

Janardan Dattuappa Bondre

Vs

Govind Prasad Shivprasad Choudhary and Others

Civil Appeal No. 1936 of 1978

Keshavrao Jaiwantrao Bahekar

Vs

Returning Officer and Others

Civil Appeal No. 2387 of 1978

(R. S. Pathak, V. R. Krishna Iyer JJ)

03.05.1979

JUDGMENT

PATHAK, J. –

1. These two appeals under Section 116-A of the Representation of the People Act, 1951 are directed against an order of the High Court of Bombay declaring void the election of Janardan Dattuappa Bondre to the 104 - Chikhli Legislative Assembly Constituency, Maharashtra and declaring Bharat Rajabhau Bondre to be duly elected.
2. Civil Appeal No. 1936 (NCE) of 1978 has been filed by Janardan Dattuappa Bondre and Civil Appeal No. 2387 (NCE) of 1978 by Keshavrao Jaiwantrao Bahekar. The parties will be referred to hereinafter according to their array in the former appeal.
3. General elections to the Legislative Assembly of Maharashtra were held in February, 1978. The appellant Janardan Dattuappa Bondre, was declared elected to the 104 - Chikhli Assembly Constituency. He secured 27,785 votes. The fifth respondent, Bharat Rajabhau Bondre was given 27,604 votes and the third respondent, Keshavrao Jaiwantrao Bahekar 27,447 votes. The election of the appellant was questioned by an election petition filed in the High Court of Bombay by a voter, the first respondent, Govindprasad Shivprasad Choudhary.
4. The High Court did not find substance in most of the grounds raised in the election petition, but having regard to the allegations made in respect of a number of ballot papers it allowed fresh scrutiny and re-count of the votes. The task was entrusted to a Special Officer of the High Court. After considering his report and the material before it, the High court made an order dated September 22, 1978 allowing the election petition, declaring the election of the appellant to be void and further declaring the fifth respondent to be duly elected. The decision was rendered on the finding that after taking into account the votes now counted in favour of the different candidates, the fifth respondent was found to have received 191 votes more than the appellant. This result was reached after denying to the appellant the benefit of 250 ballot papers cast in his favour but found

included in the packet of Bahekar's ballot papers. If these 250 ballot papers are counted in favour of the appellant, it is not disputed that the result of the election must swing in favour of the appellant. The submission of learned Counsel for the parties have, therefore, centred mainly on this aspect of the case.

5. The relevant portion of the report of the Special Officer reads :

While the counting was in progress, it was found that in one envelope from Box No. 2 of candidate 4 Shri Bahekar, there were 278 ballot papers noted by the Returning Officer on the envelope but at the time of actual counting, it was found that from them 28 ballot papers were of Shri Bahekar, while the remaining were of votes cast in favour were of candidate 3 Shri Janardan Bondre. Similarly, in the envelope of Shri Janardan Bondre there were 408 ballot papers noted by the Returning Officer but at the time of actual counting of that envelope it was noticed that from out of 408 ballot papers, 158 only were of Shri Janardan Bondre and the remaining were of Shri Bahekar. It would be therefore clear that there was some mistake committed by the Returning Officer while packing the ballot papers in the two envelopes of Shri Bahekar and Janardan Bondre.

6. On the report of the Special Officer, it was contended before the High Court on behalf of the fifth respondent that it was not permissible to take into account the 250 votes case in favour of the appellant and found in the packet of Bahekar because the order of the High Court directing a recount was limited to finding out whether any improper votes had been accepted in favour of the appellant and whether any proper votes of the fifth respondent had been rejected. Relying on *P. Malaichami v. M. Ambalam* ((1973) 3 SCR 1016 : (1973) 2 SCC 170), the High Court took the view that as the appellant had not filed a notice of recrimination under Section 97 of the Representation of the People Act, 1951, it was not open to him to allege that any of his votes had been improperly counted in favour of some other candidate.

7. In the appeal filed by Janardan Dattuappa Bondre, the principal contention on behalf of the appellant is that the High Court has erred in holding that Section 97 comes into play. It is vehemently contended that no notice of recrimination was necessary for the purpose of having the 250 votes, whose validity was never in dispute and which had been cast in favour of the appellant, counted in the total number of votes secured by the appellant. It seems to us that the appellant is right.

8. The order for a re-count was made by the High Court on an application made by the election petitioner. The directions in the order required the Special Officer, among other things, to physically count the votes recorded in favour of the appellant, Bahekar and other candidates in order to ascertain whether those votes were less than the number of votes declared as having been respectively secured by them. During the re-count, the appellant applied to the Special Officer that if any votes cast in his favour were found to have been erroneously counted in the total of other candidates the mistake should be rectified by including them in his total. A similar application was made by Bahekar. The High Court rejected the appellant's application on the ground that he had not filed a notice on recrimination. It seems to us that when the High Court directed the "physical" count of the votes cast in favour of the appellant, Bahekar and others what was intended was a mechanical re-count of those votes and nothing more. It did not envisage any enquiry into their validity, and whether any of them had been improperly received. When the appellant requested that the 250 votes cast in his favour but included in the packet pertaining to Bahekar should be counted

in his total, he was asking for nothing more than the application of a mechanical process. Those votes had never been regarded as cast in favour of Bahekar. There was never any dispute that they were votes for the appellant. Their validity was never doubted. Plainly what had happened was that by an error 250 ballot papers cast in favour of the appellant had been erroneously placed in the packet of the appellant. It is quite probable that as equal number of ballot papers of the two candidates were exchanged, the error occurred after the ballot papers of each candidate had been separately tied in bundles of 50, as is required by the "Handbook for Returning Officers". After withdrawing the 250 votes of Bahekar from the appellant's packet and the appellant's 250 votes from Bahekar's packet, the Special Officer could not stop there. The 250 votes of each candidate had then to be counted in his total. They were not invalid votes.

9. The inclusion of the 250 votes cast in favour of the appellant was material for the purpose of determining the total number of votes received by him. The accident that they were not placed in his packet but in Bahekar's packet did not render them any the less votes belonging to the appellant. Their inclusion in calculating the appellant's total was a necessary part of the process involved in deciding whether he had been duly elected or whether on the election petition his election should be declared void. It was a process relevant to the first of the reliefs claimed by the election petitioner, that is to say, that the election of the appellant be declared void. The other relief claimed by the election petitioner was that the fifth respondent be declared duly elected. Now, as we observed in *Jabar Singh v. Genda Lal* ((1964) 6 SCR 54, 60 : AIR 1964 SC 1200 : 25 ELR 323), where both reliefs are claimed in an election petition the Court must first decide the question whether the election of the returned candidate is valid or not, and if it is found that the said election is void, it makes a declaration to that effect and then deals with the further question whether the petitioner himself or some other person can be said to have been duly elected.

A notice of recrimination under Section 7 of the Act is necessary only where the returned candidate or other candidate disputes the grant of the further declaration sought by the election petitioner that he or some other candidate should be declared duly elected. When the re-count was taken, the High Court had not yet concluded that the election of the appellant was invalid. It was in the process of determining the question, and the question could properly be determined only after giving to the appellant the benefit of all the votes cast for him. These would include the 250 votes cast in his favour, even though they were found placed in Bahekar's packet. Once the benefit of his 250 votes is given to the appellant, he becomes the candidate with the highest number of votes. His election cannot be declared void. That being so, no question arises of the appellant wanting to give evidence to prove that the election of any other candidate would have been void if he had been the returned candidate. Therefore, no notice for recrimination under Section 97 was necessary. In the circumstances, the High court erred in declining to count the appellant's 250 votes in his total on the ground that no notice of recrimination under Section 97 of the Act had been given.

10. In *P. Malaichami v. M. Ambalam* (supra) on which the High Court relied, the facts were different. In that case, the re-count ordered did not involve the mere mechanical process of counting the valid votes cast in favour of the parties. It involved the kind of counting contemplated under Rule 56 of the Conduct of Election Rules, 1961, "with all its implications". The validity of the votes was to be under re-examination. And if the returned candidate intended to take the benefit of such a re-count against the election petitioner or other candidate, in whose favour the further declaration of being duly elected had been claimed, it was necessary for him to file a notice of recrimination. In the present case, the appellant was concerned with his claim to his 250 votes. The claim did not involve any reconsideration of the validity of any votes, whether cast in his favour or any other candidate; what was called for was a mere mechanical process of counting. That every order of re-

count does not bring Section 97 into play was laid down by this Court in Anirudh Prasad v. Rajeshwari Saroj Das (1976 Supp SCR 91 : (1977) 1 SCC 105).

11. We are of opinion that the High Court should not have declined to include in the appellant's total votes the 250 votes cast in favour of appellant but included in the packet of Bahekar. If those votes are included in the appellant's total, the appellant secures the highest number of votes and is entitled to be declared elected.

12. In the circumstances, it is not necessary to consider the other contention of learned Counsel for the appellant that the High Court was in error in directing a re-count of the ballot papers.

13. A submission was made by learned Counsel for the fifth respondent that the postal ballot papers were printed in Hindi and therefore, Rule 22 of the Conduct of Election Rules, 1961 was contravened. The point was raised before the High Court and, has, in our opinion, been rightly repelled. On the material before us it is not possible to say that the result of the election has been materially affected by that irregularity.

14. In the appeal filed by Bahekar, the contention raised for him is that on a proper and complete re-count of the votes cast for the respective candidates it is he who should be declared duly elected. We are not satisfied that the grounds raised have any substance, and we see no force in his appeal.

15. In the result, Civil Appeal No. 1936 (NCE) of 1978 is allowed and Civil Appeal No. 2387 (NCE) of 1978 is dismissed. The order of the High Court declaring the election of the appellant void and declaring the fifth respondent duly elected is set aside. The election petition is dismissed. The appellant is entitled to his costs throughout against the second and the fifth respondents in the election petition as well as in the appeal filed by him. The remaining respondents will bear their own costs in that appeal. All the parties will bear their own costs in the other appeal.

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