

Sheik Abdul Rehman

Vs

Jagat Ram Aryan

Civil Appeal No. 1527 (N.C.E.) of 1968

(S.M. Sikri, R.S. Bachawat, K.S. Hegde JJ)

11.02.1969

JUDGMENT

BACHAWAT, J. -

1. This appeal is directed against a judgment of a single Judge of the High Court of Jammu and Kashmir dismissing an election petition for setting aside the election of the respondent Jagat Ram Aryan to the Legislative Assembly of the State of Jammu and Kashmir from the Bhaderwah Scheduled Caste Assembly Constituency.

2. The last date for filing the nomination papers was January 20, 1967. The date of scrutiny of nomination papers was January 23, 1967. The date of poll was February 21, 1967. The date of counting and declaration of result was March 1, 1967. Several candidates filed their nomination papers from this constituency. The candidates were : (1) Jagat Ram Aryan (2) Faquir Chand, (3) Narain Dass, (4) Nikka Ram, (5) Bhagat Ram, (6) Om Parkash and (7) Swami Raj. The first five filed their nomination papers on January 23, 1967, before the Assistant Returning Officer, Kahan Singh, a Tehsildar of Bhaderwah. On scrutiny of the nomination papers, the Returning Officer Abdul Gani accepted as valid the nomination papers of Jagat Ram and Faquir Chand and rejected the nomination papers of the remaining candidates for various reasons. At the poll the contest was between Jagat Ram, the Congress candidate and Faquir Chand, the National Conference candidate. Respondent Jagat Ram having secured larger number of votes was declared elected.

3. The appellant, a voter in the constituency, filed the election petition for setting aside the respondent's election on the ground that the nomination papers of Narain Dass, Nikka Ram and Bhagat Ram were improperly rejected. The High Court found that the nomination paper of Bhagat Ram was properly rejected and this finding is no longer challenged.

4. The nomination paper of Nikka Ram was rejected on three grounds : (1) he did not make and subscribe the oath or affirmation as required by Section 51 (a) of the Jammu and Kashmir Constitution; (2) he was not a member of a scheduled Caste; and (3) his father's name was not correctly shown in the electoral rolls. The nomination paper of Narain Dass was rejected on two grounds : (1) he did not make and subscribe the oath or affirmation as required by Sections 51 (a) and (2) he was not a member of a Scheduled Caste. The High Court found that oath Narain Dass and Nikka Ram were members of the Scheduled Caste "Megh". It also held that the error in the electoral roll with regard to the name of Nikka Ram's father was not a ground for rejecting his nomination paper having regard to Section 44(4) of the Jammu and Kashmir Representation of the People Act, 1957. The High Court also rejected the additional contention that Narain Dass had not made a deposit of Rs. 125/- in conformity with Section 45(2) of the Act. All these findings are no

longer challenged.

5. The only point now in issue is whether Narain Dass and Nikka Ram made and subscribed the oath or affirmation as required by Section 51(a) of the Jammu and Kashmir Constitution. Section 51 (a) provides :

"A person shall not be qualified to be chosen to fill a seat in the Legislature unless he -

(a) is a permanent resident of the State, and makes and subscribes before some person authorised in that behalf by the Election Commission of India an oath or affirmation according to the form set out for the purpose in the Fifth Schedule."

6. The Returning Officer and the Assistant Returning Officers were authorised in this behalf by the Election Commission of India by Notification No. 3/4 J & K 65 as the person before whom the oath or affirmation could be made and subscribed. The prescribed form of oath or affirmation to be made by a candidate of the State Legislature is :-

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established and that I will uphold that sovereignty and integrity of India."

7. Section 44 of the Jammu and Kashmir Representation of the People Act, 1957, provides for presentation of nomination papers and prescribes certain requirements for a valid nomination. Section 45 provides for deposits. Section 46 deals with notice of nominations and the time and place for their scrutiny. Section 47(2) (a), reads :-

"The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of provisions of Sections 51 and 69 of the Constitution and Part VI of this Act;"

8. Form 2-A of the Jammu and Kashmir Representation of the People (Conduct of Election and Election Petition) Rules, 1957, prescribes the form of nomination paper for election to the legislative assembly.

9. It is common case that along with their nomination papers both Narain Dass and Nikka Ram filed oath forms signed by them. The appellant's case is that at the time of the presentation of their nomination papers both Narain Dass and Nikka Ram made oaths and signed the oath forms in the presence of the Assistant Returning Officer. In support of this case, the appellant examined Narain Dass, Nikka Ram, Abdul Qayum and Abdul Rehman. The respondent's case is that Narain Dass and Nikka Ram did not make or subscribe any oath or affirmation before the Assistant Returning Officer, that the oath forms had been filled up and signed before they were presented to him and were not signed in his presence. In support of his case the respondent examined Kahan Singh, the Assistant Returning Officer, and Abdul Gani, the Returning Officer. The High Court accepted the respondent's case.

10. It should be remembered that the requirement of making and subscribing an oath or affirmation was inserted in Section 51(a) of the Jammu and Kashmir Constitution by the Constitution Sixth Amendment Act, 1965. There is ground for believing that Narain Dass and Nikka Ram were not aware of this provision and for this reason they omitted to make or subscribe any oath or affirmation before the Assistant Returning Officer.

Our attention was drawn to Instruction No. 7(7) in Chapter II at p. 19 of the Handbook for Returning Officers, issued by the Election Commission, India, for General Elections, 1967. The aforesaid instruction was as follows :

"The oath or affirmation has first to be made and then signed by the candidate before the authorised officer. It should be borne in mind that mere signing on the paper on which the form of oath is written out is not sufficient. The candidate must make the oath before the authorised officer. Accordingly he will ask the candidate to read aloud the oath or affirmation in English or the regional language and then to sign and date the paper on which the oath or affirmation is written. In the case of illiterate persons who want to contest elections, and who cannot properly make and subscribe the oath or affirmation the authorised officer should read out the prescribed oath and ask the candidate to repeat the same and thereafter take his thumb-impression on the form on which the oath is printed or cyclostyled in token of his having subscribed the oath. The authorised officer should endorse on this paper that the oath or affirmation has been made and subscribed before the candidate on that day. He will immediately furnish to the candidate a certified copy thereof keeping a copy for your record. The candidate will produce this copy as evidence before you at the time of scrutiny of nomination papers. This copy will be given to the candidate forthwith without his applying for it, nor any fee be charged for it."

11. Kahan Singh the Assistant Returning Officer was not conversant with these instructions. He did not ask either Narain Dass or Nikka Ram to read the oath or to sign the oath form in his presence. But the breach of these instructions does not entitle them to say that they had made and subscribed the oath before the Assistant Returning Officer when in fact they did not make or subscribe the oath before him.

12. It is admitted by the appellant that the oath forms filed by Narain Dass and Nikka Ram did not bear any endorsement of the Assistant Returning Officer stating that the oath or affirmation had been made and subscribed before him nor was any certificate of such endorsement furnished to them. The absence of the endorsement on the oath forms tend to suggest that no oath or affirmation was made and subscribed by them before the Assistant Returning Officer. Neither Narain Dass nor Nikka Ram could produce before the Returning Officer Abdul Gani any evidence of their making and subscribing the oath or affirmation. Abdul Gani gave them an opportunity to produce affidavits in proof of this fact but they did not file any affidavit or any other evidence before him. The appellant examined witnesses to prove that attempts were made to file such affidavits, but the High Court rightly rejected the testimony of these witnesses. The materials on the record corroborate the testimony of Kahan Singh, the Assistant Returning Officer that Narain Dass and Nikka Ram did not sign the oath forms in his presence and did not make the oath or affirmation before him. Narain Dass and Nikka Ram were Jan Sangh candidates. Abdul Qayum and Abdul Rehman were their party men. All of them were interested witnesses. Having regard to all the materials on the record it is impossible to prefer their testimony to that of Kahan Singh. In agreement with the High Court we hold that neither Narain Dass and Nikka Ram signed the oath forms before the Assistant Returning Officer nor did they make the oath or affirmation before him.

13. On January 23, 1967, both Narain Dass and Nikka Ram filed with the Assistant Returning Officer signed and filled up oath forms along with their nomination papers. In our opinion, this was not sufficient compliance with the requirement of Section 51(a).

14. In *Pashupati Nath v. Harihar Prasad*, (AIR 1968 SC 1064) this Court held that the nomination paper was liable to be rejected under Section 36(2)(a) of the Representation of the People Act, 1951, corresponding to Section 47(2)(a) of the Jammu and Kashmir Representation of the People Act, 1957, if the qualification required by Article 173(a) of the Constitution corresponding to Section 51(a) of the Jammu and Kashmir Constitution did not exist on the date of scrutiny of nominations. In that case no signed oath form was attached to the nomination paper or filed before the date fixed for scrutiny. In the present case signed oath forms along with nomination papers were filed with the Assistant Returning Officer on January 23, 1967, before the date fixed for scrutiny. But this fact makes no difference. They neither made nor subscribed the oath or affirmation before the Assistant Returning Officer as required by Section 51(a). On the date fixed for the scrutiny of nominations they were not qualified to be chosen to fill the seat in the Legislature under Section 51(a) of the Jammu and Kashmir Constitution and their nomination papers were liable to be rejected under Section 47(2)(a) of the Jammu and Kashmir Representation of the People Act, 1957.

15. In the result, the appeal is dismissed. There will be no order as to costs.

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