verrier

as the nominee of the Liberal Party was the result of invalid procedure, and it should not have occurred. But there was no challenge prior to the election, with respect to the nomination, by a proceeding as authorized by Election Law, § 145, nor by a proceeding in the Court as was done in the Matter of Application of Newman, supra. The Board of Elections did accept the certificate of authorization and the certificate of nomination by the alleged executive committee of the Liberal Party at face value and caused the placing of Verrier's name upon the ballots and on the face of the voting machines as the candidate of such Party.

Now, it is clear as a general rule that questions with respect to validity of nominating procedure are to be settled prior to the opening of the polls on election day. Where the validity of the nomination of a particular person as the candidate of a certain political party is not questioned prior to election as authorized by law, then, as a matter of course, it is expected that the Board of Elections shall set up the election with his name upon the ballot as the nominated candidate of such Party; and, this having been done and the election held, it is generally held that it is [21 Misc.2d 976] then too late to attack the nomination. 'Objections relating to nominations must be timely made. It is too late to make then after the nominee's name has been placed on the ballot and he has been elected to office; his election cannot be impeached on the ground that statutory requirements regarding nominations were not complied with in his case, or that his nomination was procured by unlawful means.' 29 C.J.S. Elections § 141, and cases cited.

The foregoing general rules have been adhered to by the Courts of this State, and, in my opinion, are to be followed here. Noted, of course, is the petitioner's argument that the action of the Board of Elections in placing Verrier's name upon the ballot as the Liberal Party candidate should be considered as a totally unauthorized and invalid act, inasmuch as the certificate of nomination was not in compliance with the Election Law as the Board should have known from its records. It is held, however, that,

in the absence of objections filed pursuant to law, the Board acts ministerially only in the matter of receiving and filing certificates of nomination and placing the names of the nominees upon the official ballot. See *Matter of Lindgren*, 232 N.Y. 59, 62, 133 N.E. 353, 354; *Matter of Smith*, 196 Misc. 109, 91 N.Y.S.2d 357. Therefore, it would seem that the Board, being possessed of no judicial or quasi-judicial powers under the circumstances, had no right, without a direction of a competent Court, to proceed otherwise than it did.

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But, in any event, assuming that the action of the board of accepting and filing the Liberal Party certificate of authorization and of nomination and placing Verrier's name on the ballot as such Party's nominee, was a totally unauthorized and invalid act, nevertheless, in my opinion, the case of *People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 146, 42 N.E. 536, 537, applies to require the Court to reject the plea now made for the voiding of the votes cast for Verrier as a Liberal Party candidate.

At an election for a public office, the elector votes for a particular candidate for such office. The voting is for a particular person to fill the office. Many things may have a bearing upon the choice he makes, and, in this connection, an elector may be and many times is influenced by the party label under which the name of a candidate appears. Of course, in local elections where the candidates are generally well known as individuals to the electorate, the voting is more likely to be on a personal basis rather than strictly on a party basis. In any event, the vote the elector casts is for the person, and having voted, his vote must be counted. His reasons for voting are immaterial when it comes to the counting of his vote, and may not be inquired into in the absence of fraud. Innocent voters, who leave the polls, [21 Misc.2d 977] after properly voting for a qualified candidate may not be disfranchised by post-election Court decree. See N.Y. Constitution, Article 1,

Section 1, Article 2, Section 1; *Matter of Creedon*, 264 N.Y. 40, 43, 189 N.E. 773, 774; *People ex rel. Hirsh v. Wood*, supra. Here, an elector, when he found Verrier's name on the Liberal Party line as he was about to cast his vote, had the right to assume that it was rightfully on the voting machine under that line and that a vote for Verrier under that line would not be nullified by Court decree.

When the polls close on an election day, the will of the electorate as therein expressed is to be given effect. As a matter of public policy, the expression of the electorate given at an election duly held should stand as final. After the closing of the polls, nothing remains for election officers to do except to ascertain and put into effect the will of the voters, and the Court is nowhere expressly given any power to interfere except to see to it that the duties of the election officers are carried out. The Board of Elections shall count and tabulate the votes shown on the returns and voting machines, make statements showing the results and determine which candidate has, by the greater number of votes, been elected to office. It is held that the Board, in canvassing and re-canvassing the vote at a general election, has no judicial or quasi-judicial powers; that it serves only in a ministerial capacity. See Election Law, §§ 272-276; *Ingamells v. Board of Elections of Oswego County*, 259 App.Div. 36, 41, 18 N.Y.S.2d 247, 251. See, also, *Ginsberg v. Heffernan*, 186 Misc. 1029, 1034, 60 N.Y.S.2d 875, 879; *Mazzotti v. Swezey*, 199 Misc. 987, 103 N.Y.S.2d 956. And, it is held that this

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Court has no jurisdiction in a proceeding under either article 14 of the Election Law or article 78 of the Civil Practice Act, except to compel the election officials to perform their duties in accordance with the statute, and to correct obvious errors of the Board in passing upon questionable or disputed ballots or in making the tabulation of the valid votes. See *Mullen v. Heffernan*, 193 Misc. 334, 84 N.Y.S.2d 571,

affirmed, 274 App.Div. 972, 85 N.Y.S.2d 301; 298 N.Y. 785, 83 N.E.2d 473, citing *Matter of Oliver*, 234 App.Div. 170, 175, 254 N.Y.S. 397, 402; *Bonacker v. Chuckrow*, 166 Misc. 171, 176, 2 N.Y.S.2d 265, 270; *Ginsberg v. Heffernan*, 186 Misc. 1029, 1034-1035, 60 N.Y.S.2d 875, 879-880.

The petitioner most strenuously argues that a fraud was perpetrated here upon the electorate by the Liberal Party, participated in by the respondent Verrier; that this was accomplished by the filing by the Liberal Party of null and void certificates of authorization of the nomination of said Verrier and of his nomination, and by the filing of his acceptance of such nomination, whereby his name was placed upon an additional row on the voting machines, namely on Row 'C', the Liberal Party line. The petitioner's attorney says that this was a hoax upon the [21 Misc.2d 978] public and that the candidate Verrier must be considered a party thereto. It is true that there was here in effect a misrepresentation to the voters that Verrier was the duly nominated candidate of the Liberal Party for Town Councilman, and voters were probably misled in believing he was so nominated. The alleged wrongdoing of the Liberal Party in this connection does not, however, justify this Court's rendering a decree in this proceeding striking out the votes given under the Liberal Party line for Verrier. The votes were not for the Liberal Party. They were cast for Verrier as an individual and no one, on the record here, can say that they would not have been for him in any event. Furthermore, on the facts before the Court, it may not be said that Verrier was guilty of fraud vitiating his election. In any event, this Court has no jurisdiction in this proceeding, whether considered as an Election Law Summary Proceeding or an Article 78 proceeding, to annul, on the ground of fraud, the votes cast for Verrier under the Liberal Party

row or to set aside the election upon such ground.

The Supreme Court, possesses only such summary jurisdiction in election matters as is expressly provided by statute (see cases cited in *Fisher v. Schmarge*, Sup., 120 N.Y.S.2d 788, 790); and there are no provisions to be found in Election Law, Article 14, authorizing the Court, in the therein prescribed summary proceeding, to set aside votes or an election upon the ground of fraudulent conduct. Cf. *Southard v. McGann*, 279 App.Div. 588, 107 N.Y.S.2d 111; *Hogan v. Supreme Court of New York*, 281 N.Y. 572, 24 N.E.2d 472; *Fisher v. Schmarge*, supra; *Mullen v. Heffernan*, supra; *Lester v. Gruner*, 205 Misc. 67, 127 N.Y.S.2d 272; *Macy v. Clayton*, 277 App.Div. 1131,

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101 N.Y.S.2d 162. Nor may relief on such ground be obtained in an Article 78 proceeding, for it is well settled that such a proceeding, when considered in the nature of a mandamus proceeding, will not lie, where, as here, the petitioner does not have a clear legal right to the relief sought. Cf. *People ex rel. Lewis v. Brush*, 146 N.Y. 60, 40 N.E. 502; *Ginsberg v. Heffernan*, 186 Misc. 1029, 60 N.Y.S.2d 875.

An attack upon the election here or the title of Verrier to the office of town councilman upon the ground of fraud alleged to vitiate his election, if such an attack may be made under the circumstances here, must be processed solely by means of a plenary action or a quo warranto proceeding in which a trial may be had as to questions of fact.

The petition herein and this proceeding be and hereby are dismissed without costs. Settle order on notice.