T. H. Musthaffa

Vs

M.P. Varghese and Others

Civil Appeal No. 5036 of 1998

(CJI Dr A. S. Anand, S. Rajendra Babu, R. C. Lahoti JJ)

23.09.1999

JUDGMENT

RAJENDRA BABU, J.:-

1. Elections were held on 27-4-1996 to the Kerala Legislative Assembly. The Appellant and Respondents 1 to 19 contested in the said election from 78, Kunnathunadu Assembly Constituency. Counting took place on 8-5-1996 and 9-5-1996. The appellant secured 49,974 votes while Respondent 1 secured 50.034 votes. Thus Respondent 1 was declared elected by a margin of 60 voted. Before the declaration of the result the appellant made and application for re-count on several grounds. The Returning Officer rejected the said application. The appellant filed another application styled as "review application" which was also rejected. The appellant, thereafter, filed an election petition before the High court of Kerala. The appellant, thereafter, filed an election petition before the High Court of Kerala. The High Court dismissed the said election petition. Hence, this appeal.

2. The principal allegations raised by the appellant in the election petition are as follows:

> (i) 36 persons (a list of names and other particulars of the said 36 persons was produced as Annexure 5 to the election petition) voted twice in either the same constituency of Kunnathunadu or other constituencies. The votes cast by them are void under Section 62(3) and (4) of the Act. All the 36 persons have voted for the respondent.
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> (ii) 12 persons (whose names and particulars were given in Annexure 6) are not voters of this constituency, their names having been deleted from the final voters' list but they have voted in Polling Stations 195 and 158 taking advantage of the fact that their names found a place in the original voters' list.
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> (iv) Annexure 7 is a list of names, addresses etc. of 56 persons who are employees of Kitex Ltd., an industrial unit in the constituency and who are voters in Booths 194 195 etc. In the constituency. They are natives of faraway places and were not in Kunnathunadu Constituency during the election including the polling day so as to cast their voted due to the long day off of the factory. However their votes are seen as cast by impersonation. These voters are invalid under Section 62(1) of the Act.
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> (v) About 300 votes are vast in violation of Rules 39(2)(b) and 56(2)(b) of the Conduct of Election Rules, 1961, inasmuch as in the polling booths at Puttannoor School and Varikoli school etc. in Vadavucode-Puthencruz Panchayat about 300

voters voted using an instrument other than the arrow cross mark stamp prescribed by the Election commission. The said votes are invalid.

(vi) 5633 votes were wrongly declared invalid, majority of which were cast in favour of the election petitioner.

(vii) There are various other irregularities in mixing, sorting and bundling of the ballot papers contrary to rules and instructions issued by the Election Commission.

3. Respondent 1 in the written statement raised certain preliminary points as to non-compliance with Section 81(3) of the Representation of the People Act, 1951 (hereinafter referred to as "the RP Act"). He also raised objection as to the manner in which the signature has been put and the verification as to the petition in violation of Sections 83(I) and (2) of the RP Act. He contended that the entire counting process had been conducted legally, regularly and correctly. He denied the allegation that the Counting Supervisor and the counting Assistants were pro-leftminded and indulged in manipulations. He contended that the allegation that the Counting Supervisor and the Counting Assistants sere pro-leftminded and indulged in centers were adequate with full opportunity to the counting agents of candidates to observe or scrupulously watch the scrutiny of the ballot papers. He claimed that the ballot papers in favour of the candidates were accurately bundled with 25 ballots in each of the bundles and not even a single ballot paper of the appellant was bundled with that of the respondent. He contended that test checking had been done by the Returning Officer in accordance with the instructions in the Handbook. He asserted that here was no impersonation in voting, or any of them had voted twice either in Kunnathunadu Consfituecy or elsewhere.

4. On these pleadings 17 issues have raised. As regards Issues 1,2, 3, 4, and 5 pertaining pertaining to preliminary points raised by Respondent 1, the High 1, the High court held that the election petition was not liable to be rejected r for non-compliance with Section 86(1) of the RP Act and the parties were directed to go for trial.

5. 67 witnesses were examined on behalf of the petitioners, while on behalf of Respondent 1, he examined himself as sole witness. The learned Judge in the course of order recorded as under:

> "Issues 7, 8, 9, 10, 11, 12, and 13.- Counsel for the petitioner, Shri K. Ram Kumar Fairly conceded that the petitioner was not successful in his attempt to prove that more than 60 votes were invalid on account of double voting, voting by ineligible persons, impersonation, etc. and hence he is not pressing those issued. According to him, at the most the invalid voted would come to only 54 and as it has not reached 60, the margin by which the first respondent was declared elected, there is no useful purpose in considering the points which arise for consideration on the basis of the above issues. So, recording the submission, the issues are answered against the petitioner."

6. Thus the principal issue that remains for consideration is Issue 6 and other Issues 14 to 17 are consequential to the finding to be recorded on Issue 6. The averments contained in the election petition are as follows:

> "2… Upon such announcement the petitioner who was present at the counting station submitted a petition requesting a re-counting on the basis of several allegations of manipulations in the sorting and bundling of votes in the wrong acceptance of invalid

votes polled for the petitioner as invalid, irregularities committed by the counting supervisors and counting Assistants the absence of test checking of the bundles of 25 of all the candidates and several several other grounds which has caused error in the announcement of the number of votes of each candidate….

4. …. In several instances votes which were invalid as per the instructions issued by the Election Commission in a pamphlet showing illustrative cases of valid and invalid papers were honoured in the breach to favour the 1st respondent."

7. In the course of the trial evidence was adduced to the effect that the instrument supplied by Election Commission for the purpose of excising the preference of a voter is the arrow cross mark rubber stamp in all polling stations but in two of the polling stations at Varikoli School and Puttannoor School, votes had been cast by using the instrument meant for the poling officials for making distinguishing mark of the polling station. Thus a wrong instrument had been used in these two polling stations. The Returning officer (PW 46) admitted in his deposition before the High court that the Polling Officers had, by mistake, handed over the wrong seal to the voters for exercising their preference. Reliance was placed on "A Pamphlet Showing Illustrations Cases of Valid and Invalid Postal and Ordinary Ballot Papers" issued by the Election Commission of India in 1996. It is indicated there in as Illustrations II and III in respect of "Ordinary Ballot Papers Invalid Cases" at pp. 24 and 25 to treat a ballot paper containing a mark not made with instrument supplied to be treated as "invalid" and to be put in the "doubtful" bundle by the counting party and rejected by the counting party and rejected by the Returning Officer.

8. The learned trial Judge adverted to the pleadings of the case and notices that there is no plain the entire election petition as using a wrong instrument for the purpose of expressing preference by the voters or that an instrument to be used for distinguishing mark of the polling stating had been used instead of arrow cross mark rubber stamp, nor was any reference made to the pamphlet issued by the Election commission thereby, putting the respondent on notice thereof. The learned Judges, therefore, found that the pleading was insufficient in the election petition to base a claim to attract Rules 39(2)(b) and 56(2)(b) of the Conduct of Election Rules, 1961 (for short " the rules"). In the absence of any pleading regarding the violation of Rules39(2)(b) and 56(2)(b) of the rules in the course of the election petition with reference to the facts alleged therein, no issues could arise on that aspect of the matter.

9. The learned counsel for the appellant submitted that the claim for re -count was base on two grounds. Firstly violation of Rules 39(2)(b) and 56(2)(b) inasmuch as in the polling booths at Varikoli School and Puttannor School instrument other than the arrow cross mark rubber stamp had not (sic) been used contrary to the one prescribed by the Election commission and secondly, there are various other irregularities such as wrong miming, sorting and bundling of ballot papers.

10. The pleading reside in the case does not refer to either Rule 39 or Rule 56 of the rules much less to the "pamphlet showing Illustrative Cases of Valid and Invalid Postal and Ordinary Ballot Papers" issued by the Election commission of India, nor are any specific allegations found in the case. The allegation made in the course of the petition is that there is wrong acceptance of invalid votes polled for respondent 1. It is not made clear as to how mane votes are liable to be rejected for using wrong instrument by the voters for expressing their preference. There is no further indication as to how may of such votes had been polled in favour of Respondent 1 so as to materially affect the result of the election. In the absence of such plea the learned Judge could not have granted the relief of re-count. Therefore, the view taken by the High Court that the pleadings are insufficient to order re-

count is perfectly in order,. So far as the evidence that had been adduced in the case is concerned, it need not have been looked at by the learned Judged in the absence of appropriate pleadings in that regard. However Shri E.M.S. Anam, the learned counsel for the appellant submitted that the fact that votes in the two polling stations at Varikoli School and Puttannoor School had been cast by using a wrong instrument was not in dispute and the evidence of the Returning officer clearly indicted the use of the wrong instrument in the two polling stations which amounted to an admission in the case and, therefore, even in the absence of an appropriate pleading in that regard the evidence could be looked at. We fail to appreciate this argument. Unless the appellant had put forth his case in the pleading and the respondents are put on notice, the respondents cannot make an admission at all and there is no such admission in the course of the pleadings. If the pleadings did not contain the necessary foundation for raising an appropriate issue, the same cannot go to trial. Any amount of evidence in that regard, however excellent the same may be, will be futile. Therefore, the learned counsel justified in making the said submission and the same is rejected. The learned Judge noticed that the appellant, thought had raised objection in this regard in the application for re-count, did not reiterate the same in second application much less any averment is made in the petition. The learned judge held, in our view, rightly that there is no pleading in this regard and the evidence adduced cannot be looked into as no issue thereto arises.

11. The learned Judge did not, however, rest his decision on that basis but examined the scope of Rules 39(2)(b) and 56(2)(b) of the rules. After adverting to the decisions in *HariVishu Kamath v. Syed Ahmed Ishaque* (AIR 1955 SC 233) *Manni Lal v. Parmai Lal*((1970 2 SCC 462 : 1970 SCC (Cri) 487 : AIR 1971 SCC 330) and *Era Sezhiyan v. T.R. Balu* (1990 Supp SCC 22) the learned Judge came to the conclusion that the rules are mandatory and held that when the marking of the ballot papers is made by an instrument other than the one supplied for the purpose it will invalidate the ballot papers. While considering the question whether the marking of the ballots in this case is made otherwise than by the instrument supplied for the purpose, the learned judge took the view that Rules 39(2)(b) and 56(2)(b) of the rules should be read with clause 10-F of the "Handbook for Candidates" under the heading "Marking System of Voting" and concluded that a voter has no control over the instrument supplied to him and when a wrong instrument is handed over to him by the Polling Officer, he will naturally exercise his preference with the aid of that instrument and in such case he cannot be found fault with. The learned judge made it clear that the present is not a case where a voter had made use of an instrument which was not supplied to him for the purpose of marking his preference, but one where present is not a case where a voter had made use of an instrument which was not supplied to him for the purpose of marking his preference, but one where preference was exercised with the instrument supplied to him for the purpose and, therefore, there is not violation of the rules in making the ballot papers.

12. The learned Judge also took note of the fact that the evidence of the Returning officer (PW 46) discloses that in respect of the two polling stations in question wrong makings were done with wrong instrument in the votes polled in favour of almost all the candidates and such mistake was on the part of the Polling Officer in handing over a wrong instrument for marking a vote. All the candidates had taken advantage of votes having been abjection. There fore, he took those votes to be valid. On this analysis of the evidence the learned judge held that no objection was taken to the same at the time of counting or even subsequently when the appellant filed second petition for re-counting.

13. Shri E.M.S. Anam, learned counsel for appellant relied on the observations of this court in *Ram Autar Singh Bhadauria v. Ram Gopal Singh* ((1976) 1 SCC 43 : (1976) 1 SCR 191) to the effect that once it is established that the fault specified in Rule 56(2)(a) or (b) of the rules has been committed,

there is no option left with the Returning Officer but to reject the faulty ballot paper. He further submitted that even if such defect is caused by mistake or failure of the Polling Officer or members off staff, the Returning Officer was bound to reject the ballot papers on the ground of such defect. It is no doubt true that at the first blush one is impresses with this argument appearing to derive support from the observation made in that decision. However, a closer scrutiny of the said decision will unveil the spell. The facts in that case reveal tat 41 ballot papers were alleged to have been rejected on the ground that the elector's choice was expressed thought a worrying instrument. Dealing with this aspect of the matter, this Court observed that the Court had to apply its mind as to whether these facts were sufficient to attract Rule 56(2)(b) of the rules and to do so had to consider two question:

> (i) Was the stamping instrument with which these 41 electors "marked" the ballot papers, given to them by the Presiding Officer or any member of his Staff?
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> (ii) If so, could these ballot papers be deemed to have been marked with "the instrument supplied for the purpose" within the contemplation of Rules 39(2)(b) and 56(2)(b)?

Although certain observations were made in regard to the mandatory nature of the provisions of rules 39 and 56(2)(b), still ultimately this Court remanded the matter for consideration of these two questions and stated that if both these issues are answered in the affirmative, then and only then, the trial judge may proceed to inspection and re-count of these 41 voted referred to earlier. Therefore, the contention put forth on behalf of the appellant in this case that the mare fact of certain ballot papers having been marked with the wrong instrument would not by itself lead to the conclusion that such ballot papers are liable to be rejected unless the two question raised in *Ram Autar*[4] which we have adverted to above are answered.

14. On the question whether the stamping instrument with which the ballot papers are marked in the two polling stations was given by the Polling Officer or any member of his staff, the answer is given by the learned judge in the affirmative, on analysis of the evidence and particularly from what has been stated by the Returning officer who was examined in the case. Therefore, the learned Judge proceeded to consider the next question whether such instrument could have been deemed to have been supplied for the purpose of marking ballot papers. The learned Judge took the view on the admission made by the Returning Officer that the said instrument was supplied to the electors for that purpose by the officers by mistake. This question again arose for consideration in the decision of this Court in *Era Sezhiyan v. T.R. Balu*[3] in which this court again took the view that if the instrument supplied to the voters, though mistakenly, was other than the one intended for marking the ballot papers, the instrument must be deemed to have been supplied by the officers concerned for the purpose of marking the ballot papers. If we read the relevant Rules 39 and 56(2)(b) of the rules with the instructions given at clause 10-F in the Handbook for Candidates it will be clear that the voter will record his vote by stamping a mark on the ballot paper with the rubber stamped supplied to him by one of the Polling Officer. In this case admittedly, it is the Polling Officer who had supplying the instrument for marking the ballot papers.

15. The next argument advanced by the learned counsel for the appellant is that the intention of Rules 39 and 56 the rules is to rules is to maintain secrecy in voting and when the ballot papers are marked with a distinguishing mark by the voters it would certainly be possible to identify the voters. If the appellant canteens that about 100 voters cast their votes using the wrong instrument, Respondent 1 would put that figure at 300 in the two polling station. The appellant and Respondent

1 appear to have made only a guesswork and have not laid any foundation in the pleadings or by way of evidence to draw such an inference. On the other hand, the Returning officer is categorical in his testimony that almost all the voters in the two polling stations marked their votes using the wrong instrument. If all the voters ion the two polling stations had marked in the manner stated by the Returning Officer, and we have no reason to doubt the correctness of his statement, the whole case, as sought to be set up by the ap0pellant as to violation of secrecy in voting, falls to the ground. Thus, none of the arguments raised on behalf of the appellant base on Rules 39 and 56 the rules are tenable and they stand rejected.

16. After adverting to various principles as enunciated by this Court in various decisions regarding re-count, the learned Judges examined the case put forth by the appellant as to the various irregularities committed in the course of counting. The first irregularity pointed out is non-observance of the requirement that 5 per cent of the total number of bundles of valid ballot papers of different contesting candidates should be counted again at the table of the Returning Officer by making selection of 5 per cent of ballot papers in such a manner that it contains bundles pertaining to different contesting such a manner that it contains bundles pertaining to different contrary. The learned judge believed him and held that test checking/random checking cannot be stated to have been not done. He held that the averments in pleadings or evidence as to other irregularities alleged regarding miming, sorting and bundling of ballots papers were very vague and no weight could be attached to the same. Thus, the High Court concluded that the allegations contained in the election petition and evidence adduced were not sufficient to warrant re-count or inspection of he ballot papers.

17. The learned counsel for the appellant in spite of his strenuous efforts is unable to point out any error in the reasoning or conclusion in the judgement under appeal as to laying any foundation for re-count. Mere smallness of margin of votes by which the election is decided is irrelevant. Of course, in a given case on the totality of pleadings and evidence, smallness of margin may gain importance but not in this case. The pleadings do not indicate the errors made either with reference to the number of ballot papers or table or round in which such mistakes occurred. Except making vague statements, the appellant has neither pleaded nor given any testimony trough witnesses. Hence the appeal is liable to be dismissed.

18. In the result, this appeal stands dismissed but in the circumstances of the case the parties shall bear their respective costs in this appeal.