

N. E. Horo

Vs

Leander Tiru and Others

Civil Appeal No. 1982 of 1988

(K. Jagannatha Shetty, A. M. Ahmadi JJ)

05.09.1989

JUDGMENT

JAGANNATHA SHETTY, J. -

1. This appeal under Section 116-A of the Representation of the People Act, 1951, is from the judgment and order of the High Court of Judicature at Patna (Ranchi Bench) dated May 26, 1988, in the Election Petition No. 2 of 1985 (R). The High Court has set aside the election of appellant to the State legislature and instead declared respondent as the successful candidate.

2. The facts of the case have been neatly summarised in the judgment of the High Court to which we refer to the extent relevant for our purpose. Shri N. E. Horo, the appellant before us belongs to Jharkhand Party. Shri Leander Tiru, the respondent belongs to Congress (I) Party. In the general election held in 1985, they were rival candidates for election from 302-Torpa St. Assembly constituency. There were also three other contesting candidates from the same constituency. The appellant secured 19,159 votes as against 19,120 by the respondent. The appellant was thus elected by a narrow margin of 39 votes. The respondent filed an election petition under Section 80-A and Section 81 of the Representation of the People Act alleging various and varied irregularities in the process of counting. That it was claimed that Hans Raj Singh, the then BDO was on inimical terms with the respondent and had maneuvered the entire process of counting to his prejudice. The specific instances of illegalities committed by Hans Raj Singh were also highlighted in the petition. He demanded recounting and setting aside the appellant's election. He sought a declaration under Section 98(c) as the duly elected candidate. The appellant resisted the election petition and denied all the allegations. He asserted that there was proper scrutiny and counting. He even denied the presence of Hans Raj Singh in the counting hall.

3. Upon the pleadings, the issues 1 to 5 framed in the case related to the irregularities in counting and scrutiny of ballot papers. The burden was on the respondent to prove that the counting was not in accordance with law.

4. The respondent filed an application under Order XI Rule 15 of the Code of Civil Procedure read with Rule 93(1) of the Conduct of Election Rules, 1961 for inspection of ballot papers counted in favour of the appellant and other contesting candidates. He also produced some evidence in proof of the prima facie case required for inspection. The appellant objected to inspection and alternatively contended that the votes counted in favour of the respondent should also be inspected. The High Court by order dated November 17, 1987 allowed the request of respondent but not that of the appellant. The High Court said that the appellant in his written statement has not alleged any irregularity in the counting of votes in favour of the respondent and, therefore, votes secured by the

latter need not be inspected. It was also observed that the election petition itself could be disposed of by the result of inspection and no additional evidence would not be necessary. The relevant portion of the order of the High Court runs as follows :

"It has been shown that Part II of Form 16 of 90 booths out of 120 have been kept blank by the Supervisor and the Returning Officer. This, prima facie, shows that the result was maneuvered which is also supported by Exs. 7 and 9. On scrutiny and examination of Form 20, Ex. 2 which has been brought on record, it will be seen that there are lot of irregularities, especially with regard to totaling of the valid votes. There are also difference in the accounting of ballot papers, vide Ex. 2 and 11 series, of 53 votes, 10 votes and 3 votes respectively in the figure of voting of booth Nos. 22,101,43,48 and 111.

On the basis of the evidence of the three PWs and documents brought on the record, it can be conveniently said that the petitioner has succeeded in making out a prima facie case for getting an order for inspection of the counted ballot papers. The material facts have been stated in the election petition and this election petition can be disposed of on the basis of the inspection of all the counted ballot papers and no further evidence is likely to be adduced. Prima facie it has been shown that Sri Hans Raj Singh was appointed as the Assistant Returning Officer with whom the petitioner had enmity. It is also admitted position that no recriminatory petition has been filed in accordance with the provisions of Section 97 of the Representation of the People Act, 1951 and as such, the respondents have no right to inspect any ballot paper on the record. It has been shown that secrecy of the ballot papers is not likely to be infringed as no prayer has been made for inspection of the marked copy of the electoral roll.

"The margin was also so thin that actually a difference of 20 votes would have materially affected the result of the election. In a case of such a thin margin, it is ordinary necessary for the interest of justice and fair play that an order of inspection of the counted ballot papers should be granted to eliminate the possibility and the allegations of maneuvered ballot papers or the increase or decrease of the votes by some interested person associated with the process of the election. In this case admittedly, the figures collected are not imaginary nor any attempt has been made to fish out material in roving manner because they are based on result sheet, Ex. 2, granted by the Returning Officer."

5. The appellant challenged the legality of this order before this Court in SLP No. 14486 of 1987 which was dismissed on January 7, 1988.

6. The said order of the High Court thus became final. The High Court then directed that the inspection shall be done under the supervision of the designated officer of the court assisted by two other staff. The parties with their counsel were also permitted to be present. The inspection went on boothwise from December 11 to December 19, 1987. The day to day result of inspection was recorded and finally attested by the designated officer as well as by advocates signed the report in token of their acceptance of the result of inspection.

7. Thereafter, the parties did not lead any other evidence. They argued the main case on the basis of the result of inspection.

8. The proceedings went on before the High Court in the following manner :

In all 235 ballot papers were separated from the packet containing the appellant's ballot papers and also from one other contesting candidate. The details of 235 ballot paper with booth number, ballot papers number etc., have been specified by the designated office of the court at the time of inspection. The High Court marked that statement as Ex. 12 series. The ballot papers taken out from the packet of another candidate were marked as Ex. 13 series. The ballot papers taken out from the packets of another packets of ballot papers of the appellant relating to booth Nos. 104 and 105 were taken out to show that they contained only 49 ballot papers each, though counted and recorded as 50 ballot papers by the returning officer.

9. In the course of the hearing, the High Court scrutinised every packet and every ballot paper sorted out by the designated officer. The opportunity was also afforded to advocates for both parties to have their say. The High Court found that the respondent has polled 19,166 valid votes as against 18,988 by the appellant. The table was thus turned in favour of the respondent with 178 more votes. There was no option for the High Court but to set aside the election of the appellant and declare the respondent as duly elected candidate. Accordingly, the judgment was passed which has been challenged in the present appeal.

10. Since the result of this appeal also turns on the correctness of the view expressed by the High Court on the ballot papers sorted out during inspection, counsel on both sides very fairly agrees for appointment of a Commissioner to verify the statement in the judgment as to physical condition of the disputed ballot papers. By order dated August 2, 1989, we appointment Shri J. K. Rawal, Joint Registrar of this Court as Commissioner for the purpose. The Commissioner in the presence of counsel for the parties has scrutinised the disputed ballot papers and submitted a detailed report.

11. We have perused the Commissioner's report. It confirms the observations and conclusions of the High Court. One or two discrepancies pointed out by the Commissioner even if accepted, would not materially affect the merits of the matter. Indeed, counsel for the appellant also did not dispute this aspect. He however, argued that the High Court did not hold that Hans Raj Singh was the brain behind the irregularities, as alleged in the election petition and such irregularities would have been also noticed if there was inspection of the ballot papers of the respondent. His grievance in other words was that the High Court ought to have allowed inspection of ballot papers of all the candidates.

12. We do not think that we could accept this contention. In our opinion, the appellant's demand for scrutiny of votes secured by the respondent has been rightly rejected by the High court. In the first place, there was no recrimination by the appellant in his written statement to the election petition. Secondly, the a ppellant has stated in his written statement that the respondent has validly polled 19,120 votes. Besides, while deposing before the court, he has stated that there was no irregularity committed during the counting of votes in favour of any candidate. With these statements, and in the absence of recrimination, the appellant was not entitled to have inspection of ballot papers of all candidates.

13. The appellant's application filed in this Court for the same relief, namely for inspection of votes secured by the respondent also deserves to be rejected for the aforesaid reasons.

14. The next contention urged by counsel for the appellant relates to packet No. 8 containing 56

ballot papers. 55 ballot papers in this packet were rejected by the High Court on the ground that they contained no seal of 'arrow cross' marks of the rubber stamp of the particular booth. Counsel argued that the High Court ought not to have taken up those ballot papers for scrutiny for want of specific pleading in that regard.

15. Here again we cannot help the appellant. It may be noted that the High court while allowing inspection, has not restricted the operation to specified ballot papers. The inspection was permitted in respect of all ballot papers to the credit of the appellant. In the course of such inspection, if a ballot paper which ought not to have been accepted has, in fact, been counted in favour of the appellant, it must also fall to be excluded. There may not be any specific allegation in the pleading in respect of such ballot paper. But the absence of specific averments in the pleading is no bar to inspect such ballot papers. When illegality is noticed upon inspection, it must be corrected. Invalid votes, if any, should be excluded. That is precisely the purpose of inspection of ballot papers.

16. As to the aforesaid ballot papers, Rule 39(2)(b) of the Conduct of Election Rules, 1961 and the Election Commission Instruction to Presiding Officers require that if the mark is made otherwise than by the instrument provided for the purpose, such ballot papers are to be rejected. There is no dispute that the ballot papers in question contained on prescribed mark, namely "arrow cross" marks. The report of the Commissioner of this Court also confirms this illegality. They could not, therefore, be retained in favour of the appellant.

17. Secondly, even if we accept the contention urged for the appellant and credit the whole packet containing 55 ballot papers to the account of the appellant, there would be little difference in the result arrived at. Still there would be a balance of more than 100 votes with the respondent and there is no means known to law by which it could be excluded.

18. Counsel next relied upon the decision of this Court in *P. K. K. Shamsudeen v. K. A. M. Mappillai Mohindeen* ((1989) 1 SCC 526) and argued that there was no factual foundation established by the respondent to have an inspection of ballot papers. In our opinion, the said decision had apparently no relevance to the present case. Herein, the High Court by the order dated November 17, 1987 has reached the conclusion and recorded a finding as to the prima facie case calling for inspection of ballot papers. That conclusion as to the prima facie case was based on consideration of relevant evidence produced by the parties. That order of the High Court has been upheld by this Court by dismissing the appellant's special leave petition. The appellant was bound by that order and he cannot again contend that there was no factual foundation established by the respondent for inspection. The earlier order of the High Court which has been affirmed by this Court cannot be reopened in this appeal.

19. We have gone through the entire material meticulously. We could not find any infirmity either in the procedure followed or in the declaration made by the High Court. On the facts found, the legitimate right of the respondent to get a declaration of his success in the election cannot be doubted or disputed. He was entitled to be declared as the successful candidate. The High Court has no choice in the matter and no discretion either. Under Section 98(c) of the Representation of the People Act, the High Court was bound to grant him that relief. The High Court has done the right thing.

20. In the result, the appeal fails and is dismissed with costs.

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