D. B. Raju

Vs

H. J. Kantharaj and Others

Civil Appeal No. 3634 (NEC) of 1989

(N. M. Kasliwal, L. M. Sharma JJ)

13.07.1990

JUDGMENT

L. M. SHARMA, J. -

1. This appeal under Section 116-A of the Representation of the People Act, 1951, is directed against the decision of the Karnataka High Court setting aside the election of the appellant D. B. Raju to the State Legislative Council, and directing the recount of the votes after excluding those of 242 nominated members. The election was held by adopting the 'single transferable vote method'. The polling took place on July 3, 1988 and the counting was taken up on the next date, that is, July 4, 1988. After several rounds of counting the appellant was declared as the successful candidate.

2. The election in question relates to the Chitradurga Local Authorities Constituency, comprising 121 Mandal Panchayats. The last date and time fixed for receiving nomination papers was 3.00 p.m. on June 3, 1988. According to the appellant's case, a decision was taken by the Chitradurga Zilla Parishad in its special meeting held on May 28, 1988 to nominate two members from each Mandal Panchayat, that is, a total number of 242 members. Accordingly, steps were taken under the provisions of the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 (hereinafter referred to as 'the Parishads Act') read with the rules framed thereunder, and 242 members were duly nominated in time to be included in the electoral roll. This has been denied by the election petitioner-respondent 1, as also some of the respondents who contested the election. According to their case, the inclusion of the names of the nominated members in the electoral roll took place after the period for nomination was over and they were, therefore, not included in the electoral roll in the eye of law. The main question in the case which thus arises is as to whether the names of the 242 nominated members were included in the electoral roll within the time permitted by the law.

3. The Deputy Commissioner, who was impleaded in the election petition as respondent 5 (in this appeal also he is respondent 5), had triple role to play in connection with the disputed election. He was authorised under the Parishads Act and the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats (Conduct of Election) Rules, 1985 (hereinafter referred to as 'the Parishads Rules') to take steps for completing the nomination of the members; under Section 13-B of the Representation of the People Act, 1950, he was the Electoral Registration Officer for preparation and revision of the electoral roll; and he was also the Returning Officer under the Representation of the People Act, 1951. According to the case of the appellant, a resolution was passed by the Zilla Parishad on May 28, 1988 nominating the aforementioned 242 members, and the Chief Secretary of the Zilla Parishad sent the list of the names to the Deputy Commissioner on May 30, 1988. The Deputy Commissioner was, under Section 5(9) of the

Parishads Act, required to publish the said names so as to complete the process of nomination. He was also vested with the jurisdiction to include the names in the electoral roll under the provisions of the Representation of the People Act, 1950. It is relevant to note at this stage that the question of inclusion of the names in the electoral roll could arise only after the nomination was complete in the eye of law. A nominated person was entitled to be included as a voter for the election to the Council Constituency after he became a member of the Mandal Panchayat and not before. Having learnt about the nominations on the eve of the election, some persons challenged the same and objected before the Deputy Commissioner to the proposed publication. However, the Deputy Commissioner on June 1, 1988 passed an order directing the necessary steps to be taken under the Parishads Act, and accordingly a list of the nominated members was pasted on the notice board of the office of the Deputy Commissioner. Before the nominated persons could be treated to have become members of the Panchayats it was necessary that certain other steps also were taken in accordance with the Parishads Act and the Parishads Rules. Sub-section (1) of Section 40 of the Parishads Act, which is mentioned below, makes it clear that a nominated person becomes the member of a Mandal Panchayat only on the publication of his name under Section 5(9) :

> "40. Commencement of term of office - (1) The term of office of the members elected at a general election or at a second election held under sub-section (7) of Section 5, or nominated shall commence on the date immediately after the expiry of the term of office of the outgoing members of the Mandal Panchayat or the period of appointment of an Administrative Committee or Administrator under Section 8, or on the date of publication of their names under sub-section (9) of Section 5, whichever is later."

The manner of publication of the names has been prescribed by Rule 73 of the Parishads Rules in the following terms :

> "73. Publication of names of members elected or nominated to Mandal Panchayat - The Deputy Commissioner shall, as soon as conveniently may be, publish the list containing the names of the members elected or deemed to have been elected or nominated to the Mandal Panchayat by causing such list to be affixed on the notice board of his office, office of the Tahsildar, concerned Mandal Panchayat and in the Chavadi."

With a view to complete the nomination, the Deputy Commissioner sent out the names for affixing the same on the notice boards of the office of the concerned Tahsildars and Mandal Panchayats and in the Chavadis. The Deputy Commissioner could have taken steps for inclusion of the names in the electoral roll of the State Council Constituency after receipt of the information of their due publication in the offices situated at different places. There is a serious dispute as to when the necessary information became available at Chitradurga and the formal steps of including those names in the electoral roll were actually taken. After examining the evidence led by the parties, the High Court has held that the names were not included in the electoral roll by 3.00 p.m. on June 3, 1988.

4. Mr. M. C. Bhandare, the learned counsel appearing in support of the appeal, has contended that the High Court fell in grave error in deciding the disputed issue against the appellant as it failed to take note of the provisions of the Explanation to Section 40(1) of the Parishads Act, which reads as follows :

"Explanation - When the names of members elected at a general election or at a second election held under sub-section (7) of Section 5 or nominated are published on more than one date, the date by which the names of not less than two-third of the total number of members has been published shall be deemed to the date of publication for purposes of this section".

The learned counsel argued that the evidence on the record establishes that information of the publication of the names of more than two-third of the total number of nominated persons had reached the Deputy Commissioner in time for the amendment of the Council Constituency roll and the Deputy Commissioner had actually made an order for the inclusion of the names in the roll on June 2, 1988. Accordingly, the final electoral roll including the nominated members was ready in the office of the Returning Officer, and the appellant, as a matter of fact, had inspected the same. Reliance has been placed on his deposition as well as on the documentary evidence in the case.

5. The most important evidence in the case is to be found in the statement of the Deputy Commissioner examined as PW 4. Besides, the election petitioner examined several other witnesses. An examination of evidence on record leads to the conclusion that the Chief Secretary of the Zilla Parishad had sent the list of the nominated members to the Deputy Commissioner on May 30, 1988 and a copy thereof was placed on the notice board of the Deputy Commissioner's office on June 1, 1988. However, that did not complete the process of nomination. The provisions of Section 40(1) of the Parishads Act make it abundantly clear that a nominated person would become a member of the Panchayat only after due publication of his name in accordance with Rule 73. It was therefore necessary to have the names of the nominated persons affixed on the notice board of the office of the Tahsildars, the notice boards of the Mandal Panchayats and in the Chavadis. Mr. Bhandare is right that in view of the Explanation to Section 40(1) it was not necessary for the Deputy Commissioner to have waited for the information in this regard from all the places. On his satisfaction that the publication of two-third of the total number of the names were complete, he was free to proceed further and to revise the electoral roll under the Representation of the People Act, 1950 by including all the nominated members. But the question is as to when the Deputy Commissioner did receive the information about the two-third of the total number, and further whether he, as a matter of fact, revised the electoral roll before 3.00 p.m. on June 3, 1988. It is significant to note that the electoral roll did not get automatically amended on the completion of the process of nomination of the additional members. Ordinarily the question of inclusion of a new name in the electoral roll arises only when an application is made before the Electoral Registration Officer in this regard, but the power can be exercised by the officer even without such an application. In the present case it appears that a tactical battle was going on in the political arena between the two rival groups; one attempting to get the electoral roll amended by the inclusion of the nominated members and the other trying to foil it. The Deputy Commissioner was under pressure from both sides, and as the evidence discloses, he had to consider the different stands taken before him, which slowed down the entire process. Let us examine the evidence in this background.

6. The Deputy Commissioner has, in his evidence, stated that his office received the information about the nomination from the Zilla Parishad on May 30, 1988 when he was at Bangalore. He returned back to Chitradurga on May 31, 1988 and examined a copy of the resolution of the Parishad as also the list of the nominated persons. Soon thereafter he was approached by the two groups, one supporting the resolution and the other opposing it. Ultimately, he decided to publish the list as required by Section 5(9) of the Parishads Act read with Rule 73 of the Parishads Rules. Accordingly, a copy of the list was placed on the notice board of his office and lists for the publication in the Taluk offices were handed over to the Tahsildars who were already present in

Chitradurga. The lists for the publication in the offices of the Mandal Panchayats and Chavadis, which were scattered at considerable distances, were sent to the Chief Secretary of the Zilla Parishad. The Deputy Commissioner postponed the further step for modification of the electoral roll awaiting the report on publication from the different offices. Some reports from the Taluk offices were received on June 1, 1988 itself, but the Deputy Commissioner in his evidence was not in a position to give the details. His examination-in-chief was, therefore, discontinued and he was asked to bring the documents on the next date with reference to which he could answer the further questions. Accordingly, he later appeared with the papers and stated that the last reports regarding the publication from the Taluk Office of certain places were received on June 4, 1988. In his cross-examination the Deputy Commissioner stated that on the basis of his records he could say that he had received reports from 5 Taluk offices only on June 1, 1988, and none from the Mandal Panchayats; and on June 2, 1988 he had received reports about publication in the Mandal Panchayats from 2 Taluks. As there were only 9 Taluks in his district, it can be presumed that information about the publication of two-third number at Taluk offices had reached the Deputy Commissioner by the evening of June 2, 1988. However, there does not appear to be any relevant evidence available on the records, and none has been shown to us by the learned counsel, with regard to the publication of the requisite number of names in the Mandal Panchayat offices and in the Chavadis. It has been contended on behalf of the appellant that since the burden is on the election petitioner to prove such facts which may vitiate the election, he must fail in the present state of evidence. Before adverting to this aspect we propose to consider the other evidence relating to the revision of the electoral roll.

7. The electoral roll was produced before the High Court and was marked as Ex. P-6. Although it ought to have borne the dates of its preparation and revision, none is to be found there. The inclusion of the names of nominated members was, according to the evidence, done by attaching slips to Ex. P-6. The Deputy Commissioner was unable to state as to the date on which Ex. P-6 was prepared and typed. So far the "updated Voters' List" was concerned, it was placed on the notice board of the Deputy Commissioner at 8.55 p.m. on June 3, 1988, after a lot of wrangling between the rival groups. In answer to a question in cross-examination the Deputy Commissioner stated :

> "I cannot say if the preparation of this list was complete by 3.00 p.m. on June 3, 1988 as it is a ministerial part of it."

As has been mentioned earlier, the dispute about the validity of the belated nominations had been raised on May 31, 1988 before the Deputy Commissioner when he returned to Chitradurga from Bangalore and he took a decision on June 1, 1988 to proceed with the publication so as to complete the process of nomination. According to his statement, which he made after verifying from the documents, the necessary information from the Mandal Panchayats and Chavadis started reaching him on June 2, 1988. But they were inadequate as they were only from two Taluks. At the earliest the information about the publication of the necessary number of names reached Chitradurga on June 3, 1988 when the two groups were arrayed against each other in his office, one urging the revision of the electoral roll and the other opposing it. The deadline was 3.00 p.m. on June 3, 1988 which was approaching fast. But it is important to note that the Deputy Commissioner was not aware that the period available for the revision of the electoral roll was expiring in the afternoon. He was under a wrong impression that the entire calendar date of June 3, 1988 was available for the purpose. Towards the end of paragraph 3 in his written statement the Deputy Commissioner categorically stated that he "was under a bona fide impression that direction for the inclusion of the name in the electoral roll of the constituency shall be given under Section 23 at any time on the last date for making nominations". In the earlier writ petition between the parties (in which the issue

raised was not decided) respondent 5 had made a similar statement in paragraph 2 of his reply. Being under that wrong impression he was not in a hurry to take the decision in regard to the revision of the electoral roll quickly. The election petitioner, PW 1, was himself not a candidate but was an active supporter of one of the candidates and was seriously involved in the question of the revision of the roll, and, as stated in his evidence, the publication of the names under Rule 73 of the Parishads Rules was complete by June 3, 1988 only in some of the Mandal Panchayats. After the deadline at 3.00 p.m. on June 3, 1988 was crossed an application, which has been marked as 'Annexure R-III', signed by the Secretary, District Janata Party, was given to the Deputy Commissioner asserting that no further additions or deletions in the electoral roll were permissible and an endorsement to that effect should be made by the Returning Officer. The Deputy Commissioner did not immediately give his reply thereto. The parties were also insisting for the publication of the electoral roll in its final shape. According to the further evidence of PW 1, the Deputy Commissioner promised them that he would contact the Chief Electoral Officer at Bangalore by telephone and only thereafter he would decide on his further action. The party workers including the witness awaited the further development and at 8.55 p.m. the Deputy Commissioner declared that the names of the newly nominated members were included in the voters list. Soon thereafter he also replied to the letter of the Janata Party Secretary by a letter headed as "Endorsement", stating :

> "With reference to the above, you are hereby informed that action has been taken to include the nominated members by the Zilla Parishad to the Mandal Panchayat in the District and as per Section 27(c) read with Section 23(3) of the R.P. Act, 1950, the Electoral Roll for Local Authority constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

Two other Janata Party members have been examined as PWs 2 and 3 in the case supporting the above version.

8. Mr. Bhandare has relied upon the oral evidence of the appellant wherein he claimed to have gone to the office of the Deputy Commissioner on June 2, 1988 to secure a prescribed form for filing his nomination as a candidate in the election and was allowed to examine the electoral roll which was kept on a table in the office. He asserts that after verifying his name and serial number in the list he discovered that the names of nominated members were also included therein. He stuck to this story in the cross-examination and insisted that it was at 11.00 in the morning on June 2, 1988 that he had seen the revised roll. It is difficult to accept his case on this evidence. According to the Deputy Commissioner himself the report about the publication in the office of the Mandal Panchayats from only two Taluks were received by the evening of June 2, 1988 and it is, therefore, not believable that the Deputy Commissioner had amended the roll before June 3, 1988. The Deputy Commissioner has not claimed to have revised the roll on June 2, 1988. On the other hand, he made a very significant assertion in his written statement in the present election which is quoted below :

> "The Deputy Commissioner issued direction for the inclusion of the names of nominated members on June 3, 1988 and the electoral roll for Local Authorities constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

In the earlier writ petition also he had made a similar statement, as mentioned below, towards the end of paragraph 2 of his reply :

> "The Deputy Commissioner issued direction for the inclusion of the name of respondents 3 to 246 of June 3, 1988 and the electoral roll for Local Authorities constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

A plain reading of the above statement suggests that both the updating of the electoral roll and pasting a copy thereof took place on June 3, 1988 at 8.55 p.m. The statement cannot be interpreted to mean that the revision of the electoral roll had been done about 6 hours earlier. The circumstances that (i) the Deputy Commissioner was not able to assert in his evidence before the court that the revision of the roll had taken place before 3.00 p.m.; (ii) he was under an impression that the revision was permissible till the midnight; and (iii) in spite of the available documents to him he was not in position to assert that the report of publication of the names of two-thirds or more of the nominated persons in the offices of the Mandal Panchayats had been received in his office before the deadline, strongly support the case of the election petitioner.

9. It has been contended on behalf of the appellant that the burden to prove that the names of the nominated members were not included in the electoral roll in time is on the election petitioner and unless he is able to lead acceptable evidence to discharge the same, the election petition is bound to fail. The argument is that the oral evidence led by the petitioner cannot be accepted for recording a finding that the controversial names had not actually been included in the electoral roll before 3.00 p.m. which was in the custody of the Deputy Commissioner. The fact that political opponents of the appellant who were opposing the inclusion of the names were repeatedly asking the Deputy Commissioner orally as well as in writing to inform them whether the names were actually included in the electoral roll or not itself shows that they could not be sure of the actual position till 8.55 p.m. The bald assertion of the witnesses for the petitioner in this regard cannot be given much weight. Thus the position, according to the learned counsel, available from the records of the case is that there is no reliable evidence on the crucial issue and, therefore, the election petition must be dismissed.

10. Apart from supporting the finding of fact recorded by the High Court in favour of the election petitioner, Mr. Shanti Bhushan, learned counsel for the respondent, argued that the electoral roll must be held to have been modified in the eye of law only at 8.55 p.m. when the alleged inclusion of the names was made public and not earlier. He relied upon the decision in Bachhittar Singh v. State of Punjab (1962 Supp 3 SCR 713 : AIR 1963 SC 395). The appellant in that case was appointed as a Kanungo and later promoted as Assistant Consolidation Officer in the former State of Pepsu. A department inquiry was held against him as a result of which he was dismissed by the Revenue Secretary. He preferred an appeal to the State Government. The Revenue Ministers expressed his opinion in writing that instead of his dismissal he should be reverted to his original post of Kanungo. The said remarks were, however, not communicated to the appellant officially and the State of Pepsu was merged with the State of Punjab. The matter was thereafter re-examined and the Chief Minister passed an order confirming the dismissal of the appellant. This order was communicated to the appellant which led to the filing of the writ petition in the High Court. The High Court dismissed the writ application and the appellant appealed before this Court by special leave. One of the questions considered by this Court was as to effect of the order in writing by the Revenue Minister, Pepsu, recommending reversion of the appellant in place of his dismissal. For the reasons, mentioned below, the court held that the order of the Revenue Minister was of no avail to the appellant : (SCR p. 721)

> "Thus it is of the essence that the order has to be communicated to the person who

> would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."
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> 1. As has been pointed out earlier, the evidence of the appellant that he had actually seen the final voters list in the office of the Deputy Commissioner must be rejected as unreliable. There is no acceptable evidence at all to show as to when the alleged corrections were made in the voters list. At 8.55 p.m. on June 3, 1988 the inclusion of the names was made public for the first time. The question is as to whether the electoral roll will be deemed to have been modified when it was made public at 8.55 p.m. or earlier when the actual correction in the list was made in the Deputy Commissioner's office which fact was kept confidential in spite of repeated demands for information.

12. Besides fixing the identity of the persons to be allowed to vote at the election, the purpose of the preparation of the roll is to enable the persons included therein to decide as to whether they would like to contest the election. It is also helpful to such persons in assessing their chances of success by reference to the voters finally included in the roll. For the purpose of canvassing also, the intending contestant requires a copy of the final voters' list. The intending contestants and their supporters thus heavily depend upon the final electoral roll for deciding their future conduct, and it is, therefore, extremely essential that it is made available to them before the expiry of the period fixed for filing the nomination papers. If the roll as it stood earlier, was confidentially corrected by the Electoral Registration Officer concerned sitting in his office which did not see the light of the day, the same cannot be considered to have been prepared according to law. The observations in Bachhittar Singh case (1962 Supp 3 SCR 713 : AIR 1963 SC 395) will be fully applicable inasmuch as the officer here also could reconsider the list again.

13. Mr. Bhandare in reply relied upon the judgment in B. K. Srinivasan v. State of Karnataka ((1987) 1 SCC 658) and argued that unlike the Karnataka Town and Country Planning Act, 1961 and the Rules which were under consideration in the said case, the Representation of the People Act does not require a display of the electoral roll. The learned counsel is correct and he rightly said that putting the final voters list on the notice board is not a necessary requirement under the law. But that does not lead to the further conclusion that the electoral roll can be prepared secretly and kept in the drawers of the officer without any information or knowledge to persons who are interested in finding out its final shape. The reported case was dealing with the principle of subordinate legislation and in paragraph 15 of the judgment made important observations which support the respondents' point of view. It was stated thus : (SCC p. 672, para 15)

> "There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliable of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known."

It was further observed that unlike Parliamentary legislation which is publicly made, delegated or

subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the government or other official dignitary and it was, therefore, necessary that sub-ordinate legislation in order to take effect must be published or promulgated in some suitable manner whether such publication or promulgation is prescribed by the parent statue or not. It will then take effect from the date of such publication or promulgation. The decision instead of helping the appellant is clearly against him.

14. The vital difference between an Act of a legislature and a sub-ordinate legislation was earlier noted in Harla v. State of Rajasthan (1952 SCR 110 : AIR 1951 SC 467). The Acts of the legislature are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done, and this is done only after debates take place which are open to the public. The matter receives wide publicity through the media. But the case is different with the delegated legislation and, it we may add, also in the case of orders passed by the the authorities like that in the present appeal before us. The mode of publication can vary but there must be reasonable publication of some sort. A reference may also be made to decision in Fatma Haji Ali Mohammad Haji v. State of Bombay (1951 SCR 266), which the question as to whether certain powers given to the government for issuing a direction to the Collector not to act in accordance with the prescribed rules had been actually exercised or not was under consideration. It was stated that the power had to be exercised in clear and unambiguous terms and, (SCR p. 275)

> "the decision that the power has been exercised should be notified in the usual manner in which such decisions are made known to the public."

Before closing this discussion we should refer to the case of State of Maharashtra v. Mayer Hans George ((1965) 1 SCR 123 : AIR 1955 SC 722) where the English decision of Johnson v. Sargant and Sons ((1918) 1 KB 101 : 118 LT 95) relied upon by this Court in Harla case (1952 SCR 110 : AIR 1951 SC 467) came to be considered. The respondent Mayer Hans George was German smuggler who was carrying gold from Switzerland to Manila by an aeroplane which stopped at Bombay for some time. The respondent did not get down from the plane but he was searched by the Indian officers and was found to be carrying gold illegally. He was charged with criminal activity on the basis of a notification requiring him to declare the gold as transhipment cargo in the manifest of the aircraft, which he had failed to do. His defence was that he had no knowledge of this notification. After his conviction by the trial court, the High Court on appeal acquitted him. The Supreme Court by a majority judgment reversed the decision and found him guilty on the ground that the notification had been published in the official gazette of India. The defence plea that since he was a foreigner and was, therefore, not expected to be aware of the notification was rejected. While discussing the arguments addressed in the case, the court appreciated the criticism of Prof. C. K. Allen against the judgment in Johnson v. Sargant and Sons ((1918) 1 KB 101 : 118 LT 95), but there was no comment or suggestion against the correctness of the judgment Harla v. State of Rajasthan (1952 SCR 110 : AIR 1951 SC 467). On the other hand, the observations at page 163 G-H are on the same lines. It was stated that where there is no statutory requirement as to the mode or form of publication, "we conceive the rule to be that it is necessary that it should be published in the usual form, i.e., by publication within the country in such media as generally adopted to notify to all persons concerned the making of the rules". Having regard to the nature and purpose of the power for rectification of the electoral roll by the Electoral Registration Officer, the principle enunciated in the above mentioned cases must be held to be applicable. We accordingly hold that in the eye of law the electoral roll in question was not modified by the inclusion of the names of the nominated members before 8.55 p.m. on June 3, 1988. We, therefore, affirm the decision of the High Court and dismiss the appeal with costs.

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