

SUPREME COURT OF INDIA

P.H. Pujar

Vs.

Dr. Kanthi Rajashekhar Kidiyappa

(S Bharucha, Y Sabharwal and B Kumar JJ.)

07.08.2001

ORDER

Y.K. Sabharwal, J.

1. The appellant was elected as a member of Karnataka Legislative Assembly. His election has been called in question by respondent No. 1 who was defeated by a margin of 138 votes. In the petition filed by respondent No. 1 in the High Court under Section 81 of the *Representation of the People Act, 1951* (for short, the 'Act'), a declaration was sought that the election of the appellant was void on the grounds of improper reception, refusal or rejection of votes as also for non-compliance of the provisions of the Act, the Rules and the orders made thereunder as set out in sub-clauses (iii) and (iv) of clause (d) of sub-section (1) of Section 100 of the Act.

2. In all, 88,353 votes were polled. At the final counting, it was found that the appellant had secured 40,418 votes and the election petitioner (respondent No. 1 herein) had secured 40,280 votes. The ballot papers rejected as invalid were 3,872. According to respondent No. 1, 59 ballot papers were also found to be missing.

3. The counting of the votes was conducted in two halls which were adjacent to each other. The Returning Officer T.B. Koli was in charge of Hall No. 1 whereas Additional Assistant Returning Officer N.P. Patil was in charge of Hall No. 2. They have examined by the High Court as PW-7 as PW-8 respectively. One of the allegations of respondent No. 1 in the election petition is that the number of ballot papers rejected could have been counted in his favour and that his counting agents were not provided with appropriate opportunity to inspect the ballot papers that had been rejected by the Returning Officer. The following issues were framed:

"(I) Whether the Returning Officer had failed to make entries of the total number of ballot papers found in the boxes brought from the polling stations in Part II of Form No. 16 before the counting was commenced, under Rules 55-B of the Conduct of Elections Rules, 1961, and the entries were straightaway made in Form No. 20, declaring the elections result?"

(II) Whether it is a fact that in total, 59 votes were found to be missing at the find counting without any cogent explanation for the same?

(III) Whether, the petitioner proves that the Returning officer had rejected 3,872 ballot papers without affording a reasonable opportunity of inspection to the counting agents of the petitioner as provided under Rule 56-B of the Conduct of Election Rules, 1961?

(IV) If the answer to Issue No. III is found to be in the affirmative, then whether the rejected ballot papers are permitted to be inspected by the petitioner and the respondents for determinations as to whether rejection was proper, and if not, then the ballot papers found to be in order have to be taken into account and for whose benefit?

(V) Whether the petitioner proves that the counting of the votes was not done in accordance with the Rules?

(VI) whether any of the grounds pleaded by the petitioner, if proved, can be held to have materially affected the impugned elections so as to declare the election of the 1st respondent to be void?"

4. The High Court has answered Issue No. 1 in favour of the appellant and other issues against him. The election of the appellant has been set aside by the impugned judgment. The declaration of election has been held to be void and the High Court has directed the Returning Officer to recount ballot papers after properly scrutinizing the same and then declare the result of the election by following the mandatory provisions of law and the directions/instructions issued by the Election Commission.

5. The returned candidate is in appeal before us. During the pendency of the appeal, the operation of the impugned judgment and order has been stayed subject to the condition that the appellant may participate in the proceedings of the Assembly but he will not be entitled to vote or any resolution or bill.

6. One of the grievance of respondent No. 1 as set out in the election petition was that 3,872 ballot papers were illegally rejected as invalid by the Returning Officer though number of ballot papers could have been counted in his favour and further that his counting agents were not provided with opportunity to inspect the ballot papers which were rejected by the Returning officer. On appreciation of the evidence, the High Court has observed that the Additional Assistant Returning Officer (PW-8) according to his own statement had rejected all doubtful ballot papers where he found Swastik mark to be less than 50% in the candidate area. The High Court has concluded that clearly the Returning Officer had rejected even such doubtful ballot papers as invalid where they had possibly found faint undecipherable thump-impression or faint smudge impression on the ballot papers left inadvertently by the elector. Further observing that the Assistant Returning Officer (PW-8) had rejected all doubtful ballot papers where Swastik mark was found to be less than 50% in the candidate area, the High

Court held that the Election Commission had clearly directed that the ballot paper should not be rejected only on the ground that the mark is only partially within the column of one candidate and the rest of the mark is in blank area which has been referred to as the shaded area by the Returning Officer in his deposition. The rejection was held to be wrong.

7. Paragraph 24(m) of Chapter XIV-B of the Hand Book for Returning Officer issued by the Election Commission provides not to reject any ballot paper simply because "there is a faint undecipherable thumb-impression or faint smudge impression on the ballot paper left inadvertently by the elector on the ballot paper while handling it because of the presence of some ink on his thumb which was put thereon for the purpose of obtaining his thumb-impression on the counterfoil of the ballot paper'. The second proviso to sub-rule (2) of Rule 56B of the Conduct of Election Rules stipulates that : "Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or make more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked". Thus, clearly the main object seems to be to find the intention of the voter and where the intention of the voter to vote for a particular candidate is evident from the way the ballot paper is marked by him, it shall not be rejected merely on the ground stated in the aforequoted proviso.

8. We have heard Mr. Venugopal, learned counsel for the appellant and find no infirmity in the conclusion drawn by the High Court that infirmities have been committed by the Returning Officer in taking decision in respect of the doubtful ballot papers. The decision on the doubtful ballot papers had been taken by the two Returning Officer supervising counting in the two counting halls. The Returning Officer T.B. Koli (PW-7) stated that if voting sheet was found partially on the candidate area and partially in the shaded area, then it was counted in favour of a particular candidate but the other Returning Officer, N.P. Patil (PW-8) adopted a different stand. He deposed that if more than 50% of the voting seal was found to be in the shaded area, such ballot papers were rejected but if more than 50% of the voting seal was found to be in column of a particular candidate, he allowed such vote to be counted in his favour. He deposed to have rejected the ballot papers on finding a voting seal less than 50% in the column of any candidate.

9. The election petitioner was defeated by margin of 138 votes. The total number of ballot papers declared invalid was 3,872. We agree with the conclusion of the High Court that infirmities were committed by the Returning Officer in this regard. The High Court has issued the following directions for recounting of the ballot papers:

"For the above reason, in order to do justice between the parties, recounting appears to be imperative. Accordingly, I set aside the declaration of election of the 1st respondent to the Karnataka Legislative Assembly Election from the 213 Bagalkot Assembly Constituency held on 5.9.1999 as void and direct the Returning Officer to recount the ballot papers after properly scrutinizing the same and then declare the result of the election by following the mandatory provisions of law and the directions/instructions issued by the Election Commission."

10. In our view, for the present only 3,872 ballot papers deserve to be recounted after proper scrutiny. After this exercise, it would be known as to how many of the said ballot papers deserve to be rejected and how many deserve to be accepted and in whose favour. Accordingly, we direct the Registrar of the Karnataka High Court to recount the 3,872 ballot papers in the presence of the counsel for the appellant and respondent No. 1, and/or presence of parties of their representative. The recounting shall be conducted as per the provisions of the relevant Rules, Regulations, Instructions and Guidelines. This exercise shall be completed and report sent to this Court by 30th November, 2001.

11. In view of the aforesaid directions, for the present, we are not expressing any opinion on the aspect of 59 missing ballot papers and on the legality of direction in the impugned judgment for recount of all ballot papers after proper scrutiny and also about the legality of direction declaring as void the declaration of election in question. These aspects, if necessary, would be examined on receipt of the report of the Registrar. The matter shall be listed a week after the receipt of the report from the Registrar of Karnataka High Court.