Keshav Laxman Borkar

Vs

Dr. Devrao Laxman Anande

Civil Appeal No. 455 of 1958

(CJI S. R. Dass, K. Subha Rao JJ)

30-09-1959

JUDGMENT

DAS C.J. –

This appeal has been filed, on a certificate granted by the High Court of Bombay, on January 14, 1958, under Act. 133(1)(c) of the Constitution, challenging the correctness of that part of the judgment of the High Court, pronounced on November 14, 1957, which set aside the order of the Election Tribunal declaring the appellant to have been duly elected a member of the Legislative Assembly of the State of Bombay.

For the election to the Bombay Legislative Assembly from the Electoral Constituency No. 129 of Mazagaon in Greater Bombay held on March 11, 1957, there were originally four candidates for the unreserved seat. Out of them two had withdrawn before the polling, leaving the appellant and the respondent as the two contesting candidates. The result of the election was declared on March 12, 1957. The respondent having received 22,914 votes as against 14,885 votes secured by the appellant, the respondent was declared duly elected. On April 10, 1957, the appellant filed an Election Petition (No. 190 of 1957) alleging that as the respondent was, at all material times, an Insurance Medical Practitioner, Bombay under the Employees' State Insurance Act, 1948, he was holding an office of profit under the Government of Bombay and as such was not, under Art. 191 of the Constitution of India, eligible for election. The appellant prayed for the setting aside of the election of the respondent, and also prayed that he, the appellant, be declared to have been duly elected to the Legislative Assembly from the said constituency. The Election Tribunal was constituted on June 28, 1957. The Tribunal by its order dated September 17, 1957, held that the respondent was holding an office of profit under the Government of Bombay and as such was disqualified under Art. 191(1)(a) of the Constitution and accordingly, declared the election of the respondent to the Legislative Assembly of the State of Bombay from Constituency No. 129 Mazagaon void. The Tribunal further held that the appellant was duly elected to the State Legislative Assembly from the said constituency. This conclusion of the Tribunal was thus expressed :

> "Besides, as there was no other candidate contesting the said Legislative Assembly seat, except the Petitioner who polled 14,885 votes at the said election, he alone remains and he is thus entitled to be declared as duly elected for the said seat of the Assembly of the State of Bombay from the Constituency in place of the Respondent, under section 101 of the Representation of the People Act 1951."

Being aggrieved by the order of the Tribunal, the respondent appealed to the High Court of

Bombay. That appeal (No. 737 of 1957) was heard by a Division Bench by the judgment and order pronounced on November 14, 1957, the High Court, while confirming the order of the Tribunal, in so far as it set aside the election of the respondent set aside the remaining part of the order of the Tribunal which declared the appellant to have been duly elected a member of the State Legislative Assembly. The High Court, however, granted to the appellant, on January 14, 1958, a certificate under Art. 133(1)(c) of the Constitution that the case was a fit one for appeal to this Court. Hence the present appeal. The respondent has not filed an appeal against the judgment and order of the High Court in so far as it confirmed the order of the Tribunal setting aside his election. So the order for unseating the respondent has become final. Nor has the respondent entered appearance to this appeal and it accordingly has been heard ex parte.

The only point for our determination is whether the Election Tribunal was in error in declaring the present appellant to have been duly elected. The answer to this question depends upon a true construction of s. 101 of the Representation of the People Act, 1951 (hereinafter called the Act) which reads as follows :-

> "Section 101. Grounds for which a candidate other than the returned candidate may be declared to have been elected :-
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> If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Tribunal is of opinion -
>
> (a) that in fact the petitioner or such other candidate received a majority of the valid votes; or
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> (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,
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> the Tribunal shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

In this case the appellant in his Election Petition had, in addition to calling in question the election of the respondent, asked for a declaration that he himself had been duly elected. As already stated, the Tribunal was of the opinion, that the respondent's election having been set aside the appellant alone was left in the field and must be regarded as having received a majority of the valid votes and on that basis declared the appellant as duly elected. The High Court has taken a different view. The question is whether the High Court was right.

The expression "valid votes" is nowhere defined in the Act; but considerable light is thrown on the matter by the provisions of s. 36(8) of the Act, which runs as follows :-

"36. Scrutiny of nominations :-

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> (8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates, whose

nominations have been found valid, and affix it to his notice board".

Rule 58 framed under the Act, which was in force at the material time, in so far as it is relevant for our present purpose, runs as under :-

"58. Counting of votes and ballot papers :-

(1) Every ballot paper which is not rejected under rule 57 shall be deemed to be valid and shall be counted :

Provided that no packet containing tendered ballot papers shall be opened and no such ballot paper shall be counted."

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From the provisions quoted above two things are clear : In the first place, the candidates whose nomination papers are, after scrutiny, accepted by the returning officer, are "validly nominated candidates" and the returning officer has to affix the list of such validly nominated candidates to his notice board. The preparation of this list and the fixing of it in the notice board can only be for the purpose of giving notice to the public that votes may be cast for those candidates whose names are included in that list. The next thing that emerges is that the ballot papers which are not rejected under r. 57 are to be deemed to be "valid ballot papers" and are to be counted, which obviously means that they are to be counted as valid votes. In the instant case before us, the respondent had secured 22,914 votes as against 14,885 votes cast for the appellant. If the votes secured by the respondent are valid votes, then obviously the appellant has not received a majority of the valid votes. The contention of the appellant, however, is that as the Tribunal has held that the nomination paper of the respondent had been wrongly accepted, the entire process of election from nomination to polling was bad and the votes secured by the respondent were in effect votes cast for a candidate who was not eligible and should be regarded as votes thrown away so that the appellant must be regarded as having received the majority of the valid votes. We agree with the High Court that this argument cannot prevail.

It is true that the acceptance of a nomination paper after scrutiny is not final or conclusive but can be set aside, as it has been done in the present case by the Election Tribunal, but the acceptance of the nomination paper, under s. 36(8) makes the candidate, whose nomination paper is accepted after scrutiny, a validly nominated candidate at least for the purpose of receiving votes at the election. In other words, the acceptance of the nomination papers by the returning officer is conclusive to this extent that the nomination paper accepted as valid should form the basis of the election and that the candidate, whose nomination paper has been accepted, must be treated as a person for whom votes could be given. This position is further reinforced by the provisions of r. 58 which provides that every ballot paper which is not rejected under r. 57 should be deemed to be valid and must be counted. The question of throwing away of votes, therefore, cannot arise, in the absence of some special pleading that particular voters had cast their votes with knowledge or notice that the candidate for whom they had voted was not eligible for election and that consequently, they had deliberately thrown away their votes in favour of the disqualified person. No such allegation of knowledge or notice is made in the petition and the appellant cannot be heard to say that he might have proved the same had the respondent raised an issue on the point. Indeed under s. 101(a) the onus was on the appellant to allege and prove that he had received a majority of the valid votes and he should have adduced evidence in support of that claim. This the appellant has failed to do. In the

circumstances, we do not think there is any substance in this appeal which must, therefore, be dismissed. As the respondent has not appeared, there will be no order for costs.

Appeal dismissed.

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