

Ganesh Nagorao Raut Dudhagaonkar

Vs

Rajani Shankarrao Satay

Civil Appeal No. 12571 of 1996

(CJI Dr. A. S. Anand, M. Srinivasan, M.B. Shah JJ)

09.12.1998

JUDGMENT

M.B. Shah, J. –

1. This appeal under Section 116-A of the Representation of the People Act, 1951 calls in question the judgment and order made by the High Court of Judicature at Bombay (Aurangabad Bench) dated 12th March, 1996. Since, the controversy in this appeal only centres around Issue No. 2, which reads thus :

"Whether the petitioner proves that the Returning Officer was in error in declaring 71 ballot papers, referred to in para 12 of the petition as exhausted and he should have taken in consideration the 3rd, 4th, 5th and 6th preference indicated in those ballot papers, allegedly casted in favour of the petitioner ?"

We need to refer only to such of the facts as are necessary for consideration of the findings recorded by the learned single Judge in the impugned order on that issue.

2. The Returning Officer declared the final list of contesting candidates on 26th May, 1994 after scrutinising the nomination papers, on the last date fixed for withdrawal of candidature. The election was held on 15th June, 1994. The counting of votes commenced on 17th June, 1994 in the morning and the result was declared on the same day. Respondent No. 1 was declared elected. There were in all 424 Councillors of the Municipal Council and Zilla Parishad who comprised the constituency for the election. As per the Conduct of Elections Rules, 1961, the quota for election is fixed by dividing total number of votes by two and adding one to it. The total number of votes being 424, the quota in the present case worked out to $212+1 = 213$. None of the contesting candidates secured the requisite quota of 213 votes and, therefore, none could be declared elected at the conclusion of the counting in the first round. Two candidates, i.e., respondents 3 and 4 herein, did not secure even a single preference vote and, therefore, they were excluded in the first round itself. Out of the remaining candidates, respondents 2, 5, 6 and 7 came to be excluded during the counting in the subsequent rounds. While respondent No. 1 was declared elected, the appellant was the unsuccessful candidate.

3. In the Election Petition challenging the election of the returned candidate, the plea raised on behalf of the appellant was that preferences recorded on the ballot papers in favour of the *excluded* candidates were also required to be counted in favour of the appellant and that had the same been so counted, the appellant would have been declared elected. The learned single Judge of the High Court did not agree and dismissed the election petition.

4. We have heard learned counsel for the parties.

5. The Conduct of Elections Rules 1961, provides for the manner of counting and in Rule 74, it lays down that the ballot papers should be arranged in parcels according to the first preference, recorded for each of the contesting candidate and that credit be given to the concerned candidate of the value of the ballot papers in his parcels. Rule 75(3) details the procedure when at the end of the counting no candidate can be declared elected having obtained the requisite quota. That sub-rule reads thus :

"Rule 75.(3) : If, at the end of any count, no candidate can be declared elected, the returning officer shall -

(a) exclude from the poll the candidate who up to that stage has been credited with the lowest value;

(b) examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each such sub-parcel and credit it to the candidate for whom such preference is recorded, transfer the sub-parcel to that candidate, and make a separate sub-parcel of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota."

6. The learned single Judge of the High Court found that the Returning Officer has transferred 30 votes to the appellant and respondent No. 1 on the basis of the next available preferences recorded on the unexhausted ballot papers. Rest of the ballot papers were found exhausted, meaning thereby that there was no preference cast in favour of any of the continuing candidates. the break-up of the transferred votes was that the appellant secured 21 votes while respondent No. 1 secured 9 votes, out of the transferred votes on the unexhausted ballot papers. The learned single Judge dealing with this aspect of the case observed :

"Firstly, whenever a second preference was given in favour of the petitioner, those votes (21 in Nos.) have already been transferred to the petitioner. 9 votes were transferred to the Respondent No. 3. Other ballot papers become exhausted ballot papers since further preference was not in favour of any continuing candidates or there was no further preference cast at all. It is not the case of petitioner that second and further preference in these ballot papers was given to any continuing candidate, which obviously cannot be since at that time only election petitioner and returned candidate were continuing candidates."

7. The observations made by the learned single Judge of the High Court are completely in accord with the scheme of the rules contained in Chapter 7 of the Conduct of Elections Rules, 1961 and particularly of Rule 75(3) read with Rules 71(1) and 71(8) of the Conduct of Elections Rules which define "exhausted" and "unexhausted" ballot papers. It is only such a ballot paper which can be transferred, which has not been exhausted. Where a ballot paper has already been exhausted since either further preference was not in favour of any continuing candidate or there was no further preference cast at all, any preference recorded on such ballot papers could not be transferred to any candidate. The 71 votes which the appellant claims to get counted in his favour fell in that category

and were rightly declared as "exhausted" and were not counted in favour of any of the continuing candidates because preference recorded on those ballot papers was in favour of the eliminated candidates.

8. In *Dattatraya Eknath Lanke v. Returning Officer, Amravati and others*, AIR 1986 Bombay 354 dealing precisely with the scope of Rule 75(3) of the Conduct of Elections Rules, it was held by a learned single Judge of the Bombay High Court :

"Thus, a ballot paper on which further preference is recorded in favour of an eliminated candidate is also an exhausted paper and therefore becomes a non-transferable paper. Undoubtedly this involves wastage of additional preferences only due to unpredictable chance of some one being eliminated at a particular count, but that cannot be helped."

9. The above observations which were relied upon by the learned single Judge in the present case stand scrutiny and are based on a correct interpretation of Rule 75(3) of the Conduct of Elections Rules. The learned single Judge of the High Court, therefore, neither fell in any error nor misinterpreted Rule 75(3) of the Conduct of Elections Rules to find that counting had been properly done and 71 votes rightly excluded from being counted in favour of the appellant. Despite a vigorous attempt made by Mr. A.M. Khanwilkar, learned counsel for the appellant, we are not persuaded to take a contrary view.

10. This appeal, therefore, fails and is dismissed. There shall, however, be no order as to costs insofar as this appeal is concerned.