I.Vikheshe Sema

Vs

Hokishe Sema

Civil Appeal No. 13 of 1995

(CJI A. M. Ahmadi, B. N. Kirpal J)

01.05.1996

JUDGMENT

1.The challenge in this appeal by special leave is to the decision of the Guwhati High Court whereby the election of the appellant to the Nagaland Legislative assembly was declared to be void on an Election Petition having been filed by respondent No.1 who was one of the candidates in the said election.

2. On 12-1-1993, elections to the Nagaland legislative Assembly were notified. The appellant and the respondent, along with three other candidates, contested the said elections from Dinapur Constituency No I. The result of the election for the said constituency, which was declared, was as follows:

"S.N Name of contesting candidates Name of Party No. of votes secured.

1. I. Vikheshe	Independent	7,573
2. Hokishe Sema	Indian National (Congress-I)	7,436
3. Atoho N. Chisihi	Independent	42
4. P. Pius Lotha	N.P.C.	1,001
5. N. C. Zeliang	B.J.P.	1,160

3. On the counting of the votes, as the appellant had secured the highest number of votes, he was declared the returned candidate.

4. The respondent then filed an Election Petition under Section 81 read with Section 100(1) (d) (iii) (iv) of the Representation of the People Act. 1951 (hereinafter referred to as 'the Act') before the Guwahati High Court. The only ground on which the selection was challenged was that there had been improper reception of void votes which had materially affected the result of the returned candidate. Evidence was led to show that in the electoral rolls regarding the Dinapur Constituency No. 1, names of some of the voters were included in two different polling stations. In other words, there was duplication of names of some of the voters. Analysing the evidence, the High Court found that the position which emerged with regard to the reception of the said duplicate votes was as follows :

Ex. 3(3)	1(8)	5	815	750	298 to 567 except 565	269
Ex.3(4)	1(4)8	6	880	820	151 to 420	269
Ex.3(5)	1(5)14	28	279	270	127 to 279 (Addl. 153)	153
Ex.3(6)	1(6)6	21	606	580	454 to 606	153
		2580	2420		844	

5. Inasmuch as the difference of votes between the returned and losing candidate was only 137 votes, the High Court came to the conclusion that 844 votes were void and that there was "no room for doubt even taking into account the demonstrable trend and pattern of voting that the election result has been materially affected by reception of void votes."

6. Counsel for the parties have not disputed, in this appeal, the facts as enumerated hereinabove though there may be discrepancy regarding the number of defective votes of one or two, but the same is not material at this stage. What is contended on behalf of the appellant is that the High Court has misconstrued the provisions of S. 62 of the Act and that it wrongly presumed that about 844 votes were void. It was contended that no evidence had been led by the respondent to show as to which of the persons had voted twice because on a correct interpretation of S. 62 of the Act, only those votes would be regarded as void where a person has voted more than once. Lastly, it was submitted that before setting aside the election, the High Court ought to have come to a definite conclusion that reception of void votes had materially affected the election. This could only have been done by identifying and then excluding the void votes and recounting the valid votes but because the High Court had not done this, the election of the appellant could not have been set aside on the presumption that void votes had been received by him which had materially affected the results.

7. It was submitted by Mr. Mittal, learned counsel for the respondent that looking at the analysis of the votes polled at polling Station Nos. 5, 6, 21 and 28 it was evident that some persons must have voted more than once, as it was not in dispute that there was the aforesaid defect in the voters electoral rolls. He further contended that an application had been filed by the respondent before the High Court for inspection of the ballot papers and it was prayed therein that the record should be scrutinised in order to ascertain as to how many void votes had been accepted. This application was not allowed by the learned Judge, who also was not allow by the learned Judge, who also did not accept the request of the respondent's counsel, at the time of arguments, that the ballot papers should be summoned and the Registrar of the Court should be asked to examine them and give a report after excluding the avoid votes. The High Court did not adopt this course presumably because, it came to the conclusion that having regard to the narrow margin of victory and the large number of void votes which had been cast, the respondent had been able to establish that the election result was materially affected by the improper reception of void votes.

8. The only challenge to the election being on the ground that election had been materially affected because of reception of void votes, it is necessary to construe S. 62 of the Act which states as to which votes will be regarded as void. The said S.62 is as follows :

> "62 Right to vote-(1) No person who is not, and except as expressly provided by this Act, every person who is for the time-being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifictions referred to in S. 16 of the Representation of the People Act. 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void".

9. It is not in dispute that once the electoral rolls had become final, the validity of the same cannot be challenged in an Election petition. If however, it is found that the name of a person is recorded in more than one constituency or more than once in the same constituency, then S. 62(3) & (4) come into play. If the name of a person is included in more than one constituency, then Sub-sec. (3) of DS. 62 states that he shall not vote at a general election in more than one such constituency. If he votes at more than one constituency, then his vote in all the constituencies in which he has voted, shall be deemed to be void. Section 62(4) of the Act which is applicable in the present case provides that if the name of a person is included in the electoral roll in more than one place in the same constituency, then he shall not vote more than once but if he does so vote, all his votes in the constituency should be regarded as void. It is evident from the plain reading of the language of sub-secs. (3) or (4) of S. 62 that mere inclusion of the names of voters at more than one place would not ipso facto render all those votes as void. If the name of a voter is included at more than one place whether in more than one constituency or at more than one place in the same constituency, he has the right to choose as to where he may vote but this right can be exercised by him only once. The reason obviously is that every voter has only one vote and he has a right to vote only once and no more. If he chooses to vote at more than one place, it is only then the vote of that person, wherever he has voted, would be regarded as being void.

10. The High Court wrongly proceeded on the basis that merely because there was duplication of names in the voters" lists then all such votes without deciding whether those persons had even voted. The votes of only those persons would be void, as already observed, who had voted more than once.

11. While not disputing that there had been duplication of the voters' names in the electoral rolls, as has been indicated hereinabove, it was, however, submitted by the learned counsel for the appellant that the respondent did not identify, by leading evidence, as to which of the voters had voted more than once because it is only thereafter that their votes could be regarded as being void and eliminated from consideration. It is true that in the present case there is no specific identification of which of the voters have voted more than once. However, the facts speak for themselves e.g. in booth No. 5 total number of votes as per the electoral roll were 815 and out of this 750 voters cast their votes. Therefore, 65 of the registered voters did not cast their votes. The total number of defective votes i.e. where names of voters appeared in the electoral list of both polling stations 5 and 6, was 269. Assuming that 65 persons who did not cast their votes were those whose names had been entered more than once, or whose names had been duplicated, and by subtracting the said 65 number from the 269 defective votes, it is clear that at least 204 out of these 269 defective duplicator voters must have voted. Taking the case of booth Nos. 5 & 6 together, it would be safe to

conclude that at lest 204 voters must have voted more than once. Therefore, as far as booth Nos. 5 & 6 are concerned, 408 votes had to be excluded. This is a mathematical conclusion which the Court can safely arrive at on the basis of evidence available before it. A similar exercise with regard to the duplicate votes regarding polling station Nos. 21 & 28 also shows that at least 127 persons would have voted twice. Therefore 354 votes of polling station Nos. 21 & 28 combined would be void. On this basis, it would appear that about 862 votes would be regarded as void votes. We may here again mention that at the time of arguments, it was pointed out that perhaps the total number of defective votes mentioned by the High Court was not correct, but the difference was very minor and, therefore, we have proceeded for the purpose of deciding this appeal, on the basis of the figure of the defective votes indicated in the impugned judgment.

12. The mistake which had been committed by the High Court in the present case is in assuming that these 862 votes had materially affected the result of the election. In coming to this conclusion the High Court took into account what it termed as "the demonstrable trend and pattern of voting". The High Court overlooked the fact that apart from the appellant and the respondent, there were three other candidates who polled a total of 2203 votes. Before an election can be set aside there has to be a definite finding, based on evidence, to the effect that the reception of these 862 odd votes had materially affected the result of the election. As held by this Court in Vashit Narain Sharma v. Dev Chandra, (1955) 1SCR 509: (AIR 1956 SC 573), the words "the result of the election had been materially affected" in S. 100(1) (c) of the Act, 1951 indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes, in that case, would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate. Applying the same principle in the present case, once it is ascertained that the number of void votes which have been polled are more than the difference of votes polled by the returned candidate and the defeated candidate, then it has to be ascertained as to whether those void votes, which were polled and had been counted, if excluded from consideration would have materially affected the result of the election.

13. The respondent , in the present case, had been successful in showing, at least mathematically, that a large number of void votes had been polled. It is, however, not known as to in whose favour the void votes were cast. Once this stage had been reached where the Court was satisfied that large number of void votes had been counted, then the High Court ought to have examined the ballot papers and ascertained as to which specific votes were void and should then have excluded them from consideration and recounting should have been done thereafter. The respondent, apparently being conscious of this, had filed a miscellaneous application before the High Court contending that the ballot papers should be examined and scrutinised in order to find out the void votes which had been accepted and to ascertain as to how those said votes had affected the outcome of the election. The High Court chose not to pass any order on this application. The High Court has noted in its judgment that the learned counsel for the respondent had submitted on the conclusion of the recording of evidence that record of the ballot papers should be summoned and, in order to preserve the secrecy, the Registrar of the Court should be asked to submit his report on going through the ballot papers with regard to the casting of the void votes. The High Court, unfortunately, neither allowed the said application of the respondent nor accepted the said contention of the respondent's counsel.

14. Once, the High Court was convinced, and it was evident from the facts on record that a large number of void votes had been received and they could have affected the outcome of the election, then it was under a duty to have taken the next logical step which would have been to examine the

votes which had been cast, exclude the void votes and then recounted the valid votes in order to come to the conclusion whether the reception of the void votes had materially affected the result of the returned candidate. Without undertaking this exercise the High Court was wrong in coming to the conclusion that the election of the appellant had been materially affected and that the same should be set aside.

15. It appears to us that the course which was adopted in the case of Bashir Ahmad Magrey v. Ghulan Quadir Mir, (1977) 2 SCR 297: (AIR 1977 SC 231) is the one which requires to be followed. In that case, the election of the returned candidate had been set aside by the High Court after it had counted the votes which had been improperly rejected. When the appeal came up for hearing before this Court, an order was passed whereby the Registrar (Judicial) of this Court was deputed to inspect, in the presence of parties and their counsel, the 550 votes which were in question in that case and he was required to submit a report thereafter. After this exercise was undertaken, the Registrar (Judicial) submitted a report after examining ballot papers and it was found that the excess of votes validly polled in favour of the returned candidate over those of the respondent therein were 38. Accepting this report, this Court accepted the appeal and upheld the election of the returned candidate.

16. In our opinion, an exercise similar to the one which was carried out in Bashir Ahmad's case (AIR 1977 SC 231) (supra) should be undertaken, rather than setting aside the judgment and remanding the case to the High Court. In matters pertaining to elections, it is desirable that the disputes should be resolved as expeditiously as possible while, at the same time, ensuring the purity of the elections. We accordingly, direct the High Court to send to this Court all the ballot papers in respect of the Dimapur Constituency No. 1 the election of which was held to the Nagaland Legislative Assembly on 15-3-1993, depute the Registrar (Judicial) of this Court to make an inspection after notice to and in the presence of the parties and their counsel, of all the said ballot papers, identify the void votes which had been cast in respect of polling station Nos. 5,6,21 & 28 and to exclude the said void votes and then count the number of votes received by each of the five candidates. The report should be submitted to this Court by the Deputy Registrar within eight weeks. Appeal to be put up for formal disposal as soon as the report is ready. Order accordingly.