

Bashir Ahmad Magrey

Vs

Ghulam Quadir Mir and Others

Civil Appeal No. 317 of 1976

(H.R. Khanna, V.R. Krishna Iyer JJ)

02.12.1976

JUDGMENT

KHANNA, J. –

1. During the general elections held in March 1972 five candidates, namely, the appellant and respondents 1 to 4, contested the election for the Jammu & Kashmir State Legislative Assembly from Rajpura constituency. There was a sixth candidate, namely, Mohamed Abdullah Sheikh, respondent 5, but his nomination paper was rejected. The appellant secured 9079 votes and was declared elected. Respondent 1 was the nearest rival and he secured 8248 votes. Respondents 2 to 4 secured 1340, 1126 and 1217 votes respectively. 2034 votes were declared invalid at the time of counting. After the declaration of the result of the election, respondent 1 filed election petition out of which the present appeal arises. Two prayers were made in the election petition : (1) that the election of the appellant be declared to be void; and (2) that respondent 1 be declared to have been duly elected. The High Court accepted the first prayer and declared the election of the appellant to be void. The second prayer that respondent 1 be declared to have been duly elected was not granted. The present appeal has been filed by the appellant against the judgment of the High Court insofar as it has declared his election to be void. Cross-objections have been filed by respondent 1 and it has been prayed on his behalf that he be declared to have been duly elected.

2. The election petition was founded on the following three grounds :

- (1) Improper rejection of the nomination paper of respondent 5;
- (2) Improper rejection of the votes which had been cast in favour of respondent 1 (hereinafter referred to as the respondent); and
- (3) Improper reception of the votes in favour of the appellant on the day of polling at the following polling stations :
 1. Lassipora - Polling station no. 49
 2. Nowpora Pain - Polling station no. 50
 3. Drubgham-B - Polling station no. 24
 4. Drubgham-A - Polling station no. 23
 5. Alaipora - Polling station no. 51

6. Chandgham - Polling station no. 46
7. Arihal - Polling station no. 35, and
8. Tikan Batapora - Polling station no. 26.

3. According to the case of the respondent as set up in the election petition, the result of the election was materially affected because of the improper rejection at the time of counting of the votes which had been cast in his favour and by the improper reception of the votes in favour of the appellant on the day of polling. Giving particulars in respect of the third ground, namely, that there was improper reception of votes in favour of the appellant on the day of polling, the respondent stated that the total number of votes at Lassipora (polling station no. 49) was 824. All those votes were shown to have been polled, although 162 voters registered in that area did not cast their votes. The figure of 162 included 16 persons who were dead before the date of polling. Electoral numbers of those 162 voters, including 16 dead persons, were also mentioned in the petition. The votes of 162 persons were thus stated to have been improperly received. Similar allegations were made in respect of Nowpora Pain (polling station no. 50), Drubgham-B (polling station no. 24), Drubgham-A (polling station no. 23), Alaipora (polling station no. 51), Chandgham (polling station no. 46), Arihal (polling station no. 35), and Tikan Batapora (polling station no. 26).

4. We may add at this stage that the first ground, namely, that relating to the improper rejection of the nomination paper of respondent 5, was not pressed at the trial of the election petition, and as such no longer survives.

5. The election petition was resisted by the appellant and he denied the various allegations made by the respondent. He also pleaded that the allegations in the election petition were vague, indefinite and uncertain. Objection was also raised regarding the maintainability of the petition on the grounds that it had not been properly verified and there was misjoinder of parties.

6. The petition was initially heard by Wasi-ud-din, J. It thereafter came up for hearing before Jalal-ud-din, J. Ultimately, it came up for hearing before Mufti Baha-ud-din Farooqi, J. who finally decided the petition and gave the judgment under appeal.

7. During the pendency of the petition, orders were made on three occasions for inspection of the ballot papers. The first order was made by Wasi-ud-din, J. on August 13, 1973. The learned Judge considered the prayer for inspection of ballot papers under three heads :

- (1) Request for inspection of ballot papers which were rejected at the time of counting;
- (2) Request for inspection of ballot paper account (Form 16) in respect of the various polling stations and of the ballot papers relevant thereto;
- (3) Request for inspection of marked copies of electoral rolls at polling stations Lassipora, Drubgham-A & B, Achan, Chandgham, Arihal, Nowpora Pain, Tikan Batapora, Alaipora.

Prayer under the first and third heads was rejected but that under the second head was allowed to the extent of the inspection of Form 16 in respect of Lassipora, Nowpora Pain, Drubgham-B, Drubgham-A, Alaipora, Chandgham, Arihal and Tikan Batapora polling stations. Inspection of a

few ballot papers, of which the numbers were specified, relating to some of the polling stations was allowed. On November 2, 1973 the learned Judge amplified his previous orders in these words :

My order as it stands should be read to clearly signify which I am amplifying here also that the sorting of the ballot papers will be done by the Deputy Registrar but in the presence of the learned counsel for both the parties. The learned counsel for the parties will not be allowed to handle the ballot papers until they are sorted out by the Deputy Registrar and after this is done, the respective learned counsel for the parties can handle and inspect the ballot papers.

On June 13, 1974 the learned Judge, on an application made by the respondent, allowed inspection of ballot papers of two more polling stations, viz., Chandgham and Alaipora. The respondent also made prayer for leave to inspect the ballot papers of other polling stations, but the prayer in that behalf was rejected. The following directions were further issued by the learned Judge :

The petitioner has also made a prayer that the Deputy registrar be given directions to ascertain if the 34 series of two inspected polling station nos. 24 and 50 are not mixed in the fourth trunk which has been produced. The Deputy Registrar will of course see to this and such other discrepancies which may come to his notice, he will make a separate note and he will also make a note on the envelope if he found the discrepancy.

After Wasi-ud-din, J. relinquished his office, the case was assigned to Jalal-ud-din, J. An application was then made on July 29, 1974 by the respondent seeking permission to inspect ballot papers and other documents pertaining to the various polling stations. This application was disposed of by Jalal-ud-din, J. as per order dated January 6, 1975 in these words :

I, therefore, allow the application of the petitioner for inspection of ballot papers in respect of four polling stations, namely, 26 Tikan Batapora from serial no. 015051 to 15700, 35 Arihal-A from serial no. 020901 to 021550, 49 Lassipora from serial no. 031051 to 031900, 23 Drubgham from serial no. 013201 to 013800 and also the counterfoils of 15 Nowpora Pain. 24 Drubgham-B, 46 Chandgham and 51 Alaipora, the polling stations of which the ballot papers have already been inspected by the petitioner. I, however, do not accede to the request of the petitioner to inspect electoral roll and counterfoils and Form 16 of the entire constituency. The inspection as ordered will be held by and in presence of the counsel for the parties. But the Deputy registrar will see that neither the candidate nor their counsel shall handle the record. The Deputy Registrar will further make a separate note and record of the discrepancies found, if any. The inspection will be held during vacation on a date to be fixed by the Deputy Registrar.

In the judgment under appeal the learned Judge held that 59 votes validly polled in favour for the respondent were improperly rejected at the time of counting. It was further found that 901 votes, including 28 votes of dead voters, were improperly polled. Out of 901 votes, 351 votes were found to have been polled in favour of the appellant. Details of those 351 votes were as under :

Alaipora polling station no. 51 .. 200 Arihal polling station no. 35 .. 51 Tikan Batapora polling station no. 26 .. 100##

Regarding the remaining 550 votes, the learned Judge found that the evidence was not clear, and observed as under :

The evidence, however, is not clear as regards the fate of the remaining 550 such votes. But having regard to overall circumstances of the case it will not be unreasonable to conclude that respondent 1 was the greatest beneficiary of these 550 votes although the precise number by which he was benefited out of those votes may not be easily ascertainable. To these circumstances may be added the circumstances that 59 votes validly polled in favour of the petitioner were improperly rejected at the time of counting, as held by me before. The cumulative effect of these circumstances is that the respondent 1 was able to get an undue advantage of no less magnitude and maybe, even greater than that reflected in his declared success over the petitioner by 831 votes. In this view it must be held that the result of the election, insofar as respondent 1 is concerned, was materially affected by the improper rejection of votes in favour of the petitioner at the time of counting and the improper reception of votes on the day of poll and that his election must be declared to be void. But that should not entitle the petitioner to a declaration that he was duly elected as the total number of the votes improperly received in favour of respondent 1 on the date of poll could not be exactly worked out. The prayer for such declaration must be rejected.

In the result, the election of the appellant was declared to be void. The prayer of the respondent for a declaration that he be declared to have been elected was rejected.

8. When this appeal came up for hearing before this Court on September 3, 1976, we passed an order wherein we referred to the finding of the High Court that it cannot be said as to who was the beneficiary of the 550 votes which were found to have been improperly polled. We thereafter stated in that order :

In our opinion, it is necessary to find out as a result of further inspection as to how many of those 550 votes were in favour of the appellant, and how many, in favour of respondent 1 and the other contesting candidates. For this purpose, we depute the Registrar (Judicial) of this Court to make an inspection in the presence of the parties and their counsel and submit a report to this Court within six weeks from today. The Registrar may also have to locate the 550 ballot papers referred to in the judgment of the High Court at pages 31-51 of the cyclostyled judgment. He may also, if necessary, refer to the reports of the Deputy Registrar of the High Court. The appeal should be put up for further hearing as soon as the report is ready.

The Registrar of this Court thereafter submitted his report dated September 15, 1976. The Registrar dealt with most of the matters but in respect of some of the matters he sought further directions. Necessary directions were thereafter issued by this Court on September 17, 1976. As a result of those directions, the Registrar had to scrutinise 571 ballot papers in all instead of 550 votes. The final report of the Registrar is dated September 24, 1976. The result of the reports of the Registrar taken along with the findings of the High Court may be set out :

#(1) Votes found by the High Court to have been improperly received in favour of the appellant .. 351 (2) Votes which were found to have been improperly received in favour of the appellant as per the first report of the Registrar .. 286 (3) Votes which were found to have been improperly received in favour of the appellant as per the

second report of the Registrar .. 141 Total : 778(4) Total number of votes polled by the appellant as per the result of the election .. 9079(5) Valid votes polled by the appellant .. 9079 minus 778 = 8301(6) Votes which were found to have been improperly received in favour of the respondent as per the first report .. 25(7) votes which were found to have been improperly received in favour of the respondent as per the second report .. 19 Total : 44(8) Total votes polled by the respondent as per the result of the election .. 8248(9) Votes validly polled in favour of the respondent which were found by the High Court to have been improperly rejected at the time of counting .. 59(10) Total number of votes thus polled by the respondent .. 8248 plus 59 = 8307(11) Valid votes polled by the respondent .. 8307 minus 44 = 8263(12) Excess of votes validly polled in favour of the appellant over those of the respondent .. 38##

Some votes were found by the Registrar to have been improperly received in favour of respondent 2 to 4, but it is not necessary to set out those votes.

9. In appeal before us Mr. Phadke on behalf of the appellant has urged that in view of the final picture as it emerges from the reports of the Registrar, the appeal should be allowed and the election petition be dismissed as the appellant secured more valid votes than the respondent. The above stand has been controverted by the respondent, who has argued the case in person. At an earlier hearing we requested Mr. Gambhir to argue the case *amicus curiae* in view of the fact that the respondent was not represented by counsel. The respondent thereafter stated that he would like the matter to be argued by counsel of his own choice. Mr. Shaukat Hussain thereafter appeared on behalf of the respondent. At the final hearing the respondent, as mentioned above, chose to argue the case in person.

10. Perusal of the election petition filed by the respondent shows that apart from the ground not subsequently pressed of the improper rejection of the nomination paper of respondent 5, the only ground on which the respondent challenged the election of the appellant was the improper reception of votes in favour of the appellant and the improper rejection of the votes cast in favour of the respondent. This ground is based upon sub-clause (iii) of clause (d) of sub-section (1) of Section 108 of the Jammu and Kashmir Representation of the People Act, 1957 (Act 4 of 1957) corresponding to sub-clause (iii) of clause (d) of sub-section (1) of Section 100 of the Representation of People Act, 1951 (Act 43 of 1951). According to the above provision, if the High Court is of the opinion that the result of the election in so far as it concerns a returned candidate, has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, the High Court shall declare the election of the returned candidate to be void. Keeping the above provision in view, we may now turn to the facts of the present case. The High Court found that 351 votes had been improperly received in favour of the appellant. The High Court further found that 59 votes which had been validly polled in favour of the respondent were improperly rejected at the time of counting. In addition to that, the High Court found that 550 votes had been improperly received, but it was not possible on the material on record to find out as to who was the beneficiary of those votes. The High Court all the same was inclined to believe that the appellant must have been the major beneficiary of those 550 votes. This necessarily involved an element of surmise and conjecture. To find out the exact position, we directed the Registrar of this Court to scrutinise the 550 ballot papers in question and to make a report as to how many of those votes were cast in favour of the appellant and how many in favour of the respondent and the other candidates. The Registrar thereafter submitted reports and we have already set out the outcome of those reports taken along with the finding of the High Court. It would appear from the figures set out above that, excluding all the votes which were found to have been improperly received by the

appellant and also giving credit to the respondent for 59 votes which were found by the High Court to have been improperly rejected at the time of counting, the net result still is that the appellant has a lead of 38 votes over the respondent. There is, therefore, no escape from the conclusion that the election of the appellant should be upheld. In an election petition founded upon the ground that the result of the election was materially affected by the improper reception or rejection of votes, the court has first to decide whether certain ballot papers were improperly received or were improperly rejected. Once that controversy is resolved, the rest is purely a matter of arithmetical calculation. If the result of arithmetical calculations that the returned candidate has still a lead over his nearest rival, his election would not be declared to be void on the ground of improper reception or improper rejection of votes. Improper reception or improper rejection of votes can result in invalidating an election only if such improper reception or improper rejection materially affects the result of the election.

11. In the course of his arguments, the respondent has submitted that a number of improprieties were committed in the conduct of election and therefore the election of the appellant be declared to be void. Although it does appear from the material on record to which our attention was invited by the respondent that irregularities were committed in the conduct of the election, the respondent cannot derive any benefit on that account. As already mentioned, the respondent sought to challenge the election of certain votes. The election of the appellant was not challenged on the ground of being vitiated by corrupt practice. As it is not permissible the Constitution or of the Representation of the People Act or of any rules or orders made thereunder. Nor was the election of the appellant assailed on the ground of any irregularity or non-compliance with the provisions of to widen the scope of an election petition beyond the ground actually set up in the election petition, the respondent cannot seek relief on grounds which were not taken by him in the election petition.

12. It has also been urged by the respondent that the number of votes which were improperly received was larger than that found by the High Court. Nothing cogent has, however, been brought to our notice in support of the above submission to induce us to interfere with the finding of the High Court in this respect.

13. Lastly, the respondent submits that 153 ballot papers of Lassipora polling station cast in favour of the appellant should be rejected as they bore the initials and not the full signatures of the presiding officer. Our attention in this respect is invited to clause (h) of Rule 56(2) of the Jammu and Kashmir Conduct of Elections Rules, 1965, according to which the returning officer at the time of counting shall reject a ballot paper if it does not bear both the mark and the signatures which it should have borne under the provisions of sub-rule (1) of Rule 38. According to sub-rule (1) of Rule 38, every ballot paper shall, before issue to elector, be stamped by such distinguishing mark as the Election Commission may direct; and be signed in full in its back by the presiding officer. It is not disputed that the ballot papers in question bore the distinguishing mark. The only contention of the respondent, as already mentioned, is that the ballot papers in question bore the initials and not the full signatures of the presiding officer. In this respect we find that no express ground on that score was set up by the respondent in the election petition. This apart, we find that the matter is covered by the first proviso to sub-rule (2) of Rule 56 which reads as under :

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect.

The above proviso which is based upon the principle that a vote validly cast should not be excluded from consideration because of the mistake or omission of the presiding or polling officer, makes it plain that where the returning officer is satisfied that any defect mentioned in clause (h) has been caused by the mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect. The fact that the returning officer in the present case did not reject the ballot papers in question on the ground that they bore only the initials and not the full signatures of the presiding officer would go to show that the returning officer was satisfied that the alleged defect was caused by the mistake or failure on the part of the presiding officer. There can indeed be hardly any doubt on the point that the defect referred to by the respondent occurred because of the mistake or failure of the presiding officer. We, therefore, see no cogent ground to exclude from consideration 153 ballot papers polled in favour of the appellant.

14. Before we conclude, we may observe that some other contentions were also advanced on behalf of the appellant. In view of the fact that the appeal in any case has to be allowed because of the arithmetical calculations referred to above, it is not necessary to go into those contentions.

15. As a result of the above, we accept the appeal, set aside the judgment of the High Court and dismiss the election petition. Cross-objections filed by the respondent are dismissed. Looking to all the facts, we leave the parties to bear their own costs throughout.

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