

Jagannath Rao

Vs

Raj Kishore and Others

Civil Appeal No. 1099 of 1970

(K.S. Hegde, A.N. Grover, A.N. Ray JJ)

03.12.1971

JUDGMENT

HEGDE, J. -

1. This is an appeal under Section 116-A of the Representation of the People Act, 1951 (in short 'the Act') brought by the returned candidate whose election from the Mariahu constituency in the district of Jaunpur, in the last mid term election to the U.P. Legislative Assembly, has been set aside by the High Court of Allahabad in an election petition brought by the first respondent in this appeal, who will hereinafter be referred to as the respondent.

2. The appellant, the respondent and five others contested from the Mariahu constituency in the last mid term election. Polling took place on February 5, 1969. The votes were counted on February 10, 1969 and the result was declared on the same day. The Returning Officer declared the appellant to be the successful candidate as having secured 25,552 votes as against 25,483 secured by the respondent, his nearest rival. Margin of difference between the two was 69 votes. After the counting was over, the respondent asked for recounting but that was not granted by the Returning Officer. Thereafter the respondent applied to the Election Commission for inspection of the ballot papers. Inspection asked for was granted and the ballot papers were inspected both by the appellant and the respondent for four days i.e. between 21st and 24th of March 1969. The election petition was filed on March 27, 1969.

3. In the election petition the respondent contended that some invalid votes, some votes cast in his favour and some votes cast in favour of other candidates had been counted in favour of the appellant. The appellant denied all these allegations. In his turn he filed a recrimination petition wherein he also contended that some invalid votes, some votes cast in his favour and some votes cast in favour of other candidates had been counted in favour of the respondent.

4. During the pendency of the election petition both the appellant as well as the respondent applied for re-inspection of the ballot papers. It is unfortunate that the learned trial Judge allowed those petitions. This led to serious developments as we shall presently see. There was no occasion for allowing re-inspection of ballot papers as the parties had already inspected the ballot papers. On September 15, 1969, the Court ordered sorting out of the ballot papers alleged, either by the appellant or the respondent, as having been wrongly accepted or counted. The sorting out process went on till November 17, 1969. Meanwhile on September 22, 1969 the appellant applied for re-inspection of the ballot papers. A similar prayer was made by the respondent on September 26, 1969. As mentioned earlier those prayers were granted. The inspection of the ballot papers continued simultaneously with the sorting out of the ballot papers referred to earlier and it went on till October

30, 1969. On October 30, 1969, it is alleged that during the inspection, the Counsel for the appellant noticed certain facts from which he concluded that the ballot papers might have been tampered with. Procedure adopted at the time of inspection was that the advocates on either side inspected each ballot paper and inspected ballot papers were put in different covers; those covers were closed and sealed and the label thereon was signed both by appellant's Counsel as well as by the respondent's Counsel and at the close of the day those packets were put inside a box which was locked and sealed. According to appellant on October 30, 1969, his Counsel, Shri Misra, noticed that the seal on the lock of box No. 3 was missing and that the lock was open. Thereafter when the box was opened, it was found that the envelopes inside the box had been opened and their seals were missing. Their flaps remained unpasted and the labels that were attached on them were all missing. The same day, he made the following remarks in the daily sheet maintained by the staff :

"Attended inspection table by 10.30 a.m. Staff could come at 11 a.m. but the work started by 12.15. Inspection of only tendered B.Ps. (meaning ballot papers) was allowed. No effort for searching out postal B.P. was made by the Staff. In the course of taking out bundle of tendered votes it was detected that packets of sorted out B.P. (whose sorting has finished) are kept in unsealed envelopes and box No. 3 was found unlocked with distorted seal. P.S. Inspection was finished by 4.00 p.m."

In the same sheet respondent's son who represented the respondent at the inspection made the following remark :

"Inspection finished at 3.00 p.m. After that the envelopes were sealed in my presence. Seal of trunk No. 3 was intact, but the lock was loose."

5. On the next day, the appellant file an application before the court alleging that there are reasons to suspect that the ballot papers had been tampered with. He asked for a re-inspection of the ballot papers that had already been inspected but that prayer was rejected by the Court. Before proceeding to narrate other facts, it is necessary to mention one other circumstance. It appears that at the time of the inspection of the ballot papers, both the parties or their Counsel as well as the staff of the Court were noting down the numbers of the ballot papers to which objections were taken by either of the parties. According to the appellant, the sheets maintained by the office were also tampered with. On examination of those sheets, it was found that they contained 268 more numbers than those found in register maintained on his behalf. He brought those facts to the notice of the Court by an application made on December 10, 1969 and to that application he attached a schedule showing the numbers of ballot papers which according to him were subsequently interpolated into the sheets maintained by the office.

6. The appellant's allegation was that the tampering of ballot papers was done by one Gopinath, a member of the staff of the High Court.

7. Dealing with the evidence of Sri Misra relating to the alleged tampering with the lock of box No. 3 as well as the envelopes inside that box, this is what the learned trial Judge observe :

"Box No. 3 whose lock was noticed by him to be open, was in the middle of the pile and it was removed first. In view of the above statement it could be argued that the lock of box No. 3 might have been opened and the sealed paper on have fallen off. But no positive conclusion can be drawn from the above circumstance because there are two facts which negative it. In the first place, Sri Shivaji Misra, who was actually

removing the boxes, stated that it was not possible that the seal got broken and the lock was opened in dragging and removing the boxes, from one place to another. His statement finds some support from the note Ex. D-158/2 made by the son of the petitioner who seems to have made it in a guarded language. The lock having been loose in that note can be taken to imply that it was open. The second circumstance is the discovery of envelopes containing sorted out ballot papers inside that box not to be sealed and their flap also not pasted. The statement of Sri Shivaji Misra remained unshaken on this point. In my opinion, therefore, it cannot be doubted that the envelopes containing the sorted out ballot papers inside box No. 3 were found in open envelopes which were unsealed and whose flaps had also not been pasted. Sri Shivaji Misra further stated that all the boxes containing the ballot papers of this case were got opened and it was found that in all of them the sorted out ballot papers were kept in open envelopes which were new without their flaps either pasted or seals having been put on them or the signatures of the Counsel for the respondent on them. On behalf of the petitioner it was urged that this part of his statement was an improvement and should not be believed because in his not Ex. D-158 Sri Shivaji Misra had said this about box No. 3 alone. The contention of the petitioner's Counsel in this regard must prevail because the allegations in the note Ex D-158 are confined to box No. 3 alone. Not only that, Sri Shivaji Misra himself admitted at two places on pages 17 and 20 of his cross-examination that the seals and locks of the another boxes were found intact. Therefore the allegations will have to be confined to box No. 3 alone. To my mind, the circumstances given by Sri Shivaji Misra were sufficient to raise a suspicion that there had been intermeddling with box No. 3 and its contents."

8. From these observations it is clear that the learned Judge accepted the evidence of Sri Misra relating to the condition of the lock put on box No. 3 as well as the envelopes that were inside that box when he saw them on October 30, 1969. Sri Misra's evidence which was accepted by the learned trial Judge clearly indicates the possibility of tampering of the ballot papers inside box NO. 3. But curiously enough even after accepting the evidence of Sri Misra, the learned Judge came to the conclusion that there was conclusive proof to show that the ballot papers were tampered with in the High Court. We shall presently see that the learned Judge came to the conclusion that several ballot papers had been tampered with. But his hypothesis is that they might have been tampered with in the District Electoral Office and there might have been only an attempt at tampering in the High Court. His reasoning on this question is difficult to follow.

9. The learned Judge after scrutinizing some of the ballot papers but not all of them, observe :

"While examining them I noticed that some appeared to be suspicious and looked as if they had been tampered with. There was clear seal with the instrument provided in the compartment of respondent 1, but another seal was also to be found in the compartment of some other candidate. In some, the ink of the seal in the compartments of other candidates was watery and had spread and was fainter than that of the seal in the compartment of respondent 1. Such ballot papers were also found in Schedule I-A of the amendment application of the recriminatory petition. In some, the colour of the ink in the compartments of other candidates was different in colour than that of the seal in the compartment of respondent 1. In some, the size of the seal in the compartments of candidate was either smaller or bigger than the size of the seal in the compartment of respondent 1. In some, not only the ink of the seal

put in the compartments, of the other candidates was fainter than that of the seal in the compartment of respondent 1, but the seal was also different in form. All that goes to point that some ballot papers had been tampered with in which the above condition of the seal and ink was found."

10. From these findings, it is reasonable to conclude that the ballot papers had been tampered with, in the High Court at the time of the inspection. It is strange that even after coming to the conclusion that ballot papers had been tampered with, the learned Judge thought that he could find out, in whose favour each of the tampered ballot paper had been cast. In attempting to do so, he was clearly undertaking risky job. His reliance on the directions given in the second proviso to Rule 56 (2) of the Conduct of Election Rules, 1961 to the Returning Officers was is misconceived. The said rule does not deal with tampered ballot papers. The learned Judge, in our opinion, adopted a dangerous course. Once he came to the conclusion that there was tampering with the ballot papers he should have thought that there was no use in further inspecting the ballot paper to find out whether they were properly accepted or counted. In the course of his judgment, the learned Judge came to the conclusion that out of the ballot papers examine by him, he detected that 88 ballot papers had been tampered with. We have earlier mentioned that he had examined only some of the ballot papers and not all. Therefore that possibility of many more ballot papers having been tampered with cannot be ruled out.

11. The learned trial Judge fell into an error in thinking that in the schedule attached to the petition filed on behalf of the appellant on December 10, 1969, the respondent had mentioned the numbers of the tampered ballot papers. Because of this erroneous impression, he appears to have focussed his attention only on those ballot papers and not others. He does not say anywhere in his judgment that he scrutinized all the ballot papers found in box No. 3. It is clear from his judgment that he merely scrutinized the 268 ballot papers mentioned in the schedule mentioned earlier. A reading of the petition on which that schedule was attached makes it clear that the ballot papers mentioned therein do not refer to the tampered ballot papers. In fact, the appellant or his counsel could not have found out at the time that schedule was filed into court, which all ballot papers had been tampered with. After October 30, 1969 they were not permitted to re-examine the ballot papers that had already been examined.

12. From an examination of the material on record, we are of opinion that there are grounds to believe that where was large scale tampering of ballot papers and it is most likely that the tampering in question was done in the High Court during the time of the examination of the ballot papers. It is nobody's case that the tampering was done at the instance of or for the benefit of the appellant. That being so there was no point in the learned Judge trying to find out as to which candidate had obtained more valid votes. In the circumstances the only proper course was to proceed on the basis that the decision of the Returning Officer should be presumed to be correct. As held by this Court *Jabar Singh v. Genda Lal*, there is a prima facie presumption in favour of the validity of the acceptance or the rejection of the voting papers which had been counted.

13. In the result this appeal is allowed and the order of the High Court is set aside, consequently the election petition stands dismissed. The election petitioner shall pay the costs of the appellant in this Court and in the High Court

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