Banamali Das

Vs

Rajendra Chandra Mardaraj Harichandan and Others

Civil Appeal No. 576 of 1975

(Y. V. Chandrachud, P. N. Bhagwati, R. S. Sarkaria JJ)

01.08.1975

JUDGMENT

CHANDRACHUD, J. -

1. Six candidates contested the mid-term election to the Orissa Legislative Assembly from the Nilgiri constituency. The polling was held on February 26, 1974 and on March 1 the result of the election was declared. The appellant who contested the election on the ticket of the Communist Party of India (Marxists) was declared as the successful candidate. According to the results declared on March 1, the appellant secured 14,346 votes while respondent No. 1 who contested the election on the ticket of the Bhartiya Lok Dal secured 14,297 votes. The other contestants, respondents Nos. 2 and 5, secured votes ranging between 12,312 and 5,961. Respondent No. 6 is the Returning Officer.

2. On April 13, 1974 respondent No. 1 filed an election petition under Section 81 of Representation of the People Act, 1951 (hereinafter called "the Act") challenging the election of the appellant and praying that, instead, he himself should be declared as the successful candidate. The appellant's election was challenged by respondent No. 1 on the ground, mainly, that through an error the Returning Officer did not enter the results of the second round of counting on table No. 13 in Form No. 20, as prescribed by Rule 56(7) of the Conduct of Elections Rules, 1961. It was alleged that instead of incorporating the results of the second round of counting on table No. 13 in Form No. 20, the Returning Officer wrongly incorporated the results of the second round of counting on table No. 14 in the column meant for the corresponding count of table No. 13. In other words, the allegation was that the results of the second round of counting on table No. 14 were erroneously entered twice in Form No. 20, once as against the second round of table No. 14 and once as against the second round of table No. 13.

3. The appellant denied this allegation contending that he had secured the largest number of votes and that there was a clear difference of 49 votes between him and respondent No. 1. The appellant also raised several other contentions touching the maintainability of the election petition on the ground of non-compliance with statutory requirements.

4. On these pleadings, the learned Judge of the High Court of Orissa, Cuttack, who tried the election petition framed 8 issues but they were recast after the evidence was recorded. Issues Nos. 1 to 5 pertained to the maintainability of the election petition and on these issues the learned Judge found in favour of respondent No. 1. Those findings are not challenged before us and, therefore, we must proceed on the basis that the election petition as presented did not suffer from any illegality.

5. Issues Nos. 6 to 8 are the ones with which alone we are concerned in this appeal and those issues arise out of the contentions in regard to the entries made by the Returning Officer in Form No. 20. The ninth issue is consequential.

6. Respondent No. 1 examined himself and one Khagendranath Naik who was his counting supervisor on table No. 13. On behalf of the appellant, an election agent and a counting agent of his were examined as witnesses. Neither party examined the Returning Officer nor indeed did the Returning Officer who was respondent No. 6 to the petition offer to give evidence on the question as to whether the results of the second round of counting of table No. 14 were erroneously entered as against the corresponding column of table No. 13.

7. During the hearing of the petition, the learned Judge inquired of the parties whether they were agreeable to a recount being taken of all the ballot papers. Counsel appearing for the appellant and respondents Nos. 1 and 2 agreed to the course suggested by the learned Judge. Respondents Nos. 3 to 5 who had contested the election but were defeated did not appear at the trial nor indeed did the Returning Officer. On February 3, 1975 the learned Judge passed an order directing that "the entire ballot papers should be recounted".

8. The ballot papers were accordingly sent for. Twenty-one sealed trunks were received by the court and the recounting was done by the Deputy Registrar of the High Court in the presence of the Counsel for the contending parties. After the recount was taken, the Deputy Registrar submitted a detailed report which was made a part of the record under an order passed by the learned Judge on February 21, 1975.

9. In view of the fact that the findings recorded by the learned Judge in favour of respondent No. 1 on issues Nos. 1 to 5 are not challenged before us, the only question for decision is whether respondent No. 2 has discharged the onus of proving that the result of the second round of counting on the thirteenth table was not at all recorded in Form No. 20 and whether the result of the second round of counting on table No. 14 was erroneously entered as against the second round of table No. 13.

10. Section 64 of the Act provides that at every election where a poll is taken, votes shall be counted by or under the supervision and direction of the returning officer and each contesting candidate, his election agent and his counting agents, shall have a right to be present at the time of counting. Section 169 of the Act which empowers the Central Government after consultation with the Election Commissioner to make rules for carrying out the purposes of the Act provides by sub-section (2)(g) that such rules may provide for the scrutiny and counting of votes. Rule 56(7) of the Conduct of Elections Rules, 1961 provides that after the counting of all ballot papers contained in all the ballot boxes used in a constituency has been completed, the returning officer shall make the entries in a result sheet in Form No. 20 and announce the particulars. Form No. 20 called the "Final Result Sheet" requires the returning officer to enter therein the total number of valid votes recorded for the various candidates as also the total number of rejected ballot papers, at each round separately.

11. In order to avoid errors in counting of votes, the Election Commission has compiled a handbook for the use of returning officers containing instructions for their guidance at various stages of the elections. Before the results of the election are entered in Form No. 20, it is necessary that a record be maintained of the result of counting of each round. Paragraph 14-B in Chapter VIII of the handbook directs that the officer-in-charge of distribution of the ballot papers for counting should

take out a sufficient number of bundles from the drum so as to make up 1000 ballot papers and distribute them to each table for counting at each round. After the counting of every such thousand ballot papers is over, the bundles are given back to the supervisor of the counting table, with the "Check Memo" duly filled in and signed by the assistant. The check memo shows the votes polled by the various candidates in the particular round as also the total number of rejected votes. When the distribution and counting of bundles is thus completed on all the counting tables, one round of counting is said to be over. The next round of counting will then begin. The same procedure is required to be followed for every round of counting so that the result of each round of counting on each take is reflected in the check memo relating to each round. As many check memos as many rounds of counting. The form of the check memo is at Annexure XII-A and a sample form duly filled in is at Annexure XII-B of the handbook. These forms are not prescribed by the Act or the rules made thereunder but the directions in regard thereto have to be carried out on the instructions of the Election Commission in which the overall control and supervision of elections is vested. The directions and forms contained in the handbook for the use of returning officers are intended to facilitate the holding of fair and error-free elections and no objection can be taken to either.

12. The original check memo of the thirteenth table in which results of the second round were entered was not produced during the trial but a certified copy thereof was admitted in evidence as Ex. 1, subject to the objection raised by the appellant as to its admissibility. There is no substance in that objection. Section 74 of the Evidence Act provides that documents forming the acts or records of the acts of public officers are public documents. Section 76 provides that every public officer having the custody of a public document which any person has a right to inspect shall give that person a copy of it together with the certificate that it is a true copy of the document. By Section 77, such certified copies may be produced in proof of the contents of the documents of which they purport to be copies. The check memo which is required to be maintained by the officer-in-charge of the counting table is a document forming record of the acts of a public officer and therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document.

13. The certified copy (Ex. 1) of the check memo concerning the second round of counting on table No. 13 shows that 40 bundles each containing 25 ballot papers (i.e. 1,000 ballot papers), were distributed for counting in the second round. Part I of Ex. 1 contains these details. Part II of Ex. 1 shows the result of the counting at the second round. According to the entries contained therein, the appellant secured 21 valid votes, respondent No. 1 secured 86, while respondents Nos. 2 to 5 secured 304, 7, 15, and 524 votes respectively. Forty-two ballot papers were rejected, thus making up a total of 999 ballot papers. Evidently, there was an error regarding one ballot paper either at the stage of distribution or at the stage of counting. What is relevant is not that there was an error in the counting of one ballot paper but that the result of counting which is entered in the check memo ought to have been incorporated in Form No. 20 in the appropriate column. Surprisingly, in Form No. 20, the votes secured by the various candidates in the second round of counting on table No. 13 were shown as : the appellant - 144 votes instead of 21; respondent No. 1 - 109 votes instead of 86; respondent No. 2 - 360 votes instead of 304; respondent No. 3 - 19 votes instead of 7; respondent No. 4 - 74 votes instead of 15, and respondent No. 5 - 225 votes instead of 524. In short, whereas the appellant had truly secured 21 votes only in the second round of counting on table No. 13, the final result sheet, Form No. 20 showed that he had secured 144 votes; and whereas respondent No. 1 had secured 86 votes, he was shown to have secured 109 votes. The error was favourable to both the parties but whereas the error in favour of the appellant was to the extent of 123 votes, that in favour of respondent No. 1 was to the extent of 23 votes only. As the appellant was declared to have won the election by a margin of 49 votes only over respondent No. 1, it is plain that respondent No. 1

and not the appellant had polled the largest number of votes.

14. A mere look at the entries in Form No. 20 relating to the second round of counting on table Nos. 13 and 14 would disclose the error committed in making the entries therein. The entries made in respect of table No. 14 were accurate, but precisely those very figures were through some error carried to the second round of table No. 13. It can seldom happen that five contesting candidates would secure precisely the same number of votes in the same round of counting on two different tables, when a thousand ballot papers are distributed to the two tables by picking them up at random from a common drum or receptacle. It is, however, unnecessary to speculate about any such possibility because it is incontrovertible that entries in the check memo relating to the second round of counting on table No. 13 were not transferred to the appropriate column of Form No. 20. We therefore uphold the finding of the learned Judge that the result of the second round of the fourteenth table came to be recorded twice and that the true result of the second round of counting on table No. 13 was entirely omitted while making entries in Form No. 20. It must follow that respondent No. 1 has secured the maximum number of valid votes and is therefore entitled to be declared as the successful candidate.

15. This really should be an end of the matter because the only ground on which respondent No. 1 had challenged the appellant's election was that the relevant entries in Form No. 20 did not reflect the true picture. But the order passed by the learned Judge that a recount shall be taken of all the ballot papers has furnished to the appellant an opportunity to raise a doubt here and a doubt there regarding the manner in which the votes were counted and the ballot papers preserved. In our opinion the learned Judge was in error in directing, merely because his suggestion was accepted by the parties appearing before him, that the Court should take a recount of all the ballot papers. Respondent No. 1 who filed the election petition had not asked for such a recount and the defence of the appellant to the petition was that the entries in Form No. 20 reflected a true picture and contained no error. The consent to the recount was given only by the appellant and respondents Nos. 1 and 2. The other respondents who had contested the election did not appear at the trial of the election petition but they certainly had no notice that a recount would be suggested or accepted when there was no plea about it in the pleadings of the parties. The learned Judge widened unduly the scope of the election petition and landed himself into and unforeseen difficulty of having to decide points on which there was neither a pleading nor an issue. After the Deputy Registrar submitted his report, the learned Judge felt "serious doubts about the correctness of the recount" but all that he did in order to allay those doubts was to take a re-recount of a packet of votes where he thought the error of the recount could with assurance be located. And so we have to countenance an argument based on no pleadings, arising out of no issues and founded solely on errors, real or supposed, which are said to have happened to see the light of the day as a result of the recount and the re-recount. Even election petitions must end at some stage and they cannot, for the reason that elections are a democratic venture be permitted to procreate points during the course of their pendency. As we were listening to the appellant's argument, we thought we were hearing an independent election petition filed by the appellant in order to challenge the result of the recount.

16. Mr. Somnath Chatterjee, appearing for the appellant, argued that the facts which have emerged out of the recount throw considerable doubt on the manner in which the election was held and therefore instead of declaring respondent No. 1 as the successful candidate we should order that a fresh election be held. Elections, says the learned Counsel, are not a matter of technicalities and the Court must satisfy its conscience that the election before it was free and fair. Justice may be a matter of the Judge's conscience but even a strong and sensitive conscience must not brook an endless litigation in which parties will fish for new challenges based on accidental discoveries of no more

than plausible points to ponder. The new errors on which the appellant now relies have an air of plausibility and no more. The new argument founded on those errors must therefore fail.

17. As respondent No. 1 truly secured the maximum number of votes and as the appellant was, through an error, shown to have secured the maximum number of votes, we must uphold the judgment of the Orissa High Court setting aside the appellant's election and declaring respondent No. 1 as the successful candidate.

18. The appeal is accordingly dismissed with costs in favour of respondent No. 1.

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