

Lata Devi (Mali)

Vs

Haru Rajwar

Civil Appeal No. 3955 (NCE) of 1987

(N. D. Ojha, K. N. Saikia JJ)

22.08.1989

JUDGMENT

SAIKIA, J. –

1. The election appeal under Section 116-A of the Representation of the People Act, 1951, hereinafter referred to as 'the Act', is from the judgment of the Patna High Court (Ranchi Bench) in the 'respondent's Election Petition No. 4 of 1985 allowing the petition and declaring the election of the appellant to the Bihar Legislative Assembly from the 286 Chandan Kyari (SC) constituency to be void.

2. Pursuant to the Notification of Election to Bihar Legislative Assembly, the Returning Officer of the 286 Chandan Kyari (SC) Assembly Constituency announced the following programme :

#A. Last date for filing nomination paper February 6, 1985B. Date of the scrutiny of the nomination paper February 7, 1985C. Last date of withdrawal of candidature February 9, 1985D. Date of poll March 5, 1985E. Date of counting March 6, 1985##

3. The appellant, the respondent and 17 others filed their nomination papers; and the Returning Officer accepted the nomination papers found valid at the scrutiny. Three of them withdrew their candidature, leaving 16 contesting candidates in the field. The Returning Officer prepared and published the following list of contesting candidates with the allotted symbols :

#S. No. Name Party Symbol1. Ayodhya Rajak Independent Boat2. Uma Bawri Independent Horse3. Kokil Rajwar Independent Cultivator cutting crops4. Kiriti Bhusan Das Independent Fish5. Tilakdhari Bawri Independent Two leaves6. Dulal Das Independent Spade and Stroker7. Nakul Chandra Rajak Independent Rising sun8. Panchanan Rajak Independent Ladder9. Padam Lochan Rajwar BJP Lotus10. Mahindri Rajwar Independent Bicycle11. Murura Dasi Independent A woman carrying a basket on her head12. Yogendra Bawri Indian Congress (J) Scale13. Ramdas Ram Independent Camel14. Lata Devi (Mali) Indian National Hand Congress (I)15. Shankar Bawri Independent Swastik within the circle16. Haru Rajwar Marxist coordination Bow and arrow##

4. The Poll was held according to scheduled on March 5, 1985; and, after counting, the following result was announced on March 6, 1985 by the Returning Officer :

#S. No. Name Party Votes secured1. Ayodhya Rajak Independent 1872. Uma Bawri

Independent 5903. Kokil Rajwar Independent 45644. Kiriti Bhusan Das Independent 4775. Tilakdhari Bawri Independent 14586. Dulal Das Independent 5507. Nakul Chandra Rajak Independent 3878. Panchanan Rajak Independent 4349. Padam Lochan Rajwar BJP 823110. Mahandri Rajwar Independent 250011. Murura Dasi Jharkhand Mukti 2228 Morcha12. Yogendra Bawri Independent 116313. Ramdas Ram Independent 19514. Lata Devi (Mali) Indian National 8659 Congress (I)15. Shankar Bawri Independent 48616. Haru Rajwar Independent 8229##

5. The Appellant Lata Devi (Mali) was declared elected. The respondent Haru Rajwar filed an election petition in the Patna High Court (Ranchi Bench) calling in question the election of the appellant to the Bihar Legislative Assembly on the ground, inter alia, that on February 14, 1985 he received a notice of the intention of the Returning Officer to change his allotted election symbol and though, through counsel, he objected on February 15, 1985, the Returning Officer re-allotted the respondent's 'bow and arrow' symbol to Murura Dasi and instead allotted the symbol of 'ladder' to him. It was urged in the petition that he contested and won the earlier election from the same constituency with the same 'bow and arrow' symbol; the sudden change of his symbol left him with less than 20 days time for campaign and it resulted in confusion amongst his supporters as a result of which his election was materially affected by the change; that the election was liable to be declared void on the ground of violation of section 30(d) of the Representation of the People Act which, according to him, prescribed at least 20 days time for election campaign, which he did not have after change of the symbol; and that the election was void also for violation of Rule 10(5) of the Conduct of Election Rules, 1961 under which, according to him, the election symbol could not be changed without permission of the Election Commission.

6. It is the appellant's case that she did not receive any notice of the election petition against her. The trial proceeded ex parte. The respondent - election petitioner examined himself at the trial.

7. The High Court by its impugned order dated November 16, 1987 allowed the petition and declared the appellant's election to be void holding that the result of the election insofar as it concerned the returned candidate was materially affected by violation of Rule 10(5) of the Conduct of Election Rules, 1961. Hence this appeal.

8. Mr. R. K. Garg, the learned counsel for the appellant submits, inter alia, that even assuming what was stated by the respondent - election petitioner to be true, there was not breach of Section 30(d) of the Representation of the People Act inasmuch as the minimum 20 days time was available after the date of withdrawal of nomination paper to the date of poll; that there was no violation of Rule 10(5) of the Conduct of Election Rules; and that even assuming that there was violation of this rule, the election petitioner dismally failed to prove by evidence that the result of the election was materially affected thereby, inasmuch as no sufficient evidence was adduced in proof of his claims, and he himself could not have proved his averments.

9. Mr. S. N. Singh, the learned counsel for the respondent, relying on All Party Hill Leaders' Conferences Shillong v. Captain W. A. Sangma ((1977) 4 SCC 161 : AIR 1977 SC 2156) and Roop Lal Sathi v. Nachhattar Singh Gill ((1982) 3 SCC 487), strenuously argues that the violation of Rule 10(5) is itself sufficient to have materially affected the result of the election particularly in view of the fact that in the instant constituency of backward voters, the symbol was very important, and change thereof had disastrous consequences to the respondent candidate.

10. The material facts relevant to this appeal are not in dispute. The list of contesting candidates

with respective symbols was punished on February 9, 1985; the election petitioner's symbol 'bow and arrow' was re-allotted to candidate Murura Dasi and the symbol of ladder in place of 'bow and arrow' was re-allotted to the respondent; the poll took place on March 5, 1985; and the result was announced on March 6, 1985.

11. The Respondents election petitioner in the High Court Examined himself as PW 1 and deposed to the following effect :

"..... I was given the symbol of 'bow and arrow '. I canvassed for my votes with the symbol of 'bow and arrow' till February 15, 1985. The Returning Officer changed my symbol and allotted to me the symbol of 'sirhi' (ladder). The symbol of 'bow and arrow' was given to Murura Dasi, the another candidate. I was the sitting MLA and my symbol in the last election was also 'bow and arrow'. I lost the election this time by a margin of 430 votes. In the election held in the year 1980, I won the election by a margin of 9611 votes. This time the main reason of my defeat in the election is the change of my symbol. Due to change of my symbol, the voters were misled and they could not be apprised of this change. I could not canvass for my votes with the symbol of 'ladder ' in that constituency and in that area. I was known largely and properly in the area as the MLA with the symbol of 'bow and arrow'. The candidate of Congress party was declared elected in this election. The election of my constituency was held on March 5, 1985. I did not get 20 days time as provided in law after the change of my symbol."

12. When recalled, he added that the symbol was a free symbol which has been allotted to him earlier i.e., the symbol of 'bow and arrow'. "The last date of withdrawal of the nomination paper was February 9, 1985. By the change of symbol 'bow and arrow', I was materially affected and it affected the course of election and the voters were misled and they wrongly voted for Murura Dasi." Evidence of no other witness appears on record. The question before us is, whether on the basis of the above evidence on record the High Court was justified in holding that the result of the election was materially affected and in declaring the appellant's election to be void on that ground.

13. Section 100 of the Representation of the People Act, 1951, states the grounds for declaring an election to be void. Sub-section (1)(d)(iv) says :

"(1) subject to the provisions of sub-section (2) if the High Court is of opinion -

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

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

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

Sub-section (2) is not relevant for the purpose of this case. Was there in this case any violation of Section 30(d) ? Under Section 30 of the Representation of the People Act, 1951, as soon as the notification calling upon a constituency to elect the members or members, is issued, the Election Commission shall, by notification in the official gazette appoint, amongst others, under clause (d) the date or dates on which a poll shall, if necessary, be taken, which or the first of which shall be a date not earlier

than the twentieth day after the last date for the withdrawal of candidature. In the instant case the last date for the withdrawal of nomination was February 9, 1985 and the date of poll was March 5, 1985. There was, therefore, clear compliance with the requirement of Section 30(d). The respondent himself stated that on February 14, 1985 he received notice of intention of the Returning Officer to change his election symbol and the symbol was actually changed on February 15, 1985. We agree with the High Court that only the spirit of Section 30(d) was not complied with. In terms, this provision was clearly complied with. The Submission that it was violated, has, therefore, to be rejected.

14. Rule 10 of the Conduct of Election Rules, 1961 deals with preparation of list of contesting candidates. Sub-rule (4) thereof requires that at an election in an assembly constituency, where a poll becomes necessary, the Returning Officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission -

(a) allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice; and

(b) if more contesting candidates than one have indicated their preference for the same symbol decide by lot to which of such candidates the symbol will be allotted. Under sub-rule (5) the allotment by the Returning Officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Election Commission in this behalf in which case the Election Commission may receive the allotment in such manner as it thinks fit.

15. The change of symbol has not been proved to be violative of Rule 10(5). Even assuming violation, as Mr. Garg submits, was there enough evidence to show that the result of the election, insofar as it concerned the returned candidate, was materially affected? The election petitioner before the High Court deposed that he lost the election by a margin of 430 votes. From the result sheet it appears that the appellant secured 8659 votes and the respondent secured 8229 votes. The difference is, therefore, of 430 votes. Murura Dasi despite the 'bow and arrow' symbol secured 2228 votes. The election has not stated and proved that more than 430 voters would have voted for him, had the symbol of 'bow and arrow' not been changed, and that they voted for Murura Dasi only for her having the symbol of 'bow and arrow'. How could that be proved would, of course, depend on the facts and circumstances of the case.

16. The result of election, insofar as it concerns a returned candidate, may be affected in various ways by various factors stated under Section 100(1)(d). So far as the burden and measure of proof of such material effect is concerned, the law has been enunciated by several decisions of this Court. What is required to be demonstrated by evidence will vary according to the way in which the result of the election insofar as it concerns the returned candidate is alleged to have been materially affected. It is to be noted that in an election petition what is called in question is the election and what is claimed is that the election of all or any of the returned candidates is void, with or without a further declaration that the election petitioner himself or any other candidate has been duly elected. Declaring the election of the returned candidate void does not, by itself, entitle the election petitioner or any other candidate to be declared elected.

17. *Vashist Narain Sharma v. Dev Chandra* (10 ELR 30 : (1955) 1 SCR 509 : AIR 1954 SC 513)

was a case of improper acceptance or rejection of nomination paper and the manner of proving that the result of the election had been materially affected was slightly different from that of the instant case as that involved the question of possible distribution of wasted votes. However, this Court has stated that the result of the election being materially affected is a matter which has to be proved and the onus of proving it lies upon the petitioner. Their Lordships observed : (SCR pp. 516-17)

"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."

18. In *Inayatullah Khan v. Diwanchand Mahajan* (15 ELR 219 (MP)) where a nominated candidate was found to have been disqualified under Section 7(d) of the Act the question arose as to what had happened to the election as a result. It was contended that the margin of votes was small and that the result of the election must be taken to have been materially affected because Nandlal, a disqualified candidate, got 8000 odd votes, which in the event of his not contesting would have gone to Mahajan. Evidence was led to show how the votes which went to Nandlal would have been divided and both sides claimed that if Nandlal had not contested the election, the votes would have gone to them. The Madhya Pradesh High Court observed that the evidence on this part of the case was exceedingly general and apart from the statement by the witnesses who came forward as to their opinion, there was nothing definite about it. All the evidence which had been brought to court's notice was not decisive of the matter under Section 100 of the Act in view of the test laid down in *Vashist Narain Sharma* case (10 ELR 30 : (1955) 1 SCR 509 : AIR 1954 SC 513). It can, therefore, be taken as settled that the party who wishes herein to get an election declared void has to establish by satisfactory evidence that the result of the poll had in fact been materially affected by the violation of Rule 10(5) of the Rules. For doing this, it has to be demonstrated that the votes would have been diverted in such a way that the returned candidate would have been unsuccessful. In the instant case there was no evidence to demonstrate the returned candidate having derived any benefit from the change of symbol of the election petitioner. *Murura Dasi*, to whom the 'bow and arrow' symbol was later allotted, was not the successful candidate. The election petitioner was required to show that such number of votes had gone in favour of the successful candidate instead of in favour of the petitioner, simply because of the change of symbol as would, without that number of votes, make the successful candidate unsuccessful. The petitioner, besides making bare statement, had not produced any other satisfactory evidence in support of such a proposition.

19. In *S. N. Balakrishna v. Fernandes* ((1969) 3 SCC 238 : AIR 1969 SC 1201 : (1969) 3 SCR 603) which was a case under Section 100(1)(d)(ii) and Section 123(3)(4) - corrupt practice charged against an agent other than election agent, on the question of the result of the election, insofar it concerned the returned candidate, being materially affected, *Hidayatullah, C. J.* observed at para 58 :

"In our opinion the matter cannot be considered on possibility. *Vashist Narain* case (10 ELR 30 : (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. Jethmalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently hung. 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 case (10 ELR 30 : (1955) 1 SCR 509 : AIR 1954 SC 513) and in Inayatullah v. Diwanchand Mahajan (15 ELR 219 (MP)) (ELR at pp. 235- 36), the provision was held to prescribed an impossible burden. The law has however remained 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 rulings cited to us."

20. In Chhedi Ram v. Jhilmit Ram ((1984) 2 SCC 281) which was also a case of improper acceptance of nomination paper, Chinnappa Reddy, J. observed that 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. Under the Indian Evidence Act, a fact is said to be proved when after considering the matter 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 the case, a reasonable probability is all one way, the court must not lay down in impossible standard of proof and hold a fact as not proved.

21. As was reiterated in Shiv Charan Singh v. Chandra Bhan Singh ((1988) 2 SCC 12), in the absence of any proof the result of an election cannot be held to be materially affected; and it is not permissible in law to set aside the election of the returned candidate on mere surmises and conjectures. A decision in election petition can be given only on positive and affirmative evidence and not on mere speculation and suspicions, however strong they are. Indeed, in the instant case there is no such positive and affirmative evidence. Mere assertions by the election petitioner were not enough. Nothing was alleged and proved against the successful candidate. There could be no proposition or contention that a candidate with a particular symbol would always be successful at the hustings or that a particular voted or a number of voters would always vote for a symbol irrespective of the candidate to whom it is allotted.

22. Mr. S. N. Singh relies on paragraph 29 of the judgment in All Party Hill Leaders' Conference, Shillong v. Captain W. A. Sangma ((1977) 4 SCC 161 : AIR 1977 SC 2156) wherein Goswami, J. observed : (SCC p. 174, para 29)

"For the purpose of holding elections, allotment of symbol will find a prime place in a country where illiteracy is still very high. It has been found from experience that symbol as a device for casting votes in favour of a candidate of one's choice has proved an invaluable aid. Apart from this, just a people develop a sense of honour, glory and patriotic pride for a flag of one's country, similarly great fervour and emotions are generated for a symbol representing a political party. This is particular so in a parliamentary democracy which is conducted on party lines. People after a time identify themselves with the symbol and the flag. These are great unifying insignia which cannot all of a sudden be effacted."

There is no dispute about the importance of the symbol in a backward constituency. This will, however, not absolve the election petitioner of his burden of proving that the result of the election has been materially affected. In Roop Lal Sathi v. Nachhattar Singh Gill ((1982) 3 SCC 487) in the

facts of that case, this Court observed that : (SCC p. 498, para 17)

"The Symbols Order was issued by the Election Commission under Article 324 of the Constitution in exercise of its undoubted powers of superintendence, direction and control of the conduct of all elections to Parliament and legislature of every State. It is also relatable to Rules 5 and 10 of the Conduct of Elections Rules framed by the Central Government in exercise of their powers under Section 169 of the Act. Rule 4 of the Conduct of Elections Rules provides that every nomination paper presented under Section 33 of the Act shall be in Forms 2-A to 2-E, as may be appropriate. Forms 2-A and 2-B require the candidate to choose symbol. Under Rule 5(1) the Election Commission by notification may specify the symbols that may be chosen by candidates at elections to Parliamentary and Assembly constituencies. Under Rule 10(4) the Returning Officer shall consider the choice of symbols expressed by contesting candidates and 'subject to any general or special direction issued by the Election Commission' allot different symbols to different candidates. The allotment of symbols by the Returning Officer is final under sub-rule (5) of Rule 10 except where it is inconsistent with any directions issued by the Election Commission in that behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit."

23. Mr. Singh's submission is as if the violation of sub-rule (5) of Rule 10 would ipso facto make an election void. That, however, is not the legal position as would be clear from the provision itself. Section 100(1)(d)(iv) of the Act clearly says that subject to the provisions of sub-section (2) if the High Court is of opinion that the result of the election, insofar as it concerns a returned candidate, has been materially affected 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. The violation of sub-rule (5) of Rule 10 per se will not invalidate the election. The election petitioner has also to prove that the result of the election, insofar as it concerns the returned candidate, was materially affected.

24. From the evidence on record considered in light of the law enunciated above, we have no doubt that the election petitioner dismally failed to discharged the burden of proving that the result of the election, insofar it concerned the appellant, who has been the returned candidate, was materially affected. The High Court was in error in holding, without sufficient evidence, that it was materially affected.

25. In the result, the impugned judgment of the High Court is set aside and this appeal is allowed with costs which we quantify at Rs. 3000 (Rupees three thousand). Let steps be taken under Section 116-C(2) of the Act.

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