

S. Sivaswami

Vs

V. Malaikannan and Others

Civil Appeal No. 1737 (NCE) of 1981

(D. A. Desai, R. B. Misra, V. B. Eradi JJ)

27.09.1983

JUDGMENT

BALAKRISHNA ERADI, J. -

1. At the conclusion of the hearing of this appeal arising out of an election petition filed under Sections 80 to 83, 98, 100(1)(d)(iii) and (iv) and Section 101 of the representation of People Act, 1951, we passed the following order announcing the decision arrived at by us :

The appeal is dismissed with no order as to costs. All interim orders passed by this Court are vacated.

Reasons will follow.

2. We now proceed to state the reasons in support of the aforesaid conclusion.

3. In the General Elections to the Tamil Nadu Assembly held in May, 1980 the appellant had contested for the Ilayangudi Assembly Constituency seat, and the first respondent was a rival candidate sponsored by the Communist Party of India. Respondents 2, 3 and 4 has also stood for election in the same constituency as independent candidates. The polling took place on May 28, 1980. the counting of votes was commenced at 10 a.m. on June 1, 1980 and at 5 p.m. after the postal ballot votes were also counted, the result of the election was announced by the Returning Officer, declaring that the appellant was duly elected on the ground that he had secured the highest number of votes among the contesting candidates. According to the results of the counting as announced, the appellant had secured 34,437 votes and the first respondent had polled 34,381 votes. The other three candidates secured only a very small number of votes and had forfeited their deposits. Thus, it was only by a narrow margin of 56 votes that the appellant was declared to have won the election.

4. The validity of the election was challenged by the first respondent by filing the election petition before the High court of Madras praying for an order for the scrutiny and recounting of all the ballot-papers cast in the election to the Ilayangudi Assembly Constituency held on May 28, 1980 and for a declaration that the election of the appellant to that constituency was void and that first respondent had been duly elected in respect of that constituency. The main grounds urged in support of the prayer for setting aside the election of the appellant were three-fold, viz. (1) improper rejection by the Returning Officer of valid votes cast in favour of the first respondent; (2) improper reception of in valid votes cast in favour of the appellant; and (3) improper treatment of valid votes cast in favour of the first respondent and the third respondent as votes case in favour of the

appellant. A further ground was also taken in the petition that the procedure adopted by the Returning Officer in the counting of votes and the declaration of the result of the election of the people Act (hereinafter called the Act) the rules and the instructions issued in that regard.

5. After a detailed discussion of the evidence adduced in the case, the learned single Judge of the High court, who tried the election petition, found that there was no basis for the allegation made in the petition that the procedure adopted by the Returning Officer in the counting of votes was not in accordance with the relevant provisions of the Act, the rules and the instructions. It was further found by the learned Judge that the averment made in the petition that valid votes cast in favour of the first respondent and the third respondent had been improperly treated as votes polled in favour of the appellant was devoid of factual foundation. However, on the issue relating to the question whether there had been improper rejection of valid votes cast in favour of the first respondent herein (petitioner in the election petition,), the learned Judge found that it was clearly established by the evidence that the Returning Officer had erroneously and illegally rejected as invalid ballot-papers in which the marking had been done either on the demarcation line at the bottom of the first respondent's column - the first respondent's name was printed on the ballot-paper as the last name and immediately beneath the said name was the demarcation line at the bottom - or partially on the demarcation line and partially in the column of the first respondent. The difference in votes between the appellant and the first respondent being only 56, the learned Judge held that there should be re-scrutiny of the rejected votes and a recount in the light of such scrutiny should be undertaken. The total number of votes rejected on different counts was 751. The first respondent deposed in his evidence that there were as many as about 300 votes cast in his favour in which the marking was partially on the demarcation line and partially in the column where his name was printed and they had all been rejected. The Returning Officer, in his testimony, as RW 2, admitted that he had treated such ballot-papers as invalid but asserted that the total number of ballot-papers rejected on the said ground was only 127. The learned single Judge was of opinion that even if the version of RW 2 regarding the number of ballot-papers rejected on the aforesaid ground was to be accepted as correct, the Returning Officer had committed a manifest illegality while counting the votes and the declaration of the result made on the basis of such defective counting had to be set aside. Accordingly, the High court directed a re-scrutiny and a recount of all the rejected votes to be carried out in the premises of the High Court. The learned Judge appointed one of the Assistant Registrars of the High Court as Presiding Officer to supervise the recounting. The Chief Electoral Officer was directed to cause the production of all the rejected votes in respect of the Ilayangudi Assembly Constituency at the election held on May 28, 1980. A direction was also issued to the Returning Officer - fifth respondent - to render all necessary assistance to enable the re-scrutiny and recounting to be properly carried out by the Assistant Registrar as Presiding Office. It is against the said decision of the High Court that this appeal by special leave has been preferred.

6. The Returning Office, in the testimony given by him as RW 2, has admitted in categorical terms that he had rejected as invalid ballot-papers where the marking was partially in the column of the candidate and partially in the shaded area and also those where the marking was partially in the candidate's column and partially on the dividing line in the bottom. His explanation was that in doing so he had strictly followed the instructions contained in the booklet P-3, entitled "Instructions to Counting Staff" issued in Tamil Language by the Chief Electoral Officer of Tamil Nadu in connection with the elections to the Tamil Nadu Legislative Assembly, 1980.

7. Rule 39(2)(b) of the Conduct of Election Rules, 1961 requires an elector to make a mark on the ballot-paper with the instrument supplied for the purpose " on or near the symbol of the candidate for whom he intends to vote." Rule 56(2) directs the Returning Officer to reject a ballot-paper "(a)..

or (b) if it bears no mark at all to indicate the vote, or it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or (c).. or (d) if the mark indicating the vote thereon is placed in such a manner as to make it doubtful to which candidate the vote has been given." The essence of the principle incorporated in the rule is that so long as the ballot-paper bears a mark made with the instrument supplied for the purpose, the ballot-paper shall not be rejected as invalid, if it is reasonably possible to gather a definite indication from the marking as to the identity of the candidate in favour of whom the vote had been given. In this context it is necessary to remember that nearly 90 per cent of the electorate in this country consists of illiterate and uneducated rural folk totally unacquainted with the intricacies of the rules and technicalities of procedure pertaining to elections. Even if the best of endeavour is made to explain to them such complicated rules and procedures they may not be capable of grasping and fully understanding all the implications and actually carrying them into effect while exercising their franchise. If the right conferred on the people to choose their representatives to the State Legislatures and the Parliament through the process of free and fair elections is to be meaningful the will of the illiterate and unsophisticated voter expressed through a marking on the ballot paper which though not strictly inside the column of the particular candidate is clearly indicative of the identity of the candidate for whom the vote is cast has to be respected and given its full effect. It is gratifying to note that the Election Commission has manifested due awareness of this stark reality while issuing instructions to the Returning Officers regarding the principles to be adopted for rejection of ballot-papers in the "Handbook for Returning Officer" published by the Commission in 1982. At page 90 of the book, the Returning Officers have been instructed to reject a ballot-paper only -

- (i) when there is no mark at all on the front or the mark is made otherwise than with the instrument supplied for the purpose;
- (ii) when the mark is in blank area, that is to say, at the back or entirely in the shaded area; or
- (iii) when there are marks against two or more candidates or
- (iv) when there is any writing or mark by which the voter can be identified or
- (v) when the ballot-paper is mutilated beyond recognition or
- (iv) when the ballot-paper is not genuine or it is spurious.

The Election Commission has also issued a "Handbook for Candidates" for election to the House of the People, Legislative Assemblies of States and Union Territories, etc. At page 78 of the book, it is specifically stated that the Returning Officer will not reject any ballot-paper simply because the mark is only partially within the column of one candidate and the rest of the mark is in the blank area. It has also clarified that a ballot-paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote is for a particular candidate clearly appears from the way the paper is marked. The matter has been further clarified in a pamphlet issued by the Election Commission of India in 1982 entitled "A pamphlet showing illustrative cases of valid and invalid postal and ordinary ballot-papers". The illustration at page 17 of the pamphlet depicts a case where the mark affixed on the ballot paper is partially in the column of the candidate No. 1 the rest of it being in the shaded area and it is clearly directed that in such case the ballot-paper should be treated as containing a valid vote in favour of candidate No. 1.

The Chief Electoral Officer of Tamil Nadu had issued a similar pamphlet containing instructions in Tamil to the counting staff purporting to be in terms identical with those contained in the Handbook and the pamphlet issued by the Election Commission of India. Ex. P-3 marked in this case is the pamphlet so issued in Tamil by the Chief Electoral Officer Tamil Nadu. Ex. P-3 contains illustrative cases of valid and invalid postal and ordinary ballot-papers and in publishing it, the obvious intention was to have illustrations on identical lines as those found in the corresponding pamphlet issued by the Election Commission of India. Unfortunately, however, in the illustration of invalid ballot-papers appearing at page 40 of the Book (Ex. P-3), the major portion of the marking is in the shaded area and a small portion of the mark is in the column of the candidate. Apparently what was intended to be printed was an illustration showing a ballot-paper in which the whole of the marking was in the shaded area only without any portion of it being in the column of the candidate. The illustration as printed in the pamphlet obviously conveys the erroneous impression that a ballot-paper where the marking is partly in the column of the candidate and partly in the shaded area is to be rejected by Returning Officer as invalid. This is directly contrary to the intendment of the relevant rule and also the express wording of the instructions issued by the Election Commission.

8. In the case before us, the Returning Officer was obviously misled by the aforesaid illustration contained in the pamphlet, Ex. P-3 and that was the sole reason why he rejected as invalid the ballot-papers where the marking was contained partly in the column of the first respondent and partly on the demarcating line or shaded area. Had the Returning Officer taken the trouble to study the instructions contained in the "Handbook for the Candidates" and the "Handbook for the Returning Officers" it should have been apparent to him that the illustration aforementioned contained in Ex. P-3 did not correctly reflect the position laid down in the rules and instructions. It follows that the High Court was perfectly right in holding that the counting and declaration of the results in the instant case were vitiated by serious illegality and in directing a re-scrutiny and recounting of all the rejected votes. The appeal is, therefore, devoid of merits.

9. Before we part with the case, we consider it necessary to observe that in order to avoid a recurrence of such unfortunate instances of illegal rejection of votes on the basis of the misleading illustration contained in the pamphlet, Ex. P-3 it is essential that immediate action should be taken by the Chief Electoral Officer, Tamil Nadu, to withdraw the said pamphlet from circulation and to substitute it by issuing a fresh pamphlet containing illustrations correctly reflecting the legal position under relevant rules and instruction relation to the scrutiny, acceptance or rejection of ballot-papers.

10. The Registrar will forward copies of this judgment to the Election Commission of India and to the Chief Electoral Officer, Tamil Nadu, for necessary early action being taken in the light of our foregoing observations.

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