Shiv Charan Singh S/O Angad Singh

Vs

Chandra Bhan Singh S/O Mahavir Singh and Others

Civil Appeals Nos. 4132-33 (NCE) of 1986

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

19.01.1988

JUDGMENT

SINGH, J. –

1. These two appeals under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as the Act) are directed against the judgment and order of the High Court of Rajasthan in Jaipur dated October 22, 1986 setting aside the appellant's election to the Legislative Assembly of the State of Rajasthan. Election to the Rajasthan Legislative Assembly constituency No. 80 (Karauli) was held in 1985. The appellant and 10 other candidates contested the election from the aforesaid assembly constituency. The Returning Officer declared the appellant duly elected on his having obtained majority of valid votes. Chandra Bhan Singh, respondent 1, filed Election Petition No. 1 of 1985 as an elector and another Election Petition No. 9 of 1985 was filed by Mukand Ram, respondent 2, also an elector before the High Court of Rajasthan under Section 80 of the Act, challenging the validity of the appellant's election to the Legislative Assembly on the ground that Kanhaiya Lal a contesting candidate was not qualified to contest election under Article 173(b) of the Constitution as he was below 25 years of age on the date of scrutiny of nomination papers and his nomination paper was improperly accepted by the Returning Officer which materially affected the result of the election of the returned candidate. The appellant appeared and contested both the election petitions, and pleaded before the High Court that Kanhaiya Lal was qualified to be a candidate at the election as he had completed 25 years of age on the date of scrutiny of nomination papers and there was no improper acceptance of his nomination paper. He further pleaded that in any view, his election was not materially affected by the acceptance of Kanhaiya Lal's nomination paper. Both the election petitions were consolidated and tried jointly by the High Court. The issues framed were almost identical in the two election petitions and the election petitioners and the appellant produced evidence in support of their cases before the High Court. The High Court by its order dated October 22, 1986 held that Kanhaiya Lal was not qualified to be a candidate as he had not completed 25 years of age and that his nomination paper was improperly accepted by the Returning Officer. The High Court further held that since the difference between the votes polled by the appellant and Roshan Lal an unsuccessful candidate who obtained the next highest votes was only 4497 votes, the result of the election was materially affected. On these findings the High Court declared the appellant's election void and directed the Election Commission to hold fresh election.

2. Learned counsel for the appellant raised only one submission before us in challenging the correctness of the order of the High Court. He urged that the finding recorded by the High Court that the improper acceptance of the nomination paper of Kanhaiya Lal had materially affected the result of appellant's election was based on conjectures and surmises and not on any legal evidence.

Learned counsel further submitted that neither of the two election petitioners had produced any cogent and reliable evidence to discharge the burden that the result of the election was materially affected on account of improper acceptance of the nomination paper of Kanhaiya Lal but on the other hand the appellant had produced large number of witnesses in support of his case, but the High Court had failed to consider the evidence of those witnesses. Dr. Chitale appearing on behalf of the respondents urged that on the material on record and having regard to the number of votes polled by Kanhaiya Lal and the difference between the votes polled by the appellant and the next unsuccessful candidate Roshan Lal the findings recorded by the High Court are sustainable in law and the same are in accordance with the law laid down by this Court in Chhedi Ram v. Jhilmit Ram [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146]

3. In all eleven candidates contested the election. After counting, it was found that the total number of votes polled were 60,815 out of which 821 votes were rejected being invalid by the Returning Officer. Thus the total number of valid votes were 59,994. The total valid number of votes polled by each of the candidates was as under :

> #1. Shiv Charan Singh (appellant) 21,4432. Kanhaiya Lal 17,8413. Asphak 2754. Narayan 13105. Prahlad 2526. Puran Chandra Sharma 13087. Mana Lal 1988. Ram Swaroop 1029. Roshan Lal 16,94610. Samanta 27111. Heera Lal 40##

The High Court has held that Kanhaiya Lal's nomination paper was improperly accepted, as he was not competent to contest the election for the reason of his being below 25 years of age. Since there was difference of only 4497 votes between the votes polled by the appellant and the next unsuccessful candidate Roshan Lal who had polled 16,946 votes the High Court held that if Kanhaiya Lal had not contested the election the aforesaid number of votes polled by him could have gone in favour of Roshan Lal and other candidates, as a result of which Roshan Lal would have polled the Majority of valid votes. In this view the High Court concluded that the result of the appellant's election was materially affected and it accordingly declared the appellant's election void. Since the learned counsel for the appellant did not challenge the finding recorded by the High Court that Kanhaiya Lal was not qualified to be a candidate on the date of his nomination as he was below 25 years of age and his nomination paper was improperly accepted by the Returning Officer the said finding must be accepted as correct. The only question which survives for consideration is whether improper acceptance of Kanhaiya Lal's nomination paper materially affected the result of the appellant's election.

4. Section 100 confers power on the High Court to declare the election of the returned candidate void if the grounds set out therein are made out. Section 100 (1) relevant for our purpose is as under :

> 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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> (a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or
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> (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected -

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

5. Section 100(1)(d)(i) provides for setting aside the election of the returned candidate on the ground of improper acceptance of any nomination paper provided the result of the election of the returned candidate is materially affected by reason of such improper acceptance of nomination of a candidate other than the returned candidate. Improper acceptance of nomination paper of any contesting candidate (other than the contesting [sic returned] candidate) does not ipso facto render the election of the returned candidate void. The election can be declared void only if it is found that the result of the election of the returned candidate was materially affected on the ground of such improper acceptance. The burden of proving the material effect on the result of election is always on the election-petitioner challenging the validity of the election of the returned candidate. Unless this burden is discharged by the election petitioner the result of the returned candidate cannot be declared void.

6. The question as to how and in what manner the burden of proving that the result of election was materially affected should be discharged is a vexed question which has been considered by this Court in number of cases. In the leading case of Vashist Narain Sharma v. Dev Chandra [(1955) 1 SCR 509 : AIR 1954 SC 513] this Court considered this question at length. In that case the nomination paper of one Dudh Nath a contesting candidate who had polled 1983 votes was found to have been improperly accepted. The returned candidate had polled 12,860 votes while Vireshwar Nath Rai had polled 10.996 votes being the next highest number of votes. There was thus difference of 1864 votes between the votes polled by the returned candidate and the next unsuccessful candidate. The Election Tribunal set aside the election of the returned candidate on the finding that improper acceptance of the nomination paper of Dudh Nath had materially affected the result of the election. This Court set aside the order of the Tribunal on the ground that the election petitioner had failed to discharge the burden of proving that the result of the election had been materially affected. The court observed as under :

> But we are not prepared to hold that the mere fact 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

7. Section 100(1)(c) of the Act as it stood in 1952 was in pari materia with the present Section 100(1)(d)(i) of the Act. The interpretation of Section 100(1)(c) of the Act as given by the court in Vashist Narain Sharma case [(1955) 1 SCR 509 : AIR 1954 SC 513] fully applies to the interpretation of Section 100(1)(d)(i) of the Act. In Vashist Narain Sharma case [(1955) 1 SCR 509 : AIR 1954 SC 513] this Court has categorically held that the result of the election of the returned candidate cannot be materially affected merely for the reason that the number of votes polled by the candidate whose nomination paper was improperly accepted was greater than the margin of votes polled by the returned candidate and the candidate securing the next highest number of votes, because it could not be predicated in what manner of proportion the votes would have exercised their choice in the absence of the improperly nominated candidate from the election contest. Proceeding further the court considered the question whether any speculation, or conjecture could be made in a case where the number of votes secured by the candidate whose nomination paper was improperly accepted was higher than the difference between the votes polled by the returned candidate and the candidate who may have polled the next highest number of votes. The Court observed that in such a case it was impossible to foresee what the result would have been if the improperly nominated candidate had not been in the field. Since it was not possible to anticipate the result, the election petitioner must discharge the burden of proving that fact, and on his failure to prove that fact the election of the returned candidate must be allowed to stand. Then the question arose as to how and in what manner the burden could be discharged by the election petitioner. On behalf of election petitioner an attempt had been made to discharge burden by producing a number of electors before the Tribunal who had stated that all or some of the votes would have gone to the candidate who had polled the next highest number of votes in the absence of the improperly nominated candidate and he would have polled majority of valid votes. The court held that the statement of the witnesses as to in what manner votes would have been distributed among the remaining contesting candidates could not be relied upon in determining the question of material effect on the election of the returned candidate. The court observed :

> It is impossible to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the legislature to consider.

8. In Paoki Haokip v. Rishang [(1969) 1 SCR 637 : AIR 1969 SC 663] the Judicial Commissioner, Manipur had set aside the election of the returned candidate to Lok Sabha on the ground that there

was gross violation of the Act and the Rules framed thereunder in conducting the election as a result of which the result of the election was materially affected under Section 100(1)(d)(iv) of the Act on the findings that on the polling date a number of polling centres were changed without notice to voters and there was firing and riots at some polling stations, as a result of which a number of voters could not exercise their right to vote. In rendering the aforesaid findings the Judicial Commissioner had placed reliance upon the statement of witnesses who had testified before the Tribunal that if they had opportunity to cast their votes, they would have voted for the unsuccessful candidate. This Court, placing reliance on the decision in Vashist Narain Sharma case [(1955) 1 SCR 509 : AIR 1954 SC 513] held that the statement of witnesses could not be taken at their word and it was a surmise and anybody's guess as to how those people who did not vote, would have actually voted. Then the question arose if witnesses could not be relied upon, in what manner the election petitioner could discharge the burden. Referring to the decision in Vashist Narain Sharma case [(1955) 1 SCR 509 : AIR 1954 SC 513]. the court observed as under :

> How he has to prove it has already been stated by this Court and applying that test, we find that he has significantly failed in his attempt and therefore the election of the returned candidate could not be avoided. It is no doubt true that the burden which is placed by law is very strict; even if it is strict it is for the courts to apply it. It is for the legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that, taking the law as it is, the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not. We are satisfied that in this case this burden has not been discharged.

9. We are in respectful agreement with the view taken by this Court in the aforesaid decisions. The election of a returned candidate cannot be declared void on the ground of improper acceptance of nomination paper of a contesting candidate unless it is established by positive and reliable evidence that improper acceptance of the nomination of a candidate materially affected the result of the election of the returned candidate. The result of the election can be affected only on the proof that the votes polled by the candidate whose nomination paper had wrongly been accepted would have been distributed in such a manner amongst the remaining candidates that some other candidate (other than the returned candidate) would have polled the highest number of valid votes. In other words the result of the election of the candidate cannot be held to have been materially affected unless it is proved that in the absence of the candidate whose nomination paper was wrongly accepted in the election contest, any other candidate (other than the returned candidate) would have polled the majority of valid votes. In the absence of any such proof the result cannot be held to have been materially affected. The burden to prove this material effect is difficult and many times it is almost impossible to produce the requisite proof. But the difficulty in proving this fact does not alter the position of law. The legislative intent is clear that unless the burden howsoever difficult it may be, is discharged, the election cannot be declared void. The difficulty if proving the material effect was expressly noted by this Court in Vashist Narain Sharma [(1955) 1 SCR 509 : AIR 1954 SC 513]. and Paokai Haokip case [(1969) 1 SCR 637 : AIR 1969 SC 663] and the court observed that the difficulty could be resolved by the legislature and not by the courts. Since then the Act has been amended several times, but Parliament has not altered the burden of proof placed on the election petitioner under Section 100(1)(d) of the Act. Therefore the law laid in the aforesaid decisions still holds the field. It is not permissible in law to avoid the election of the returned candidate on speculations or conjectures relating to the manner in which the wasted votes would have been distributed amongst the remaining validly nominated candidates. Legislative intent is apparent that the harsh and difficult burden of proving material effect on the result of the election has to be

discharged by the person challenging the election and the courts cannot speculate on the question. In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the court should not interfere with the election on speculation and conjectures.

10. In the instant case Shiv Charan Singh the appellant had polled 21,443 votes and Roshan Lal had polled 16,946 the next highest number of votes. There was thus a difference of 4497 votes between the votes polled by the appellant and Roshan Lal. Kanhaiya Lal whose nomination paper had improperly been accepted, had secured 17,841 votes which were wasted. The election petitioners did not produce any evidence to discharge the burden that improper acceptance of the nomination paper of Kanhaiya Lal materially affected the result of the election of the returned candidate. On the other hand the appellant who was the returned candidate produced 21 candidates representing cross-section of the voters of the constituency. All these witnesses had stated before the High Court that in the absence of Kanhaiya Lal in the election contest, the majority of the voters who had voted for Kanhaiya Lal would have voted for Shiv Charan Singh the appellant. The High Court in our opinion rightly rejected the oral testimony of the witnesses in view of this Court's decision in Vashist Narain Sharma case [(1955) 1 SCR 509 : AIR 1954 SC 513]. The High Court however having regard to the votes polled by the appellant Roshan Lal and Kanhaiya Lal held that the result of the election was materially affected. The High Court held that in view of the fact that difference between Shiv Charan Singh the appellant and Roshan Lal was only 4497 and Kanhaiya Lal, whose nomination was improperly accepted had secured 17,841 votes therefore it could reasonably be concluded that the election was materially affected. In our opinion the High Court committed error declaring the appellant's election void on speculation and conjectures.

11. Indisputably, the election petitioners had failed to discharge the burden of proving the fact that the result of election of the appellant had been materially affected by reason of improper acceptance of the nomination paper of Kanhaiya Lal. In the absence of any positive evidence produced by the election petitioners, it was not open to the High Court to record findings that the result of the election was materially affected. The High Court's findings relating to the material effect on the result of the election are based on conjectures and surmises and not on any evidence. The legislature has, as noted earlier, placed a difficult burden on the election petitioner to prove that the result of the election was materially affected by reason of improper acceptance of nomination paper of a candidate (other than the returned candidate) and if such burden is not discharged the election of the returned candidate must be allowed to stand as held by this Court in Vashist Narain Sharma [(1955) 1 SCR 509 : AIR 1954 SC 513] and in Paokai Haokip case [(1969) 1 SCR 637 : AIR 1969 SC 663]. It is true that the burden placed on the election petitioner in such circumstances is almost impossible to discharge. But in spite of the fact that this Court had highlighted this question on more than one occasion, Parliament has not amended the relevant provisions although the Act has been subjected to several amendments. It is manifest that law laid down by this Court in Vashist Narain Sharma [(1955) 1 SCR 509 : AIR 1954 SC 513] and in Paokai Haokip case [(1969) 1 SCR 637 : AIR 1969 SC 663] holds the field and it is not permissible to set aside the election of a returned candidate under Section 100(1)(d) on mere surmises and conjectures. If the improperly nominated candidate had not been in the election contest, it is difficult to comprehend or predicate with any amount of reasonable certainly the manner and the proportion in which the voters who exercised their choices in favour of the improperly nominated candidate would have exercised their votes. The courts are ill- equipped to speculate as to how the voters could have exercised their right of vote in the absence of improperly nominated candidate. Any speculation made by the Court in this respect would be arbitrary and contrary to the democratic principles. It is a matter of common knowledge that electors exercise their rights of vote on various unpredictable considerations. Many times electors cast their

vote on consideration of friendship, party affiliation, local affiliation, caste, religion, personal relationship and many other imponderable considerations. Casting of votes by electors depends upon several factors and it is not possible to forecast or guess as to how and in what manner the voters would have exercised their choice in the absence of the improperly nominated candidate. No interference on the basis of circumstances can successfully be drawn. While in a suit or proceedings it may be possible for the Court to draw inferences or proceed on probabilities with regard to the conduct of parties to the suit or proceedings, it is not possible to proceed on possibilities or draw inferences regarding the conduct of thousands of voters, who may have voted for the improperly nominated candidate. In the instant case there were 11 contesting candidates. If Kanhaiya Lal whose nomination paper had been improperly accepted was not in the election contest, it is difficult to say in what proportion the voters who had voted for him would have voted for the remaining candidates. There is possibility that many voters who had gone to the polling station to cast their votes in favour of Kanhaiya Lal may not have gone to exercise their vote in favour of the remaining candidates. It is probable that in the absence of Kanhaiya Lal in the election contest, many voters would have voted for the returned candidate as he appeared to be the most popular candidate. It is difficult to comprehend that the majority of the voters who exercised their choice in favour of Kanhaiya Lal would have voted for the next candidate Roshan Lal. It is not possible to forecast how many and in what proportion the votes would have gone to one of the other remaining candidates and in what manner the wasted votes would have been distributed among the remaining contesting candidate. In this view, the result of the returned candidate could not be declared void on the basis of surmises and conjectures.

12. The High Court placed reliance on the decision of this Court in Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] in holding that the result of the election was materially affected in view of the margin of difference between the appellant and Roshan Lal and the votes secured by Kanhaiya Lal. The decision in Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] does not overrule earlier decisions of this Court in Vashist Narain Sharma [(1955) 1 SCR 509 : AIR 1954 SC 513] and in Paokai Haokip case [(1969) 1 SCR 637 : AIR 1969 SC 663]. and it does not lay down any different law. Instead the decision of the case turned upon the facts and of that case. In Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] there were four contesting candidates. Jhilmit Ram the returned candidate had polled 17,822 votes while Chhedi Ram had polled the next highest number of votes being 17,449 votes. Thus the difference between the successful candidate and the candidate who had secured the next highest number of votes was 373 votes only. While Moti Ram whose nomination paper was found to have been improperly accepted had polled 6710 votes. The High Court had dismissed the election petition on the finding that the result of the election had not been materially affected as a result of the improper acceptance of the nomination paper of Moti Ram. This Court allowed the appeal and set aside the election of the returned candidate on the finding that if the number of votes secured by the candidate whose nomination was improperly accepted was 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, 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, there was a reasonable probability that the result of the election had been materially affected and one may venture to hold that fact as proved. After making these observations the Court noted that in that case the candidate whose nomination was improperly accepted had obtained 6710 votes i.e. 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, in that situation the result of the election was held to have been materially affected. The decision in Chhedi Ram

case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] rests on is own facts. Applying the principles laid down in Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] to the facts of the instant case it is not possible to hold that the result of the election of the appellant was materially affected. As already noted the appellant had polled 21,443 votes while Roshan Lal had polled the next highest number of votes 16,946 and the difference between the two was only 4497 votes while the votes polled by the improperly nominated candidate Kanhaiya Lal was 17,841 thus the proportion of difference was only four times, while the difference in Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] was 20 times. Further in Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] there were only 4 contesting candidates while in the instant case there were 11 contesting candidates and in the absence of Kanhaiya Lal other remaining 10 would have shared the wasted votes. On these facts even on the basis of Chhedi Ram case [(1984) 1 SCR 966 : (1984) 2 SCC 281 : AIR 1984 SC 146] it is not possible to draw any inference or act on probability and to record a finding that the majority of wasted votes would have gone to Roshan Lal in such a way as to affect the result of the appellant's election. In the circumstances, the findings recorded by the High Court that the result of the election of the appellant was materially affected is not sustainable in law.

13. In the result, we hold that the election petitioners have failed to prove that the result of the election of the appellant was materially affected on the ground of improper acceptance of nomination paper of Kanhaiya Lal. Therefore, the election of the returned candidate could not be declared void. We accordingly allow the appeals, set aside the judgment and order of the High Court, uphold the appellant's election and dismiss the election petitions with costs throughout.

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