Vashist Narain Sharma

Vs

Dev Chandra and Others

Civil Appeal No. 151 of 1953

(S.R. Dass, Ghulam HasanB. Jagannath Das JJ)

20.05.1954

JUDGMENT

GHULAM HASAN J. -

This appeal preferred under article 136 of the Constitution against the order, dated May 4, 1951, of the Election Tribunal, Allahabad, setting aside the election of Sri Vashist Narain Sharma to the Uttar Pradesh Legislative Assembly, raises two questions for consideration. The first question is whether the nomination of one of the rival candidates, Dudh Nath, was improperly accepted by the Returning Officer and the second, whether the result of the election was thereby materially affected.

Eight candidates filed nominations to the Uttar Pradesh Legislative Assembly from Ghazipur (South East) Constituency No. 345, three withdrew their candidature and the contest was confined to the remaining five. The votes secured by these candidates were as follows :-

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1. Vashist Narain Sharma 12868

2. Vireshwar Nath Rai 10996

3. Mahadeo 3950

4. Dudh Nath 1983

5. Gulab Chand 1768

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They were arrayed in the election petition as respondents Nos. 1 to 5 respectively. The first respondent having secured the highest number of votes was declared duly elected. Three electors filed a petition under section 81 of the Representation of the People Act (Act XLIII of 1951) praying that the election of the returned candidate be declared void and that respondent No. 2 be declared to have been duly elected; in the alternative, that the election be declared wholly void. The election was sought to be set aside on the grounds, inter alia, that the nomination of respondent No. 4 was improperly accepted by the Election Officer and that the result of the election was thereby materially affected. The Tribunal found that respondent No. 4, whose name was entered on the electoral roll of Gahmar Constituency Ghazipur (South East) 'personated' (meaning, passed himself off as) Dudh Nath Kahar and used the entries of his electoral roll of Baruin Constituency Ghazipur (South West), that the Returning Officer had improperly accepted his nomination, and that the result

of the election was thereby materially affected. Allegations of major and minor corrupt practices and non-compliance with certain statutory rules were made but the Tribunal found in favour of the returned candidate on those points.

Dudh Nath, respondent No. 4, is Rajput by caste. His permanent or ancestral home is Gahmar but since 1943 he had employed as a teacher in the Hindu Higher Secondary School at Zamania - a town 10 or 12 miles away - and he had been actually residing at village Baruin which is quite close to Zamania. The person for whom Dudh Nath 'personated' is Dudh Nath Kahar whose permanent house is at Jamuan, but his father lives at Baruin. Dudh Nath Kahar used to visit Baruin off and on but he was employed at Calcutta. The nomination paper filed by Dudh Nath gave his parentage and age which more properly applied to Dudh Nath Kahar. He gave his father's name as Shiv Deni alias Ram Krit. Ram Krit is the name of Dudh Nath Kahar's father. The electoral roll (Exhibit K) of Gahmar gives Dudh Nath's father's name as Shio Deni with no alias and his age as 39, while the electoral roll of Pargana Zamania Mouza Baruin (Exhibit C) gives Dudh Nath's father's name as Ram Krit and his age as 31. In the electoral roll of Jamuan Dudh Nath's age is entered as 34 but in the supplementary list it is mentioned as 30. When the nomination paper was filed on November 24, 1951, at 2-20 P.M. It was challenged by Vireshwar Nath Rai on the ground that Dudh Nath's father's name was Shivadeni and not Ram Krit but no proof was given in support of the objection and it was overruled on November 27. This order was passed at 1 P.M. One of the candidates, who later withdrew, filed an application at 3-25 P.M. before the Returning Officer offering to substantiate the objection which the objector had not pressed. This application was rejected on the ground that the nomination had already been declared as valid. In point of fact no evidence was adduced. This acceptance of the nomination on the part of the Returning Officer is challenged as being improper under section 36(6) of the Representation of the People Act and as the result of the election according to the objector has been materially affected by the improper acceptance of this nomination, the Tribunal is bound to declare the election to be wholly void under section 100(1)(c) of the Act. Mr. Daphtary on behalf of the appellant has argued before us with reference to the provisions of sections 33 and 36 that this is not a case of improper acceptance of the nomination paper, because prima facie the nomination paper was valid and an objection having been raised but not pressed or substantiated, the Returning Officer had no option but to accept it. There was, as he says, nothing improper in the action of the Returning Officer. On the contrary, it may, according to him, be more appropriately described as a case of an acceptance of an improper nomination paper by the Returning Officer, inasmuch as the nomination paper contained an inherent defect which was not discernible ex facie and could be disclosed only upon an enquiry and upon the taking of evidence as to the identity which was not then forthcoming. Such a case, it is argued, is not covered by section 100(1)(c) but by section 100(2)(c) in which case the election of the returned candidate is alone to be declared void, whereas in the former case the election is wholly void. We do not propose to express any opinion upon this aspect of the matter, as in our view the appeal can be disposed of on the second question.

Section 33 of the Representation of the People Act, 1951, deals with the presentation of nomination paper and lays down the requirements for a valid nomination. On the date fixed for scrutiny of the nominations the Returning Officer is required to examine the nomination paper and decide all objections which may be made to any nomination, and after a summary inquiry, if any, as he thinks necessary he is entitled to refuse nomination on certain grounds mentioned in sub-section (2) of section 36. Sub-section (6) lays down 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. This sub-section shows that where the nomination paper is accepted, no reasons are required to be given. Section 100 gives the

grounds for declaring an election to be void. The material portion is as follows :-

> (1) If the Tribunal is of opinion -
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> (a)..... .....
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> (b)..... .....
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> (c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination,

the Tribunal shall declare the election to be wholly void. It is under this sub-section that the election was sought to be set aside.

Before an election can be declared to be wholly void under section 100(1)(c), the Tribunal must find that "the result of the election has been materially affected." These words have been the subject of much controversy before the Election Tribunals and it is agreed that the opinions expressed have not always been uniform or consistent. These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the return candidate. The next question that arises is whether the burden of proving this lies upon the petitioner who objects to the validity of the election. It appears to us that the volume of opinion preponderates in favour of the view that the burden lies upon the objector. It would be useful to refer to the corresponding provision in the English Ballot Act, 1972, section 13 of which is as follows :-

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the Tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

This section indicates that an election is not to be declared invalid if it appears to the Tribunal that non-compliance with statutory rules or any mistake in the use of such forms did not affect the result of the election. This throws the onus on the person who seeks to uphold the election. The language of section 100(1)(c), however, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected. On the contrary under the English Act the burden is placed upon the respondent to show the negative, viz., that the result of the decision has not been affected. This view was expressed in Rai Bahadur Surendra Narayan Sinha v. Amulyadhone Roy & Others (Indian Election Cases by Sen and Poddar, page 188), by a Tribunal presided over by Mr. (late Mr. Justice) Roxburgh. The contention advanced in that case was that the petitioner having established an irregularity it was the duty of the respondent to show that the result of the election has not been materially affected thereby. The Tribunal referred to the provisions of section 13 of the Ballot Act and drew a distinction between that section and the provisions of paragraph 7(1)(c) of Corrupt Practices Order which was more or less on the same lines as section 100(1)(c). They held that the onus is differently placed by the two provisions. While under the English Act the Tribunal hearing an election petition is enjoined not to interfere with an election if it appears to it that non-compliance with the rules or mistake in the use of forms did not affect the

result of the election, the provision of paragraph 7(1)(c) placed the burden on the petitioner. The Tribunal recognized the difficulty of offering positive proof in such circumstances but expressed the view that they had to interpret and follow the rule as it stood.

In C. M. Karale v. Mr. B. K. Dalvi etc. (Doabia's Election Cases, Vol. 1 (p. 178)), the Tribunal held that the onus of proving that the result had been materially affected rests heavily on the petitioner of proving by affirmative evidence that all or a large number of votes would have come to the returned candidate if the person whose nomination had been improperly accepted had not been in the field.

In Babu Basu Sinha v. Babu Rajandhari Sinha etc. (Indian Election Petitions (Vol. 111) by Shri Jagat Narain, page 80), it was emphasized that it is not enough for the petitioner to show that the result of the election might have been affected but he must show that it was actually affected thereby.

The case of Jagdish Singh v. Shri Rudra Deolal etc. (Gazette of India (Extraordinary) October 13, 1953), was one under section 100(1)(c) of the Representation of the People Act. It was held that the question should always be decided on the basis of the material on the record and not on mere probabilities. The Tribunal distinguished between an improper rejection and an improper acceptance of nomination observing that while in the former case there is a presumption that the election had been materially affected, in the latter case the petitioner must prove by affirmative evidence, though it is difficult, that the result had been materially affected.

The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways :

> (1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,
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> (2) where the person referred to above secured more votes, and
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> (3) where the person whose nomination has been improperly accepted is the returned candidate himself.

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. So far as the third case is concerned it may be readily conceded that such would be the conclusion. But we are not prepared to hold that the mere fact that the wasted votes are grater than the margin of votes between the returned candidates and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by section 100(1)(c) and hold without evidence that the duty has

been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand.

In two cases [Lakhan Lal Mishra v. Tribeni Kumar etc. (Gazette of India (Extry.) Feby. 2, 1953) and Mandal Sumitra Devi v. Sri Surajnarain Singh etc. (Gazette of India (Extry.) Feby. 26, 1953)], the Election Tribunal, Bhagalpur, had to consider the question of improper acceptance of the nomination paper. They agreed that the question whether the result of election had been materially affected must be proved by affirmative evidence. They laid down the following test :-

> "If the number of votes secured by the candidate, whose nomination paper has been improperly accepted, is lower than the difference between the number of votes secured by the successful candidate and the candidate who has secured the next highest number of votes, it is easy to find that the result has not been materially affected. If, however, the number of votes secured by such a candidate is higher than the difference just mentioned, it is impossible to foresee what the result would have been if that candidate had not been in the field. It will neither be possible to say that the result would actually have been the same or different nor that it would have been in all probability the same or different."

In both the cases the margin of votes between the successful candidates and the next highest candidate was less than the number of votes secured by the candidate whose nomination was improperly accepted. They held that the result was materially affected. We are unable to accept the soundness of this view. It seems to us that where the margin of votes is greater than the votes secured by the candidate whose nomination paper had been improperly accepted, the result is not only materially not affected but not affected at all; but where it is not possible to anticipate the result as in the above mentioned cases, we think that the petitioner must discharge the burden of proving that fact and on his failure to do so, the election must be allowed to stand.

The Tribunal in the present case rightly took the view that they were not impressed with the oral evidence about the probable fate of votes wasted on Dudh Nath Singh, but they went on to observe : "Considering that Dudh Nath respondent No. 4 received more votes than the margin of votes by which respondent No. 1 was returned we are constrained to hold that there was reasonable possibility of respondent No. 2 being elected in place of respondent No. 1, had Dudh Nath not been in the field." We are of opinion that the language of section 100(1)(c) is too clear for any speculation about possibilities. The section clearly lays down that improper acceptance is not to be regarded as fatal to the election unless the Tribunal is of opinion that the result has been materially affected. The number of wasted votes was 111. It is impossible to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the Legislature to consider. The English Act to which we have referred presents no such conundrum and lay down a perfectly sensible criterion upon which the Tribunal can proceed to declare its opinion. It directs the Tribunal not to set aside the election if it is of opinion that the irregularity has not materially affected the result.

Mr. Naunit Lal argued that the finding that the result of the election has been materially affected is a finding of fact which this Court should not interfere with in special appeal but there is no foundation for the so-called finding of fact. If the Tribunal could not be sure that the respondent No. 1 would get only 56 out of the wasted votes to give him an absolute majority, how could the Tribunal conjecture that all the wasted votes would go to the second best candidate.

The Tribunal misdirected itself in not comprehending what they had to find and proceeded merely upon a mere possibility. Their finding upon the matter is speculative and conjectural.

Mr. Naunit Lal also attempted to argue that he could support the decision of the Tribunal on other grounds which had been found against him and referred to the analogy of the Code of Civil Procedure which permits a respondent to take that course. That provision has no application to an appeal granted by special leave under article 136. We have no appeal before us on behalf of the respondents and we are unable to allow that question to be reagitated.

The result is that we set aside the order of the Tribunal and hold that it is not proved that the result of the election has been materially affected by an improper acceptance of the nomination, assuming that the case falls within the purview of section 36(6) and that finding is correct.

We accordingly set aside the order of the Tribunal and uphold the election of the appellant. The appellant will get his costs from the respondents incurred here and in the proceedings before the Tribunal.

Order accordingly.

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