Dr. Anup Singh

Vs

Shri Abdul Ghani and Another

Civil Appeal Nos. 141 and 142 of 1946

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, K. C. Das Gupta, J. C. Shah, S. M. Sikri, K. Subha Rao, Raghubar Dayal, N. Rajgopala Ayyangar JJ)

14.08.1964

JUDGMENT

WANCHOO J.

These appeals on certificates granted by the Punjab High Court arise out of an election to the Council of States by the Punjab Legislative Assembly and will be dealt with together as they arise out of two separate election petitions by two persons, challenging the election of the same person.

There was an election to the Council of States by the Punjab Legislative Assembly in March 1962. There were a number of candidates for three seats which had to be filled. In the present appeals we are concerned with two candidates, namely, Dr. Anup Singh, appellant, and Shri Abdul Ghani respondent. Two of the seats were filled by Shri Chaman Lal and Shri Surjit Singh. Though originally their election was also challenged, that is not in dispute now. The position with respect to Dr. Anup Singh and Shri Abdul Ghani on first preference votes (the election being on proportional representation) was that Dr. Anup Singh got 36 votes and Abdul Ghani 35 votes. Thereafter preferences were transferred and Dr. Anup Singh got 36.3 votes and Shri Abdul Ghani 35 votes. In consequence Dr. Anup Singh was declared elected along with the other two candidates whose election is not now in dispute. This was followed by two election petitions, one by Shri Abdul Ghani and the other by Shri Lachhman Singh. Originally the election of all the three candidates was challenged on a large number of grounds; but eventually the matter was pressed only against the election of Dr. Anup Singh and only on one ground, namely, that certain votes cast in favour of Shri Abdul Ghani had been wrongly rejected and certain votes cast in favour of Dr. Anup Singh were wrongly accepted. This challenge was met by the appellant on two grounds. In the first place he contended that the petitions were liable to be dismissed under s. 90(3) of the Representation of the People Act, No. 43 of 1951 (hereinafter referred to as the Act) for non-compliance with s. 81(3). In the second place it was contended that there was no improper rejection of the votes of Shri Abdul Ghani and no improper acceptance of votes of the appellant.

These were the two main questions before the Tribunal. On the first question, the Tribunal decided that the election petitions were maintainable inasmuch as there was substantial compliance with s. 81(3) of the Act. On the second question relating to eight votes which were under challenge, the tribunal held that the three votes in favour of Shri Abdul Ghani were rightly rejected. This decision of the tribunal has been upheld by the High Court and is no longer in dispute before us. As to the five votes in favour of Dr. Anup Singh, it was conceded on behalf of the appellant that one was invalid. Of the remaining four, two were held to be valid and two were held to be invalid on the basis of the decision of the Punjab High Court in Pala Singh v. Natha Singh. (LXIV (1962) P.L.R.

1110) Thereafter the Tribunal redistributed the votes on the basis of its findings and declared Shri Abdul Ghani elected as on redistribution Dr. Anup Singh received 33.3 votes and Abdual Ghani 35 votes.

Thereupon there were two appeals to the High Court by the present appellant and two points were urged on his behalf, namely, (i) that the election petitions should have been dismissed under s. 90(3) of the Act as they did not comply with s. 81(3), and (ii) that the Tribunal was wrong in rejecting the two ballot papers. The High Court held that there was substantial compliance with s. 81(3) and therefore the petitions could not be rejected under s. 90(3). It further held that one of the two votes in favour of Dr. Anup Singh which the Tribunal had invalidated was not invalid. Lastly, it held that the second vote rejected by the Tribunal was rightly rejected. The final position on this basis was that Dr. Anup Singh got 34.3 votes and Shri Abdul Ghani 35 votes. In consequence the High Court dismissed the two appeals. Then followed two petitions for certificates which were granted; and that is how the matter has come up before us.

Two points have been urged on behalf of the appellant before us. In the first place it is contended that the High Court was in error in not rejecting the election petitions under s. 90(3) of the Act for non-compliance with the provisions of s. 81(3). Secondly, it is urged that the High Court was in error in rejecting one of votes, and that if that vote had not been rejected Dr. Anup Singh would have got 35.3 votes and Shri Abdul Ghani 35 votes and the election petitions should have therefore failed. On this aspect of the matter therefore we have to consider the validity of one vote only.

So far as the first point is concerned, the argument is that s. 81(3) requires that "every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and one more copy for the use of the Election Commission and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition." In this case the necessary number of copies were filed and each copy bore the signature of the petitioner concerned. It may also be mentioned that these copies were carbon copies of the original and it is not in dispute that they were true copies thereof. But the attestation required by s. 81(3) was not there specifically on the copies. Consequently, the appellant contends that there was no compliance with s. 81(3) and in consequence the petitions should have been rejected under s. 90(3) which provides that "the Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, or section 82 notwithstanding that it has not been dismissed by the Election Commission under section 85." It is urged that in view of the penalty provided for non-compliance complied with s. 81(3), that section is mandatory and has to be strictly complied with. Inasmuch as in this case there was no attestation, the petitions should have been rejected.

An exactly similar matter came to be considered by this Court in Ch. Subba Rao v. Member, Election Tribunal. (A.I.R. 1964 S.C. 1027) In that case also the copies were signed by the petitioner but there was no attestation in the sense that the words "true copy" were omitted above the signature of the petitioner. This Court held that as the signature in original was there in the copy, the presence of such original signature in the copy was sufficient to indicate that the copy was attested as a true copy, even though the words "true copy" were not written above the signature in the copies. This Court further held that there was substantial compliance with s. 81(3) of the Act and the petition could not be dismissed under s. 90(3). That case applies with full force to the facts of the present case, and it must therefore be held that there was substantial compliance with s. 81(3) and the petitions could not therefore be dismissed under s. 90(3).

This brings us to the main question that has been argued before us, namely, whether the Tribunal

and the High Court were right in rejecting one of the ballot papers which was marked Ex. P-76. The Tribunal's judgment shows that it was inclined to hold that this ballot paper was not invalid, but following the judgment of the High Court in Pala Singh's case (LXIV (1962) P.L.R. 1110) it held this particular ballot paper to be invalid. When the matter came before the High Court, the case was placed before a Full Bench of three Judges to consider the correctness of the judgment in Pala Singh (LXIV (1962) P.L.R. 1110). It may be mentioned that that judgment was concerned with a mark on the ballot paper and not with any writing thereon, and the High Court in Pala Singh's case (LXIV (1962) P.L.R. 1110) took in view that making of any mark would make the ballot paper invalid in view of r. 73(2)(d). Pala Singh's case (LXIV 1962 P.L.C. 1110) was reconsidered by the High Court and it held that on the whole Pala Singh's case (LXIV 1962 P.L.C. 1110) could not be held to have been correctly decided in the matter of a mark on the ballot paper in view of certain decisions of the English courts in that behalf. But so far as Ex. P-76 was concerned, the High Court took the view that that was a case of writing and relying on the decision of Woodward v. Sarsons. ((1875) L.R. 10 C.P. 733) the High Court held by majority the ballot paper to be invalid.

> #Rule 73(2)(d) lays down as follows :-"(2) A ballot paper shall be invalid on which - (a) . . . . . .(b) . . . . . .(c) . . . . . .(d) there is any mark or writing by which the elector can beidentified."##

The contention of the appellant is that before any ballot paper can be declared invalid under r. 73(2)(d) because of the existence of any mark or writing on it other than that permitted by r. 37-A, it has to be shown that the elector is actually identified because of the mark or writing. Now what r. 73(2)(d) requires is (i) that there should be a mark or writing on the ballot paper other than what is permitted under r. 37-A, and (ii) that this mark or writing should be such that the elector can be identified because of it. There is no dispute in this case that there are both a mark and a writing other than the figure permitted by r. 37-A on this ballot paper. The question is whether the mark and the writing (other than that permitted by r. 37-A) which are both present on the ballot paper are such that the elector can be identified be cause of them.

This raises the question as to what the words "by which the elector can be identified" appearing in r. 73(2)(d) mean. The contention of the appellant is that these words mean that the mark or writing should be such that the elector is actually identified because of them. On the other hand the contention of the respondents is that it is not necessary that the elector is actually identified by the presence of the mark or writing. It is urged that it is enough if the elector might possibly be identified by such mark or writing, or at any rate the mark or writing should be such as would make it reasonable and probable that the elector can be identified thereby. Thus there are three possible interpretations of the words "by which the elector can be identified" appearing in r. 73(2)(d), namely - (i) any mark or writing which might possibly lead to the identification of the elector, (ii) such mark or writing as can reasonably and probably lead to the identification of the elector, and (iii) the mark or writing should be connected by evidence aliunde with an elector and it should be shown that the elector is actually identified by such mark or writing. The appellant presses for the third of these alternative constructions both in respect of the mark and the writing while the respondents press the first construction, and in any case it is urged that the words do not go beyond the second construction.

We are of opinion that the words cannot bear the first construction, namely, that any mark or writing other than that permitted by r. 37-A which might possibly lead to the identification of the elector would be covered thereby. When the legislature provided that the mark or writing should be such that the elector can be identified thereby it was not providing for a mere possibility of identification.

On this construction almost every additional mark or writing would fall within the mischief of the provisions. If that was the intention the words would have been different, for if a mere possibility of identification had been enough to invalidate the ballot paper, cl. (d) of r. 73(2) would have read something like this : "that there is any mark or writing other than that permitted by r. 37-A". But the words used by the legislature are "any mark or writing by which the elector can be identified", and this in our opinion implies that there should be something more than a mere possibility of identification, before a vote can be invalidated. This may happen when some pre-arrangement is either proved or the marks are so many and of such a nature that an inference of pre-arrangement maybe safely drawn without further evidence.

We are further of opinion that the third construction on which the appellant relies also cannot be accepted. If the intention of the legislature was that only such votes should be invalidated in which the elector was actually identified because of the mark or writing, the legislature would not have used the words "the mark or writing by which the elector can be identified". These words in our opinion do not mean that there must be an actual identification of the elector by the mark or writing before the vote can be invalidated. If such was the intention of the legislature, cl. (d) would have read something like "any mark or writing which identifies the elector". But the words used are "any mark or writing by which the elector can be identified", and these words in our opinion mean something more than a mere possibility of identification but do not require actual proof of identification before the vote can be invalidated, though by such proof, when offered, the disability would be attracted.

It seems to us therefore that the second construction, out of the three alternatives we have mentioned above, is the real construction of these words. When the legislature used these words it was providing that any mark or writing by which the elector can reasonably and probably be identified would invalidate the ballot paper. The words "can be identified" in our opinion imply something more than a mere possibility of identification; at the same time they do not in our opinion require that before the ballot paper is rejected the elector's identify must be actually established. Truly construed therefore the words mean that the mark or writing should be such that the elector can be identified thereby with reasonably probability. Thus it is not the mere possibility which will invalidate the vote under r. 73(2)(d), nor is it necessary that there should be certain identification before the vote is invalidated. All that these words require is that there should be reasonable probability of identification by the mark or writing (other than that permitted by r. 37-A) and if there is such a reasonable probability of identification, that ballot paper would be invalidated.

Obviously when these words mean that there should be a reasonable probability of identification by means of the mark or writing there would be a difference in the approach of the returning officer as well as of the tribunal and of the court when dealing with a mark as distinguished from a writing. So far as the mark is concerned it has by itself very little value for purposes of identification and therefore in the case of marks the returning officer or the tribunal or the court may require evidence to show that there was arrangement between the elector and the candidate to put a certain mark on the ballot paper which would lead to his identification. But in the case of a writing the mere presence of the writing in certain circumstances would be sufficient to warrant the returning officer, or the tribunal or the court to say that the elector can be identified by the writing. Whether the elector can be identified by the writing would always be a question of fact in each case and in that connection the extent of the writing on the ballot paper may have a bearing on the question whether the elector can be identified thereby. For example, if the writing consists of say, a capital letter 'A', it may be possible for the returning officer, the tribunal or the court to say that there is not sufficient material in the writing by which the elector can be identified. But if the writing consists of a number

of words it will be open to the returning officer after taking into account the entire circumstances to say whether the elector can be identified by the presence of so much writing. In dealing with this question the size of the constituency and the number of words may not be irrelevant. We may also add that when scrutinising the ballot papers under r. 37-A and considering whether a particular ballot paper should be rejected, it is not necessary for the returning officer to take evidence, though if any parties prepared to give evidence then and there while the scrutiny is going on the votes are being counted, there is nothing to prevent the returning officer from taking such evidence to determine whether the mark or writing is such that the elector can be identified thereby. But generally evidence may not be forthcoming and it will be for the returning officer, the tribunal or the court to decide on the ballot paper as it stands whether the mark or writing is such that the elector can be identified thereby. As we have said already the difficulty is greater in the case of a mere mark; the difficulty may be less in the case of a writing depending upon the amount of writing that is available on the ballot paper and it will be for there turning officer, the tribunal or the court in each case to decide in all the circumstances, whether the writing is of such a nature and of such an extent that the elector can be identified by it.

Similar provisions exist in the English law and have been the subject of decisions by English courts. In Woodward's case ((1875) L.R. 10 C.P. 733) the validity of voting papers which bore marks as well as writing other than permitted under the rules came up for consideration. So far as the marks were concerned they consisted of two crosses instead of one as required by rule, and the court observed that in such a case if there were evidence of an arrangement that the voter would place two marks, so as to indicate that it was he, that voter, who had used that ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not a substantial breach of the statute. As to the writing on two ballot papers, however, the Court held with some hesitation that it should disallow them, and the rule was put this way :

> "We yield to the suggestive rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter".

The question again came to be considered in Isaacson v. Durant ((1886) IV O'M & H 34) (popularly known as Stepney case). In that case a certain name had been written at the back of the paper and a question arose whether that writing was such as to lead to the identification of the voter. The two learned Judges constituting the court differed on this point. Field J. was not even sure whether the voter had written the name as it was at the back of the ballot paper. Denman J. however, thought that the case was covered by Woodward's case ((1875) L.R. 10 C.P. 733) and put it thus at p. 42 :

> "Now I take the decision in Woodward v. Sarsons to amount to this, not that every departure from a simple cross is a mark by which the voter can be identified - a double cross for instance was allowed by the Court - but that where the name of the candidate, not of the voter, is written in full upon the ballot-paper, the vote shall be invalid, because that is a mark by which the voter can be identified. The principle is this : that where a man has once written a name in full upon a paper it is evidence of his handwriting, and evidence of his handwriting is evidence of the identity of the man."

The matter was again considered in H. L. Lawson v. Colonel Chester Master ((1893) IV O'M & H

194) (known as Cirencester case) and Hawkins J. put the matter thus at p. 198 :

> "We think we ought to adhere to the language of the statute itself, which says that the mark must be mark by which the voter can (not might possibly) be identified, whether the mark is such, is a mater of fact."

The matter again came up for consideration in Henry Edward Duke v. Richard Harold. ((1911) VI O'M & H 228) There the voter had written the words, "Up, Duke !" against the name of the candidate for whom he was voting, and the question that arose specifically was whether the rule in Woodward's case ((1875) L.R. 10 C.P. 733) had been invalidated by subsequent cases, Ridley J. said that he did not "think that subsequent cases have invalidated the rule - not really.

Finally we may refer to the case of Lewis v. Shepperdson ((1948) 2 All E.R. 503) where the rule in Woodward's case ((1875) L.R. 10 C.P. 733) which was followed in Cirencester case ((1893) IV O'M & H 194) was adhered to. The law in England thus appears to be in accord with what we think to be the interpretation of the crucial words in r. 73(2)(d).

Learned counsel for the appellant however refers to three cases from Australia. In Reginald Pole Blundell v. Joseph Vardon ((1907) 4 (Pt. 2) C.L.R. 1463), the court was dealing mostly with marks and not with writing except in one case where the word "yes" had been written. The vote was held to be valid; but it was remarkable that the Cirencester case ((1893) IV O'M & H 194) was followed. The other case is Kennedy v. Palmer ((1907) 4 Pt. 2 C.L.R. 1481). In that case also the Court followed Cirencester case ((1893) IV O'M & H 194) and that was also a case mainly dealing with marks and not with writing.

In Kean v. Kerby ((1920) 27 C.L.R. 448) what had happened with one of the votes was that the presiding officer did not write the name of the candidate on the ballot paper as he should have done. The voter apparently thought that he himself had to fill the name and wrote "McGrath" and filled in the figure 1. Consequently it was urged that as the voter had written the the name of the candidate,, the vote invalid on the basis of the case of Woodward ((1875) L.R. 10 C.P. 733). Isaacs J. decided in that the vote was valid. He referred to Woodward's case ((1875) L.R. 10 C.P. 733) and said that he substantially agreed with that case. But the case in question was treated as a special case because the presiding officer had not written the name of the candidate as he should have done and the voter thought that he should write it. The decision therefore does not in any way affect the decision in Woodward's case ((1875) L.R. 10 C.P. 733) and if the actual decision appears to be inconsistent with the ratio of Woodward's case ((1875) L.R. 10 C.P. 733), it can well be said that the special facts before the court, it was thought, justified the departure from the view. It seems therefore that the Australian law on the subject is not different from the English law and it is a question of fact in each case whether looking at the writing or mark on the ballot paper, the returning officer, tribunal or the court is able to come to a conclusion that the mark or writing is such that the voter can be identified thereby in the sense in which we have explained those words above.

This then being the construction to be placed on the words "by which the electors can be identified" we have to see whether ballot paper Ex. P-76 bears any mark or writing by which the elector can be identified. Besides the figures 1, 2 and 3 which were permissible under r. 37-A. the ballot paper in question also bears crosses in each case. A cross however is in our opinion a slender basis on which the elector can be reasonably identified. Therefore we shall overlook the crosses. After the cross we find the words "One, Two, Three" written in each case along with the figures "1, 2, 3" which come last. The contention on behalf of the appellant is that the words "One, Two, Three" were really

written as a matter of emphasis and it cannot be said that the voter can be identified by writing these words. Now there is no dispute that these words constitute the writing of the elector on this ballot paper, and the only question is whether by this writing he can be identified. Applying the interpretation of the words we have given above, the question is whether this writing is of the nature and extent which would be reasonably sufficient to lead to the identity of the elector. We are of opinion that the writing is sufficient in extent, particularly when we bear in mind a small constituency of 152 electors and it would in our opinion be right to say that there was a reasonable probability of the identification of the elector by this writing which he had on put on the ballot paper. To say that the elector merely wanted to emphasise his choice is of no assistance to the appellant if the writing is of a nature and extent that it can with reasonable probability lead to the identification of the elector. In the present case we have no doubt that the writing was of sufficient extent and can lead to the identification of the elector. As Denman J. put it in the Stepney case ((1886) IV O'M & H 34), the elector here has by his handwriting left sufficient evidence of his identity and can be identified thereby. We may add that it is not necessary, as the majority of the learned Judges of the High Court seem to think, that the returning officer in the peculiar circumstances of this case, being the Secretary of the Legislative Assembly might be knowing the handwriting of the members. Even if he does not know the handwriting, the ballot paper would be invalidated if the writing is of the nature and extent that it can lead to the identification of the elector. In the present case we have no doubt that by writing is of the words "One, Two, Three" on the ballot paper, the elector has left sufficient evidence of his identity which can lead to his identification. In the result this ballot paper was rightly rejected. In this view of the matter the conclusion of the High Court is correct and the appeals must fail.

We therefore dismiss the appeals with costs - one set of hearing fee.

Appeals dismissed.

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