Sarnam Singh

Vs

Pushpa Devi and Others

Civil Appeal No. 1177 (NCE) of 1986

(E. S. Venkataramiah, K. N. Singh JJ)

27.10.1987

JUDGMENT

VENKATARAMIAH, J. –

1. This appeal is filed under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') by the appellant against the judgment dated January 17, 1986 of the High Court of Allahabad in Election Petition No. 34 of 1985 dismissing the election petition.

2. The election to the Uttar Pradesh State Legislative Assembly from Constituency No. 41 - Gunnaur, village Mirzapur, District Baduan took place in early March 1985. Sixteen candidates contested at the said election. Respondent 1 - Smt. Pushpa Devi was declared elected having secured 23,006 votes. The next highest number of votes was secured by Shri Naurangi Singh. He secure 20,735 votes. The different between the votes secured by respondent 1 and the votes secured by respondent 2 was in the order of 2271 votes. Respondent 8, who was working as a teacher in the Babu Ram Singh Intermediate College, Baburala, Baduan was also one of the candidates in the election. He secured 3606 votes, which were more than the different between the votes secured by respondent 1 and respondent 2. The appellant, who was an elector at the said election, filed the election petition, out of which this appeal arises, contending that respondent 8, who was working as a teacher in the Babu Ram Singh Intermediate College, Baburala, Baduan, was holding an office of profit under the State Government and, therefore, the acceptance of his nomination by the Returning Officer was illegal. Since respondent 8 secured 3606 votes, which were higher than the difference between the votes secured by respondent 1 and the votes secured by respondent 2, the election of respondent 1 should be considered as having been materially affected by the wrongful acceptance of the nomination paper of respondent 8 and the election of respondent 1 was liable to be set aside. The election petition was contested by respondent 1. It was pleaded by respondent 1 that the acceptance of the nomination paper of respondent 8 was not illegal since respondent 8 was not holding an office of profit under the State Government and secondly even if the acceptance of nomination paper of respondent 8 was illegal, the election could not be set aside since the result of the election was not materially affected thereby. The High Court held that the acceptance of the nomination paper of respondent 8 was not illegal as respondent 8 was not holding an office of profit under the State Government and it further held that even if the acceptance of the nomination paper of respondent 8 was illegal, the appellant had not established that the result of the election of respondent 1 had been materially affected on the facts and in the circumstances of the case. The High Court accordingly dismissed the petition. Aggrieved by the judgment of the High Court the appellant has filed this appeal.

3. Since it is possible to dispose of this appeal on the second ground we do not propose to express

any opinion in this case on the question whether respondent 8 was, in fact, holding an office of profit under the State Government or not on the date on which the nomination paper was filed or on the date of the election. We leave the said question open.

4. In order to decide the second question it is necessary to set out the relevant part of Section 100 of the Act which reads thus :

> 100. Grounds for declaring election to be void. - (1) Subject to the provisions of sub-section (2) if the High Court is of opinion -
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> (c) that any nomination has been improperly rejected; or
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> (d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected -
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> (i) by the improper acceptance of any nomination, or .....

5. Section 100 of the Act makes a distinction between the effect of improper rejection of any nomination and the effect of the improper acceptance of any nomination on the election. If a nomination of any person at an election has been improperly rejected the election of the returned candidate is liable to be set aside without any further proof because it is difficult to visualise the number of votes which the person whose nomination has been rejected would have securing the highest number of votes. It is for this reason clause (c) of Section 100(1) of the Act states that if the High Court is of the opinion that any nomination has been improperly rejected it shall declare the election of the returned candidate to be void. Sub-clause (i) of clause (d) of sub-section (l) of Section 100 of the Act is, however, worded differently. It says that if the High Court is of opinion that the result of the election insofar as it concerns the returned candidate has been materially affected by the improper acceptance of any nomination it shall declare the election of the returned candidate as void. Sub-clause (i) of clause (d) of Section 100(1) of the Act requires a petitioner in an election petition to establish two grounds in order to get the election of the returned candidate set aside, namely, (i) that there has been improper acceptance of any nomination; and (ii) that by reason of the entry of the candidate whose nomination has been improperly accepted into the contest the materially affected. The reason for making a distinction between a case falling under clause (c) of Section 100(1) of the Act and a case falling under sub-clause (i) of clause (d) of Section 100(1) of the Act can be explained with reference to a hypothetical case. Let us assume that the returned candidate has secured at an election 30,000 votes and 20,000 votes have been secured by a candidate who has secured the next highest number of votes. We shall assume that a third candidate, whose nomination paper had been improperly accepted had secured just 1000 votes. In this case even if it is held while deciding an election petition that the nomination of the third candidate has been improperly accepted, there is no justification to set aside the election of the successful candidate because even if all the votes secured by the third candidate are added to the candidate who has secured the next highest number of votes he would be a person who has secured 21,000 votes and the successful candidate would still be a person who has secured the highest number of votes at the election. In this hypothetical case it has to be held that the result of the election has not been materially affected at all. Such election petition has necessarily to be rejected. This Court was called upon to decide a case similar to the present one in Vashist Narain Sharma v. Dev Chandra ((1955) 1 SCR 509 : AIR 1954 SC 513). In that case the returned candidate Vashist Narain Sharma had secured 12,868 votes and Vireshwar Nath Rai secured the next highest number of votes, i.e., 10,996. The difference in the number of votes secured by these two candidates was 1872. Another candidate

by name Dudh Nath at the election, whose validity was in issue in that case, had secured 1983 votes. There were also two other candidates in the field. One of the grounds in the election petition, out of which the above case arose, was that the election of the returned candidate was liable to be set aside since the nomination paper of Dudh Nath had been improperly accepted by the Election Commissioner. The court in that case held that the burden of proving that the result of the election had been materially affected on account of the improper acceptance of a nomination was on the petitioner and that even if there was wrongful acceptance of the nomination having regard to the number of votes secured by the several candidates it was not possible to hold that the result of the election had been materially affected. In Samant N. Balakrishna v. George Fernandez ((1969) 3 SCR 603 : (1969) 3 SCC 238 : AIR 1969 SC 1201) Section 100(1)(d)(i) of the Act again arose for consideration. In that case this Court commented at pages 643-644 on the decision in Vashist Narain Sharma's case ((1955) 1 SCR 509 : AIR 1954 SC 513). thus : (SCC p. 267, paras 58-59)

> Mr. Chari relies upon the rulings of this Court where it has been laid down how the burden of proving the effect on the election must be discharged. He referred to the case reported in Vashist Narain Sharma v. Dev Chandra ((1955) 1 SCR 509 : AIR 1954 SC 513) and Surendra Nath Khosla v. Dilip Singh (1957 SCR 179 : AIR 1957 SC 242) and the later rulings of this Court in which Vashist Narain case ((1955) 1 SCR 509 : AIR 1954 SC 513) has been followed and applied.

In our opinion the matter cannot be considered on possibility. Vashist Narain's case ((1955) 1 SCR 509 : AIR 1954 SC 513) insists on proof. If the margin of votes were small something might be made of the points mentioned by Mr. Jethamalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature. In Vashist's case ((1955) 1 SCR 509 : AIR 1954 SC 513) and in Inayatullah Khan v. Diwanchand Mahajan (15 ELR 219 at 235-36 (MP)), the provision was held to prescribe an impossible burden. The law has however contained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged. We cannot overlook the rulings of this Court and follow the English ruling cited to us.

6. The very same question was considered by this Court in Chhedi Ram v. Jhilmit Ram ((1984) 2 SCC 281) by a Bench of which one of us (Venkataramiah, J.) was a member. The judgment in that case was delivered by Chinnappa Reddy, J. In that case the returned candidate Jhilmit Ram had secured 17,822 votes and Chhedi Ram, the runner-up had secured 17,449 votes. Thus the difference between the successful candidate and the candidate who secured next highest votes was 373 votes. There were four other candidates, of whom Moti Ram secured 6710 votes. Chhedi Ram challenged the election of Jhilmit Ram on the ground that Moti Ram was a Kahar by caste, not entitled to seek election from the reserved constituency, i.e., his nomination had been improperly accepted and the result of election was materially affected. The High Court found that Moti Ram was Kahar by caste and not a member of the Scheduled Castes. Having arrived at the conclusion that Moti Ram's nomination had been accepted improperly, the High Court was not prepared to set aside the election of Jhilmit Ram as it took the view that the result of the election had not been shown to have been affected in view of the improper acceptance of the nomination of Moti Ram. The election petition in that case was, therefore, dismissed. Chhedi Ram then preferred an appeal to this Court against the judgment of the High Court. This Court allowed the appeal. In the course of the judgment Chinnappa Reddy, J. observed thus : (SCC pp. 282-84, para 2)

> We are afraid the appeal has to be allowed. Under Section 100(1) (d) of the

Representation of the People Act, 1951, the election of a returned candidate shall be declared to be void if the High Court is of opinion that the result of the election, insofar as it concerns the returned candidate, has been materially affected as a result of the improper acceptance of a nomination is on the person impeaching the election. The burden is readily discharged if the nomination which has been improperly accepted was that of the successful candidate himself. On the other hand, the burden is wholly incapable of being discharged if the candidate whose nomination was improperly accepted obtained a less number of votes than the difference between the number of votes secured by the successful candidate and the number of votes secured by the candidate who got the next highest number of votes. In both these situations, the answers are obvious. The complication arises only in cases where the candidate, whose nomination was improperly accepted, has secured a large number of votes than the difference between the number of votes secured by the successful candidate and the number of votes got by the candidate securing the next highest number of votes. The complication is because of the possibility that a sufficient number of votes actually cast for the candidate whose nomination was improperly accepted might have been cast for the candidate who secured the highest number of votes next to the successful candidate, so as to upset the result of the election, but whether a sufficient number of votes would have so done, would ordinarily remain a speculative possibility only. In this situation, the answer to the question whether the result of the election could be said to have been materially affected must depend on the facts, circumstances and reasonable probabilities of the case, particularly on the difference between the number of votes by the successful candidate and the candidate securing the next highest number of votes, as compared with the number of votes secured by the candidate whose nomination was improperly accepted and the proportion which the number of wasted votes (the votes secured by the candidate whose nomination was improperly accepted) bears to the number of votes secured by the successful candidate. If the number of votes secured by the candidate whose nomination was rejected is not disproportionately large as compared with the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, it would be next to impossible to conclude that the result of the election has been materially affected. But, on the other hand, if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected and one may venture to hold the fact as proved. Under the Indian Evidence Act, a fact is said to be proved when after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. If having regard to the facts and circumstances of a case, the reasonable probability is all one way, a court must not lay down an impossible standard of proof and held a fact as not proved. In the present case, the candidate whose nomination was improperly accepted had obtained 6710 votes, that is, almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes.

> Not merely that. The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate - it was a little over one-third. Surely, in that situation, the result of the election may safely be said to have been affected.

7. In the case before us respondent 1 had secured 23,006 votes and respondent 2 had secured 20,735 votes. The margin thus was of 2271 votes. Respondent 8, the validity of whose nomination was questioned, had secured 3606 votes. It is no doubt true that if we assume that all the 3606 votes secured by respondent 8 would have gone to respondent 2, respondent 2 would have been the successful candidate at the election. Having regard to the facts of this case we feel that it is not possible to hold that the appellant in this appeal has established that the result of the election of the returned candidate had been materially affected because the difference between the votes secured by respondent 1 and the votes secured by respondent 2 was 2271 votes. Respondent 8 had secured only about 1/7th of the number of votes polled by respondent 1 and there were 15 candidate (excluding respondent 8) contesting the election. It is not possible to reach a finding in this case by making a judicial guess that all the 3606 voters who had voted in favour of respondent 8 would have cast their votes in favour of respondent 2 alone. Even if about 1350 of them had cast their votes in favour of any of the other 14 candidates (including the returned candidate) respondent 2 could not have become the candidate who had secured the highest number of votes at the election. At this stage it is relevant to refer to the observation of Gulam Hasan, J. in Vashist Narain Sharma case ((1955) 1 SCR 509 : AIR 1954 SC 513) which run thus :

> But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand.

8. In the case before us we are of the view that the High Court was right in observing that the appellant or any other party had not placed satisfactory evidence to reach the conclusion that all or a sufficient number of the wasted votes which had been cast in favour of respondent 8 would have gone in favour of respondent 2, had respondent 8 not been one of the candidates at the election. The High Court has on the evidence before it held that "it the context particularly of the poll being heavy and the contestants being large in number - 16 in all - it remains unreasonable to guess that if respondent 8 were excluded from the arena of contest the wasted votes would have gone to respondent 2 thereby enabling him to succeed. The burden lying upon the petitioner remains clearly undischarged and the speculative possibility does not attain the level of proof". We agree with the above observation of the High Court since the appellant has not discharged the burden which clearly lay on him of proving that the result of the election had been improperly accepted. This appeal should, therefore, fail. We accordingly dismiss it. We, however, make no order as to costs.

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