

Shri Shankar Babaji Savant

Vs

Shri Sakharam Vithoba Salunkhe and Others

Civil Appeal No. 624 of 1964

(CJI P. B. Gajendragadkar, M. Hidayatullah, J. C. Shah, S. M. Sikri, R. S. Bachawat JJ)

09.12.1964

JUDGMENT

BACHAWAT, J. -

Shankar Babaji Savant and Sakharam Vithoba Salunkhe were candidates for election to the Maharashtra Legislative Assembly from the Mahad Constituency. There were four other candidates in the field. Savant and Salunkhe got equal number of valid votes. The other candidates got much lesser votes. The Returning Officer drew lots and declared Savant duly elected. Salunkhe filed an election petition claiming that the election was void, and that he, having received the majority of the valid votes, should be declared duly elected. The Election Tribunal at Alibag dismissed the petition. On appeal, the Bombay High Court declared that the election of Savant was void, and dismissed the rest of the claim made by Salunkhe. Savant now appeals by special leave. The High Court rejected Savant's preliminary contention that the first appeal was not maintainable on account of non-compliance with the provisions of section 119A of the Representation of the People Act, 1951. This contention is no longer pressed before us.

The complaint of Salunkhe that the Returning Officer improperly received and counted in favour of Savant a postal ballot paper with the writing "Shankar Babaji Savant" on its back instead of rejecting it on the ground that it bore a writing by which the elector could be identified is concluded by the concurrent finding of fact that the elector could not be identified by the writing on the back of the ballot paper. The particular complaint of Salunkhe is no longer pressed, and may be left out of consideration.

The major complaint of Salunkhe was that Kolhe, the Presiding Officer for the polling station at Village Turveh Khurd, improperly prevented 19 voters from inserting their ballot papers into the ballot box. On the polling day, those 19 voters wanted to vote in favour of Salunkhe. The polling agent of Savant challenged those voters, disputing their identity. For each challenge he deposited a sum of Rs. 2 in cash with Kolhe. On enquiry, Kolhe was satisfied that all the 19 voters were electors entered on the electoral roll, and the challenges as to their identity were not established. The voters were then supplied with ballot papers, and they duly entered their votes on those papers. They then wanted to insert their ballot papers into the ballot box, but Kolhe did not permit them to do so, and instead, directed them to hand over those papers to himself. On taking possession of the ballot papers, Kolhe kept them inside a sealed envelope and forwarded them to the Returning Officer. Salunkhe succeeded in establishing this major complaint. The Election Tribunal and the High Court have concurrently found that, in the circumstances, the Presiding Officer wrongfully took possession of the ballot papers, and thus prevented the voters from inserting those ballot papers into the ballot box. None of the ballot papers was returned by the voters to the Presiding Officer under

R. 41(2) of the Conduct of Election Rules, 1961. All the 19 voters indicted their preferences on the ballot papers before they were taken possession of by the Returning Officer. A scrutiny of the ballot papers show that 18 voters recorded their votes on their ballot papers in favour of Salunkhe, and one recorded his vote in favour of a candidate other than Savant and Salunkhe. The ballot papers were not tampered with after they were taken possession by the Presiding Officer. The Returning Officer received the 19 ballot papers inside the sealed envelope, but he did not count them, as they were not taken out of the ballot box. The question is whether, in the circumstances, Savant's election is liable to be declared void.

The charge of Salunkhe that the Returning Officer improperly refused to count these 19 votes cannot be sustained. The 19 ballot papers were not valid votes. They never went inside the ballot box. Rules 39, 44, 47, 56, 57 and 64 of the Conduct of Election Rules, 1961 show that the elector casting his vote must insert the ballot paper into the ballot box, at the close of the polling the ballot papers contained in the ballot box are transmitted by the Presiding Officer to the Returning Officer in sealed covers or bags; the ballot papers taken out of the ballot box are finally scrutinised by the Returning Officer, those not rejected are counted as valid votes and the candidate to whom the largest number of valid votes had been given is declared elected by the Returning Officer. All these provisions indicate that in order to become a valid vote the ballot paper recording the vote must be inserted by the elector into the ballot box. In the circumstances, the Returning Officer rightly refused to count the 19 ballot papers as valid votes.

The Election Tribunal held that the election of Savant could not be set aside under section 100(1)(d)(iv) of the Representation of the People Act, 1951 on the ground of the failure of the voters to insert the ballot papers into the ballot box in accordance with R. 39(1)(e) of the Conduct of Election Rules, 1961. This conclusion is correct, but the High Court rightly pointed out that the Election Tribunal was in error in focussing its attention on the provisions of section 100(1)(d)(iv) of the Representation of the People Act, 1951 and R. 39 of the Conduct of Election Rules. The 19 voters did not voluntarily refrain from inserting their ballot papers into the ballot box. The High Court found that by refusing to allow them to insert those ballot papers into the ballot box, the Presiding Officer improperly refused to receive their votes and this improper refusal of votes was a ground of declaring the election to be void under section 100(1)(d)(iii) of the Representation of the People Act, 1951. Mr. Viswanatha Sastri strenuously challenged this finding.

Mr. Sastri contended that the issues before the Election Tribunal as also the memorandum of appeal before the High Court show that the complaint of Salunkhe was based upon the breach of section 100(1)(d)(iv) and not upon the breach of section 100(1)(d)(iii), and the High Court was in error in making out a new case for Salunkhe. We are not inclined to accept this argument. All the relevant facts are set out in the election petition. The petition definitely charged that the Presiding Officer improperly prevented the 19 voters from inserting the ballot papers into the ballot box. The pleadings are broad enough to cover a case of breach of section 100(1)(d)(iii).

Mr. Sastri next contended that there was no improper refusal of votes, because the 10 voters were not entitled to vote at all. He argued that the 19 voters were not identical with the electors referred to in the relevant entries in the electoral roll. In this connection, he rightly pointed out that the Election Tribunal erred in holding that Savant could not raise this objection without filing a recrimination under section 97 of the Representation of the People Act, 1951 and also that the High Court erred in assuming that the objection as to the identity of the voters was not raised at the polling on behalf of Savant. We find that the objection was distinctly raised by the polling agent of Savant. We also think that the enquiry under section 100(1)(d)(iii) is outside the purview of section

97. On an enquiry under section 100(1)(d)(iii) with regard to improper refusal of votes, the respondent to the election petition is entitled to dispute the identity of the voters without filling any recrimination under section 97. In view of this erroneous approach of the Election Tribunal and the High Court, Mr. Sastri justifiably asked us to examine the evidence on this point. We have examined the evidence with the assistance of Mr. Sastri, and on such examination, we are satisfied that the 19 voters are identical with the electors referred to in the relevant entries in the electoral roll. The names of the 19 voters and the names of the electors shown in the relevant entries are as follows :

#-----	Name of Elector as appearing	Name of voter in the electoral roll-----	(1)	(2)-----
	1. Utekar Nanu Daulat	Utekar Nanu Ganpat		
	2. Dalvi Babaji Sitaram	Utekar Babaji Sitaram		
	3. Malakar Anandibal Pitambar	Shet Anandibal Pitambar		
	4. Malakar Maalti Ramachandra	Shet Malati Ramchandra		
	5. Dalvi Rajaram Ramachandra	Utekar Rajaram Ramchandra		
	6. Malakar Parshuram Ranchod	Shet Parsram Rauchhod		
	7. Dalvi Ramchandra Tukaram	Utekar Ramchandra Tukaram		
	8. Dalvi Sakharam Shankar	Utekar Sakharam Shankar		
	9. Dalvi Muktabai Govind	Utekar Muktabai Govind		
	10. Dalvi Bhagubai Ramchandra	Utekar Bhagubai Ramchandra		
	11. Dalvi Shantabai Shankar	Utekar Shantabai Shankar		
	12. Dalvi Parvati Shankar	Utekar Parvati Shankar		
	13. Dalvi Muktabai Babaji Jadhav	Muktabai Babaji Jadhav		
	14. Dalvi Ramabai Pandurang	Utekar Ramabai Pandurang		
	15. Dalvi Draupadibai Arjann	Utekar Drdupadibai Arjuna		
	16. Dalvi Krishnabai Babaji	Utekar Krishnabai Babaji		
	17. Dalvi Sitabai Jivaji	Utekar Sitabai Jivaji		
	18. Dalvi Ganpat Dagdu	Utekar Ganpati Dagdu		
	19. Dalvi Sitaram Babaji	Utekar Sitaram Babaji		

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In the first item, the father's name appearing in the electoral roll is "Daulat", and that given by the voter is "Ganpat". In the rest of the items, there is a difference in the surname appearing in the electoral roll and that given by the voter; in some "Dalvi" appears in place of "Utekar", in some "Shet" in place of "Malakar", in one "Jadhav" in place of "Dalvi". In item 11 additionally "Shankar", the name of the voter's husband, appears in the electoral roll, but at the polling station, the voter, a Hindu woman, refrained from giving her husband's name. The other parts of the voter's name as also their age and house numbers tally with those given in the entries. At the polling, no other person claimed to be the elector referred to in any of the entries. The Police Patel on the spot identified the 19 voters as the electors referred to in those entries. In all these circumstances, we think that the identities of the voters are satisfactorily established, and the surnames and the father's name given in the entries are merely inaccurate descriptions of those voters.

Mr. Sastri then contended that the power of the Presiding Officer to disregard errors is circumscribed by r. 35(4) of the Conduct of Election Rules, 1961, that under the rule he could overlook only clerical or printing errors and the errors in this case could not be said to be clerical or printing errors. The High Court held that under R. 35(4) of the Conduct of Election Rules, the Presiding Officer could overlook merely clerical or printing errors, that the error in the father's name of the first voter could not be regarded as merely clerical or printing error and the ballot paper was wrongly issued to him. But the High Court also held that the errors in the surnames of the other 18 voters were merely clerical errors and the ballot papers were rightly issued to them. Mr. Sastri challenged this finding. He contended that the errors could not be regarded as clerical errors. We think that he is right in this contention. A clerical error connotes some error arising from a slip of the pen or some such thing, some mistake by a clerk or a transcriber in writing or copying. We are unable to say that the errors with regard to the surnames or the father's name were merely clerical errors. But the question still remains whether the Presiding Officer could, apart from R. 35(4), disregard errors other than merely clerical or printing errors. Mr. Sastri submitted that the power of

the Presiding Officer in this respect was circumscribed by R. 35(4) and he could not reject errors other than merely clerical or printing errors. He contended that the electoral roll was conclusive with regard to the name of the elector, and elaborate procedure is prescribed by the Representation of the People Act, 1950 and the Registration of Electors Rules, 1960 for correction of an entry in the electoral roll and any mistake in the name appearing in the entry could be corrected only by recourse to the machinery prescribed therein, and at the time of the polling the Presiding Officer could overlook only clerical or printing errors. Our attention was drawn to the fact that in our electoral law there is no provision corresponding to section 39(5) of the English Representation of the People Act, 1949 (12 & 13, Geo. 6, c. 68), which provides that no misnomer or inaccurate description of any person or place named in the register of parliamentary electors and other documents shall affect the full operation of the document with respect to that person or place in any case where the description of the person or place is such as to be commonly understood. In view of the elaborate argument of Mr. Sastri, we shall briefly examine the scheme of our electoral law on the subject.

Part III of the Representation of the People Act 1950 provides for the preparation of electoral rolls for assembly constituencies. Section 21 or 25 of this Act provide for the preparation and yearly revision of electoral rolls, correction of entries therein, inclusion of names of persons whose names are omitted and for applications to the electoral registration officer in this behalf and for appeals from his orders. In particular, section 22(a) provides for correction of any entry which is erroneous or defective in any particular. Rules 10 to 27 of the Registration of Electors Rules, 1960 provide for the publication of the draft roll, lodging of claims and objections in respect of the draft roll, disposal of those claims and objections and consequential orders and appeals, final publication of the rolls and the procedure for correction of entries and inclusion of names on applications under sections 22 and 23 of the Representation of the People Act, 1950. Rule 13(3) and Form No. 8 show that a person to whom an entry relates may ask for correction of any incorrect particular or particulars in the entry. Rules 22(2), 23 and 26 show that, on final publication, the roll together with the list of amendments made by the registration officer becomes the electoral roll of the constituency, subject to such further amendments as may be necessary to give effect to any subsequent order disposing of claims and objections or directing correction of entries and inclusion of names. Section 2(e) of the Representation of the People Act, 1951 shows that an elector in relation to a constituency must be a person whose name is entered in the electoral roll of that constituency for the time being in force. Section 62(1) of this Act provides that no person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. Section 27 of the Act imposes upon the Presiding Officer at a polling station the duty to see that the poll is fairly taken. Part IV of the Conduct of Election Rules, 1961 provides for voting in Parliamentary and Assembly Constituencies. Rules 35, 36, 37 and 38 provide for the identification of electors at the polling station, disposal of challenges to their identity, safeguards against personation and issue of ballot papers to the electors. Rule 35(1) empowers the Presiding Officer to employ such persons as he thinks fit to help in the identification of the electors. Rule 35(2) provides that as each elector enters the polling station, the Presiding Officer shall check the elector's name and other particulars with the relevant entry in the electoral roll and then call out the serial number, name and other particulars of the elector. Rule 35(4) provides that in deciding the right of a person to obtain a ballot paper the Presiding Officer shall overlook merely clerical or printing errors in an entry in the electoral roll, if he is satisfied that such person is identical with the elector to whom such entry relates. Rule 36 provides for a summary enquiry into a challenge of the identity of any person claiming to be a particular elector. Rule 36(2)(b) provides that the Presiding Officer shall read the relevant entry in the electoral roll in full

and ask him whether he is the person referred to in that entry. Rule 36(3) shows that evidence may be given by the challenger and the person challenged on the question of identity and the Presiding Officer may put to the person challenged any questions necessary for the purpose of establishing his identity. Rule 36(4) provides that if after the enquiry, the Presiding Officer considers that the challenge is not established, he shall allow the person challenged to vote, and if he considers that the challenge is established, he shall debar the person challenged from voting.

This brief survey of the electoral law reveals that the elective franchise of a citizen is a valuable right. The elector is entitled to the inclusion of his name on the electoral roll so that he may vote at the election. If the entry in the electoral roll relating to him is erroneous or defective in any material particular, he may obtain correction of the error or defect by recourse to the machinery provided in the Representation of the People Act, 1950 and the Registration of Electors Rules, 1960. In the absence of such a correct he runs the risk of a challenge at the polling station and may be debarred from voting if he fails to establish his identity. But the error or defect in the entry does not disqualify the elector from voting. It is still open to him to satisfy the Presiding Officer at the polling station that he is really the elector to whom the entry relates. Rule 35(4) of the Conduct of Election Rules, 1961 makes it obligatory on the Presiding Officer to overlook merely clerical or printing errors if he is satisfied about the identity of the elector. But the power of the Presiding Officer to disregard errors in the entry is not rigidly circumscribed by r. 35(4). Rules 35 and 36 confer upon the Presiding Officer ample power of enquiry into the identity of the elector. If on such enquiry he is satisfied that the claimant is really the elector referred to in the entry and some parts of the entry are incorrect or erroneous descriptions of the claimant, he may disregard those errors and issue the ballot paper to the claimant. We are not inclined to construe Rules 35 and 36 narrowly and to hold that his power to disregard errors in the entry on such an enquiry is limited to overlooking merely clerical or printing errors. In our opinion, under the specific provision R. 35(4) he must disregard merely clerical and printing errors, and in the exercise of his general powers of enquiry under Rules 35 and 36, he may disregard other errors if he is satisfied about the identity of the elector. In the instant case, the Presiding Officer was satisfied that the 19 voters were the electors referred to in the relevant entries and the surnames and the father's name given in them were erroneous and should be disregarded. In the circumstances, we hold that the ballot papers were rightly issued to all the 19 voters. We think that on this point no distinction can be made between an error in the father's name and an error in the surname of the elector.

In the above discussion, we have purposely refrained from referring to section 36 of the Representation of the People Act, 1951 and sub-sections (44) and (7) thereof, as we do not propose to consider the effect of a misnomer or an inaccurate description of a candidate in a nomination paper. In this case, we are concerned with the question of the effect of an error in the name of the elector on the elector roll, on the right of the elector to vote at the election.

Mr. Sastri next contended that section 100(1)(d)(iii) contemplates breaches of duty by the Returning Officer and the improper refusal of a vote by the Presiding Officer at a polling station cannot be considered to be a breach of section 100(1)(d)(iii). This contention must be rejected. Section 100(1)(d)(iii) covers not only an improper rejection of votes by a Returning Officer at the time of counting, but also an improper refusal of a vote by the Presiding Officer at the time of polling. We have no doubt that Kolhe's conduct in not allowing the 19 voters to place their ballot papers in the ballot box amounts to improper refusal of votes within the meaning of section 100(1)(d)(iii).

Mr. Sastri next contended that an improper refusal of votes contemplated by section 100(1)(d)(iii) must mean an improper refusal of valid votes and as the 19 ballot papers never became valid votes,

their refusal cannot be regarded as improper refusal of votes affecting the result of the election under section 100(1)(d)(iii). In support of this argument, he strongly relied on the following observations of Venkatarama Aiyar, J., in *Hari Vishnu Kamath v. Syed Ahmed Ishaque and others* ([1955] S.C.R. 1104, 1131 and 1132.) :

"The expression 'the result of the election' in section 100(1)(c) must, unless there is something in the context compelling a different interpretation, be construed in the same sense as in section 66, and there is clearly means the result on the basis of the valid votes....."

It is argued with great insistence that as the object of the Election Rules is to discover the intention of the majority of the voters in the choice of a representative, if an elector has shown a clear intention to vote for a particular candidate, that must be taken into account under section 100(8)(c), even though the vote might be bad for non-compliance with the formalities. But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of law, in the same position as an intention not expressed at all."

In Kamath's case ([1955] S.C.R. 1104, 1131 and 1132.), ballot papers not bearing the requisite marks were received and counted as valid votes in breach of the mandatory provisions of R. 47(1)(c) of the Representation of the People (Conduct of Elections and Election Petition) Rules, 1951, and this Court held that votes received in breach of R. 47(1)(c) could not be regarded as valid votes and must be disregarded and only valid votes could be counted for declaring the result of an election. The complaint in that case was that there was an improper reception of votes, and the Court was concerned only with the question whether invalid votes could be counted for declaring the result of the election, and the observations of Venkatarama Aiyar, J. must be read in that context. The court was not there considering the case of an improper refusal of votes. A vote which is improperly refused is a vote, though not a valid vote. From the time when the elector marks his vote on the ballot paper until the vote is counted by the Returning Officer, the voting is one continuous process. An improper refusal of a vote affects the election in two ways. It prevent the vote from becoming a valid vote and from its being counted as a valid vote in the favour of the defeated candidate in whose favour the vote was given. It also affects the election of the returned candidate, because if the votes were received, he might not have been returned at all. It follows that the High Court rightly took into account the improper refusal of the 19 votes for the purpose of ascertaining whether the election of Savant is void. But the 19 votes not being valid votes could not be looked at for the purpose of declaring that Salunkhe got the majority of the valid votes. The High Court rightly refused to declare that Salunkhe had received the majority of valid votes, and there is no cross-appeal by Salunkhe before us.

Out of the 19 votes which the Presiding Officer refused to receive, 18 votes were case in favour of Salunkhe. The remaining one vote was cast in favour of a candidate other than Savant and Salunkhe. Savant alleged that two ballot papers and 27 or 29 postal ballot papers were wrongly rejected and should have been counted in his favour. The High Court has found that one ballot paper was wrongly rejected, and should have been counted in his favour. The High Court rejected the rest of his charge, and they are no longer pressed before us. We find that Savant And Salunkhe got equal number of valid votes. There was improper refusal to receive 18 votes cast in favour of Salunkhe. There was also improper rejection of one vote cast in favour of Savant. Had the 18 votes case in favour of Salunkhe been received, the result of the election would have been otherwise. We thus

find that the result of the election was materially affected by the improper refusal of of those votes. The High Court, therefore, rightly declared that Sanvant's election was void.

In the result, the appeal fails and is dismissed with costs.

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