

## **SUPREME COURT OF INDIA**

Jaidrath Singh

Vs.

Jivendra Kumar

(Ruma Pal and S.P.Bharucha JJ.)

15.02.2000

### **JUDGMENT**

#### **BHARUCHA, J.**

The issue in the appeals and in the special leave petition is the correctness of the result, as declared, of the election to the post of Adhyaksha/ President of the Zila Parishad, Shahjahanpur. The election was held under the provisions of the U.P. Zila Parishads (Election of Adhyaksha and Up-Adhyaksha and Settlement of Election Disputes) Rules, 1963 framed under the provisions of Section 237 of the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961. Rule 26 of the said Rules states that Schedule II thereof sets out the instructions for determining the result of elections.

The candidates at the concerned election, held on 22nd May, 1995, were Jivendra, Manvendra and Smt. Gayatri Verma.

There were 31 electors, all of whom voted. Jivendra got 10 first preference votes, Manvendra got 14 first preference votes and Gayatri got 7 first preference votes. By reason of the provisions of Schedule II to the said Rules the quota for securing a result was 16, which none of the three candidates secured. Gayatri, having secured the lowest number of first preference votes, was eliminated and the second preference votes on her ballot papers were considered. Jivendra got 5 more votes and Manvendra got 1 more. This meant that the number of votes secured on the second count by Jivendra and Manvendra was 15 each.

Accordingly, the Returning Officer decided to draw lots, and by reason thereof Jivendra was declared elected.

Manvendra filed an election petition challenging Jivendras election. The election petition succeeded and appeals therefrom were filed before the High Court. The maintainability of the appeals was challenged in proceedings with which we are not concerned. Ultimately, the High Court was required to hear and decide the appeals on their merits.

The High Court, on a construction of Schedule II, noted that neither Jivendra nor Manvendra had, on the second count, secured the quota of 16. It held that no lots could have been drawn; also that Manvendra could not be declared as elected on the basis that he had secured a larger number of first preference votes for the reason that he had been unable to secure the mandatory quota. Accordingly, the High Court declared that a casual vacancy in the office of the Adhyaksh had been created.

What is called for is an analysis of Schedule II. The relevant portion thereof may be quoted : 2.

Ascertain the number of first preference votes secured by each candidate and credit him with that number.

3. Add up the numbers so credited to all the candidates, divide the total by two and add one to the quotient disregarding any remainder. The resulting number is the quota sufficient to secure the return of candidates at the election.

4(1). If there are only two contesting candidates then:

(a) If one candidate gets larger number of first preference votes than the other, declare the former as elected; or (b) If both the candidates get equal number of first preference votes, determine the result by drawing of lots.

Exclude the candidate on whom the lot falls and declare the other candidates as elected.

(2). If there are more than two candidates, then- (a) If one of them is found to secure first preference votes equal to or more than the quota determined under Instruction no.3, declare him as elected; or (b) If none of them secure first preference votes equal to or more than the quota aforesaid proceed according to the instruction hereinafter taking into consideration second and subsequent preferences as may be necessary.

5. If at the end of the first or any subsequent count the total number of votes credited to any candidate is equal to or greater than the quota or there is only one continuing candidate, that candidate is declared elected.

6. If at the end of any count, no candidate can be declared elected :

(a) exclude the candidate who up to that stage has been credited with the lowest number of votes;

(b) examine all the ballot papers in his parcel and sub-parcel, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of votes 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 candidate has, after such transfer and credit, secured the quota.

If, when a candidate has to be excluded under clause (a) above, two or more candidates have been credited with the same number of votes and stand lowest on the poll exclude that candidate who had secured the lowest number of first preference votes and if that number also was the same in the case of two or more candidates decide by lot which of them shall be excluded.

All the sub-parcels of exhausted paper referred to in clause (b) above shall be set apart as finally dealt with and the vote recorded thereon shall not thereafter be taken into account.

Schedule II requires that each candidate shall be credited with the number of first preference votes that are secured by him. The total number of first preference votes secured by all the candidates shall be added, the aggregate thereof divided by two and the resultant figure increased by one, disregarding any fraction. The resultant figure is the quota sufficient to secure the return of candidates at the election; that is to say that a candidate who secures votes equal to or larger than the quota shall be declared elected.

Now, if there are only two candidates at the election, the candidate who gets the larger number of first preference votes is to be declared elected. It is only if the two candidates get an equal number of first preference votes that the result is to be determined by drawing of lots.

If there are more than two candidates at the election and one of them secures enough first preference votes to meet the quota, he shall be declared elected. If none of the candidates secures first preference votes equal to the quota then the candidate who has secured the lowest number of first preference votes shall be eliminated. His ballot papers shall then to be examined for second preference votes and such second preference votes shall be credited to the concerned candidates. It shall then be seen whether any candidate has secured the quota and, if so, he shall be declared elected. If not, the process of exclusion and addition of votes on his ballot papers shall be continued.

When a candidate has to be excluded and two or more candidates have been credited with the same number of votes and stand lowest, that candidate shall be eliminated who has secured the lowest number of first preference votes and should that number also be the same in the case of the other candidate, a lot shall be drawn to determine which of them is to be excluded.

There is a general provision in paragraph (5) of the Schedule which requires the Returning Officer to check at the end of the first or any subsequent count the total number of votes credited to each of the candidates; if any one of them secures the quota he shall be declared elected.

It also provides that if at the end of any subsequent count there is only one continuing candidate, that candidate shall be declared elected.

The first question, therefore, is whether for the purposes of being elected every candidate must secure the quota. Where there are only two candidates, the quota plays no part. Paragraph (4) of the Schedule states that the candidate who secures more first preference votes than the other shall be declared elected, and where both get an equal number of first preference votes lots shall be drawn. The quota plays a part when there are more than two candidates.

In that event successive counts shall be held until either a candidate secures the quota or only one candidate remains.

In the case before us, there were three candidates so that the quota was relevant. The first preference votes were cast thus : 14 in favour of Manvendra, 10 in favour of Jivendra and 7 in favour of Gayatri, aggregating to 31. The quota had to arrived at thus:  $31/2 + 1 = 16$  (disregarding the fraction). None of the three candidates secured 16 first preference votes. Gayatri, having secured the least number of first preference votes, was eliminated and the second preference votes on her ballot papers were scrutinised. Manvendra secured 1 and Jivendra secured 5 second preference votes. Their tally on the second count, therefore, was equal: 15 votes each. Neither of them had secured the quota.

There is no provision in the Schedule to meet a situation such as this.

In the Memorandum of Appeal reference has been made to three judgments of the Allahabad High Court and it has been submitted that these cases hold, relying upon paragraph (6) of the Schedule, that where both continuing candidates secure an equal number of votes on the second count and one of them had secured a lesser number of first preference votes, he should be eliminated and the candidate who had secured the higher number of first preference votes should be declared elected.

The first of these judgments of the Allahabad High Court, all delivered by learned Single Judges, is in the case of Nanak Chand vs. Vachaspati and another [1968(66) Allahabad Law Journal 29]. The judgment refers to Rule 26 of the Rules, which lays down that after all the valid ballot papers have been arranged in parcels according to the first preference recorded for each candidate, the Returning Officer shall proceed to determine the result of the voting in accordance with the instructions contained in the Schedule. The Schedule, the learned Judge notes, makes no provision as to how the result should be declared where the last two candidates after exclusion of others are found to have received an equal number of votes, counting both the first and the second preference votes together. The Schedule does make provision, however, for a situation, where it is found that there are two or more candidates receiving the lowest number of votes; in that event paragraph (6) of the Schedule provides that that candidate shall be excluded who had secured the lower number of first preference votes. For this reason the learned Judge finds that preference is to be given to first preference votes.

He says:

It is only when there is equality of first preference votes that the exclusion of a candidate is determined by drawing of lot. Rule 26 also refers to first preference. I am thus of opinion that in the election of the Adhyaksha and Up-Adhyaksha the drawing of lot shall not ordinarily determine the result of the election in case two candidates are found to have secured the same number of votes. The rule adopted shall be that out of the two candidates securing the same number of votes, the one who secured greater number of first preference votes is to be declared elected; but if they secured not only the same number of votes but also the same number of first preference votes, the lot shall determine the candidate to be excluded, in other words, the candidate not drawing the lot shall be declared to have been elected.

The judgment in Jagat Singh vs. Dharam Pal Singh [1984(82) Allahabad Law Journal 859] states:

There being a variance in the number of first preference votes secured by the appellant on the one hand and the respondent No.1 on the other, that becomes, in my view, decisive in the ultimate analysis of the prescribed manner of counting for the purpose of being declared elected or the result being determined.

The judgment holds that paragraph (6) of the Schedule clearly envisages the determination of the result on the basis of the strength of first preference votes where there is equality of votes in favour of the two continuing candidates on taking their second preference votes into account. The last judgment of the Allahabad High Court on the point is in Genda Singh vs. Distt. Judge, Aligarh and others [1985(83) Allahabad Law Journal 436] and it follows the judgment in Jagat Singhs case (supra).

We find some difficulty in reading paragraph 6 of the Schedule in the manner in which it has been done by the learned Judges of the Allahabad High Court in the cases aforementioned.

Paragraph (6) of the Schedule can, in any event, not apply to facts such as those of the case in hand for the simple reason that under the provisions of that paragraph only a candidate who has secured the quota can be declared elected. To use as illustration the votes secured in this case, even if, on the second count, Jivendra Kumar was to be excluded by reason of the fact that he had secured 10 first preference votes as against Manvendras 14 first preference votes, Manvendra could not be declared elected because he had not secured the quota of 16. In our view, therefore, the High Court was right in holding that Manvendra could not be declared elected.

The provision in paragraph (4) for the drawing of lots operates only when both candidates get an equal number of first preference votes. The provision in paragraph (6) for the drawing of lots is applicable only to determine which out of two or more candidates who have secured the same number of votes at a count subsequent to the first count shall be eliminated; if these candidates happen to have secured the same number of first preference votes it shall be decided by lots which of them is to be eliminated. The instructions to the Returning Officer in the Schedule are detailed and he is obliged by Rule 26 to follow them. They tell him when he may resort to the drawing of lots but the contingency of the two continuing candidates having the same number of votes, counting both first and second preference votes, is not covered thereby. No resort to the drawing of lots could have been made in the absence of an instruction in that behalf in the Schedule (see *University of Poona & Ors. vs. Shankar Narhar Ageshe & Ors.*, (1971) Supp.

S.C.R. 597). We are of the opinion, in the circumstances, that the Returning Officer was not entitled to draw lots between Jivendra and Manvendra. The High Court was, therefore, right in holding that the election of Jivendra by the draw of lots was invalid.

Accordingly, the declaration of the High Court that there was a vacancy in the office of the Adhyaksh was justified.

The appeals and the special leave petition are dismissed.

No order as to costs.