

SUPREME COURT OF INDIA

Markio Tado

Vs.

Takam Sorang

C.A.No.1539 of 2012

(Deepak Verma and H.L. Gokhale JJ.)

02.02.2012

JUDGEMENT

H.L. GOKHALE J.

1. Leave granted.

2. This appeal is directed against the Judgment and Order dated 14.9.2010 passed by a Learned Single Judge of Gauhati High Court in Misc. Case (E.P.) No. 05(AP)/2010 in Election Petition No. 01(AP)/2009 whereby the High Court has allowed the Interlocutory application filed by the first respondent herein, and directed the District Returning Officer, Distt. Papum Pare, Arunachal Pradesh to produce the record of Register of voters' counterfoils (in Form 17A) of 38 polling stations of 13-Itanagar (ST) Assembly Constituency in that State.

Brief facts leading to this appeal are as follows:-

3. The appellant and the respondent No. 1 herein contested the election to the Arunachal Pradesh Legislative Assembly from 20-Tali (ST) Assembly Constituency held in October 2009, wherein the appellant was declared elected, defeating his nearest rival respondent No. 1, by 2713 votes. Respondent No. 1 filed Election Petition No. 01/2009 to challenge the election of the appellant on the ground of corrupt practice of booth capturing. This 20-Tali (ST) Assembly Constituency consists of two circles viz. (i) Tali, and (ii) Pipsorang. Each of the circles was having 10 polling stations. The voting had taken place on 13.10.2009. It was alleged that on two polling stations viz. (i) 7-Roing and (ii) 2-Ruhi from circle Tali, boxes (containing EVMs) were illegally removed by the party workers

of the appellant, and votes in favour of the appellant were cast by a single hand. The common voters were not allowed to exercise their voting rights as they were threatened for their lives by the miscreants of the appellant. It was claimed that polling agents of the first respondent at these two polling stations jointly reported about the happenings in these polling stations on 15.10.2009 to the Assistant Returning Officer. It was alleged that such incidents also took place on 6 more polling stations. In para 9 of the petition, it was stated that, it was necessary to bring the EVMs and counter foils of Form 17A (register of voters) of these 8-polling stations (mentioned in para-7 of the petition) for forensic test and other examination etc. before the Hon'ble Court for proper adjudication of the case. It was stated that the votes received by the appellant in these 8 polling stations were 3763, and if they were deleted from the votes of appellant, the first respondent would be declared as elected. It was prayed that the records of (i) register of voters counterfoils (Form 17-A) of these 8 polling stations described in paragraph 7 of the petition, (ii) EVMs of these 8 polling stations, and (iii) records relating to 20 Tali (ST) Assembly Constituency be called, and appellant be directed to show cause as to why those votes cast by booth capturing in 8 polling stations in favour of the appellant should not be declared as illegal, and the election order dated 22.10.2009 be not declared as void, and why the respondent No. 1 should not be declared as elected candidate.

4. The appellant contested this petition by filing a Written Statement. He submitted that no unfair means were employed by him, or by his agents, and stated that the allegation of illegal practice adopted in 8 polling stations is completely false. He submitted that the election was conducted peacefully with free and fair means. The polling stations were guarded by police personnel who carried arms and ammunitions. There was no booth capturing or criminal intimidation at all. EVMs and voters' counterfoils were duly verified at the Receiving Centre, and there was no need to call for any of these documents, nor was there any question to declare the election void.

5. The learned Judge framed the necessary issues on 8th March, 2010 including as to whether the EVMs were illegally removed, whether any election offence of booth capturing and criminal intimidation was committed, whether the election was liable to be declared void under Section 100 of the Representation of the People Act, 1951 (Act of 1951 or the said Act for short) and whether the first respondent was entitled to be declared as duly elected?

6. Before the evidence could start, the first respondent filed Interlocutory Application No. 6/2010 in the said Election Petition on 29th March, 2010. In para 1 thereof he submitted as follows:-

1. That your applicants beg to state and submit that some thousand of voters of those 8 polling stations viz. (i) Giba, (ii) Tungmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5- Guchi, (vii) 8-Dotte, (viii) 2-Ruhi of 20 Tali (ST) Assembly Constituency have double entry in different 38 polling stations of 13-(ST) Itanagar Assembly Constituency. So far your applicant knowledge is concerned about 80% of the voters of 20-(ST) Tali Assembly Constituency from those 8 polling stations viz. (i) 6- Giba, (ii) 4-Tugnmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5-Guchi, (vii) 8-Dotte, (viii) 2-Ruhi have cast their votes at 13-(ST) Itanagar Assembly Constituency and not at 20-(ST) Tali Constituency.

Thereafter, he gave the list of 38 polling stations of Itanagar constituency. He claimed that the total number of such voters who had their names in those 38 polling stations was 1304. He, therefore, prayed that the record of register of voters counterfoils (Form 17-A) of the above 38 polling stations of 13- (ST) Itanagar Assembly Constituency from the District Returning Officer, Distt. Papum Pare be called.

7. The appellant opposed this application. The learned Single Judge noted the submissions on behalf of the respondent No. 1. He also noted the submissions on behalf of the appellant that there was no allegation of double enrollment, and no issue had been framed in this respect in the election petition, and therefore the application was liable to be dismissed. Having noted the submissions, the learned Single Judge rejected the said application by his order dated 31.03.2010 observing I am of the considered view that calling of records as sought for by the applicant is not justified at this stage.

8. Thereafter, the evidence was recorded. The first respondent went into the witness box on 4th April, 2010 and in his examination in chief, he stated that he had sent a fax message to the Returning Officer of 20-Tali (ST) Assembly Constituency on 15.10.2009 alleging the booth capturing of 2-Ruhi and 7-Roing polling stations. He stated that he had complained about the booth capturing in 6 more polling stations and produced copies of complaints. He stated that there was single handed voting in favour of the appellant, and respondent's voters were threatened and not allowed to cast their votes. He further stated that a large number of voters had double entries in the electoral roll of 20 Tali (ST) as well as Itanagar

(ST) Assembly Constituency. They had actually cast their votes at 38 different polling stations of 13-(ST) Itanagar Assembly Constituency, and in their place votes were cast in Tali Constituency by the miscreants of the appellant. The electoral rolls of the two constituencies were to be exhibited. He further pointed out that a vote was cast against a dead person by name Markio Tama from 2-Ruhi polling station and the death certificate of the person concerned was produced.

9. In his cross examination on 9th June, 2010, the first respondent accepted that he had not made any averments in the election petition regarding double enrollment of the voters in the two Assembly Constituencies. He accepted that he was aware that the final electoral rolls were published by the authorities concerned before the election was held, prior to which the draft roll was published for information of the voters concerned, and that he did not lodge any complaint before the authorities concerned about the double enrollment in the two constituencies. He explained it by stating that he did not know that such double enrollment had taken place. He could not say who actually cast the vote for Markio Tama, who had already expired. He accepted that he had appointed his polling agents for all the polling stations. He knew about the duties of the polling agents which included raising objection in case of detection of any impersonation during the polling time, before the Presiding Officer concerned by filling up a prescribed form alongwith a fee of Rs. 2/-. He stated that his polling agents were not allowed to enter into the polling booths and the candidates appointed by the appellant acted as fake polling agents for the first respondent. He however, accepted that he has not stated in election petition that the candidates appointed by the opposite party had acted as fake polling agents for him. He further accepted that his complaint to the Returning Officer did not mention all the 8 polling stations. It mentioned only about 2 polling stations. He also accepted that he did not mention the names of persons involved in booth capturing. The first respondent had alleged that in two polling stations viz. Ruhi and Roing, booth capturing had taken place which was on the basis that in Ruhi the first respondent got only 3 votes as against appellant getting 697 votes and in Roing he got only one vote as against the appellant getting 1196 votes. On this aspect it was put to him that there were two circles in this constituency viz. Tali and Pipsorang. The above two polling stations were in Tali Circle. The first respondent accepted that the returned candidate secured no vote in 11-Vovia polling station. He also accepted that the returned candidate secured only 7 votes in 13-Zara polling station, both falling in Pipsorang circle. Thereafter, he accepted that

It may be correct that securing less vote by a candidate may be due to his less attachment to the people of a particular area and it may also be the one of the reasons for losing the election.

The first respondent also accepted that Micro Observers were appointed in all the polling stations and they were provided with digital camera for their use as and when required during election for all the purposes.

10. It was at that stage that the first respondent moved another application viz. Mis Case No. 05(AP) of 2010 on 29th June, 2010. In that application he repeated that some of the voters of the 8 polling stations mentioned earlier, had double entries in different 38 polling stations of 13 Itanagar (ST) Assembly Constituency. In para 2 he stated that 30% of voters of Tali Constituency from those 8 polling stations had cast their votes in Itanagar and not in Tali, and in their place the double voting was effected on behalf of the appellant, and therefore it was necessary to get the record of the voters' counterfoils (in Form 17A) from the 38 polling stations under 13-(ST) Itanagar Assembly Constituency. The appellant opposed this application. The counsel for the appellant submitted that this was a fishing inquiry to improve the case. The learned Single Judge however observed: This allegation sounds to be new one, but when it is closely examined, it also comes under the purview of booth capturing because votes by impersonation is one of the modus operandi adopted towards accomplishment of securing votes by use of illegal method or illegal resource.

11. The learned Judge referred to a judgment of this Court in Hari Ram Vs. Hira Singh reported in AIR 1984 SC 396, that electoral rolls and counter foils should be called sparingly and only when sufficient material is placed before the Court. He also referred to a judgment of this Court in Fulena Singh Vs. Vijoy Kr. Sinha reported in 2009(5) SCC 290 wherein it was held that inspection of register of voters in Form 17-A would be permissible where a clear case is made out. The learned Single Judge held that the official record would be the most reliable evidence where there was impersonation, and thereafter passed the impugned order calling for the record of registers of voters counterfoils in form 17A of 38 polling stations of 13-(ST) Itanagar Assembly Constituency which order is challenged in the present appeal.

Submissions on behalf of the rival parties

12. Mr. Giri, learned senior counsel appearing for the appellant submitted that the learned Judge of the High Court clearly erred in allowing the second application

filed by the first respondent for the simple reason that he was making a roving and fishing inquiry. Mr. Giri submitted firstly that if the respondent No.1 was concerned with the alleged double entries of the voters in the two constituencies, he ought to have challenged the double enrollment when the draft rolls were published. Secondly, this ground of impersonation and double voting was not raised in the election petition at all. Then there were no particulars provided as to whether anybody had seen the real voters not voting, and somebody else voting in their place. Thirdly, he submitted that the application made by respondent No.1 earlier having been rejected, there could not be a second application for that very purpose.

Besides, impersonation or double voting would come in the category of 'improper reception of votes' which is a separate category of corrupt practice falling under Section 100 (1) (d) (iii) of the Act of 1951. For invoking this ground one has to plead that the election was materially affected by such improper reception of votes which the first respondent had not done. 'Improper reception' is different from 'booth capturing' which is a separate corrupt practice under Section 123 (8) read with Section 135 A of the Act of 1951. The first respondent had filed the election petition only on the ground of booth capturing and not on the basis of improper reception of votes and he cannot be permitted to improve upon it from stage to stage. The sanctity and secrecy of the electoral process was important and the same could not be permitted to be violated.

13. Mr. Rakesh Dwivedi, learned senior counsel appearing for the first respondent on the other hand submitted that the first respondent had filed the election petition on the ground of booth capturing, and double voting or impersonation could be considered as facets of booth capturing. The learned Judge could not be faulted for his order since impersonation is a link between the booth capturing and improper reception. If purity of the election process is to be maintained, and if the true result of the election is to be found out, the order which is impugned in the petition was a necessary order.

Consideration of the rival submission

14. The order impugned in the present appeal has been passed on the second application in this behalf which was Misc. Case No. 05(AP)/2010 filed on 29th June, 2010 after the recording of the evidence of the first respondent. It is material to note that in his evidence the first respondent did not dispute that he had not made any averment in the election petition regarding double enrollment of some

voters of the two constituencies. He also accepted that one has to object to such double entries when that draft electoral roll is published, but he explained his inaction in this behalf by stating that he did not know that such double enrollment had taken place. With respect to impersonation, he cited the instance of only one person, namely Markio Tama who had expired, but he could not state as to who voted in his place. He accepted that the polling agents have to object when such impersonation takes place, but explained inaction of his polling agents by saying that his polling agents were not allowed to enter into the polling booths and the candidates appointed by the opposite party acted as fake polling agents for him. He however, accepted that such plea was not taken in the election petition. He also accepted that his complaint about double voting was only about 2 polling stations, and that he did not mention all the 8 polling stations in his complaint. He had to accept that he did not mention the names of persons involved in the booth capturing. The first respondent had emphasized the fact that in Ruhi he got only 3 votes as against appellant getting 697 votes. In Roing he got only one vote as against appellant getting 1196 votes. He further had to accept that there were two circles in Tali constituency, namely, Tali and Pipsorang. Ruhi and Roing were falling in Tali circle where appellant did get most of the votes. As against that in Pipsorang circle the respondent No.1 got most of the votes. Thus in Vovia polling station, the appellant got no vote at all and if we see the pleadings we find that the first respondent got 365 votes. In Zara polling station, the appellant got only 7 votes as against 335 votes of the first respondent. There are two more noteworthy polling stations. Thus, in Keba polling station the first respondent got 346 votes as against the appellant's one vote, and in Tedung polling station the first respondent got 361 votes as against only 5 votes of appellant. The first respondent had to accept that the securing of less votes may be due to the less attachment of the candidate to the people of a particular area, and may be one of the reasons to loose the election. He has also accepted that there were micro observers in all the polling stations with digital cameras.

15. In this Misc. Case No.05(AP)/2010 the first respondent once again prayed for calling for the voters counterfoils in Form 17-A from 38 polling stations of Itanagar Assembly Constituency. In para 2 of this application he now stated that 30% of the voters' of Tali Constituency from 8 polling stations had cast their votes in Itanagar, and in their place double voting was effected. Thus, in this second application, the first respondent's grievance of such double voting came down from 80% to 30%. The question is as to whether the learned Judge was right in allowing this second application for getting this additional record on the background of the material that had then come on the record.

16. To begin with, one must note that in an election petition, one has to plead the material facts at the outset, and the failure to plead the same is fatal to the election petition. For reference one may see the judgment of a bench of three judges of this Court in Hari Shanker Jain Vs. Sonia Gandhi reported in [2001 (8) SCC 233]. Besides, no evidence can be led on a plea which is not raised in the pleadings and no amount of evidence can cure the defect in the pleadings as held in para 7 of Ravinder Singh Vs. Janmeja Singh reported in [2000 (8) SCC 191].

17. (i) In the present case the election petition filed by the first respondent made the grievance of booth capturing which is a corrupt practice covered under Section 123 (8) of the Act of 1951. Committing a corrupt practice is a ground to declare an election void under Section 100 (1) (d) of the Act. Booth capturing is also made an offence under Section 135 A of the Act, and the term 'booth capturing' is spelt out in the explanation to that section.

(ii) Section 135 A alongwith the Explanation reads as follows: 135A. Offence of booth capturing - [(1)] Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which [shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine.

Explanation - For the purpose of [this sub-section and section 20B], booth capturing includes, among other things, all or any of the following activities, namely:-

(a) seizure of a polling station or a place fixed for the poll by any person or persons making polling authorities surrender the ballot papers or voting machines and doing of any other act which affects the orderly conduct of elections;

(b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or their own supporters to exercise their right to vote and [prevent others from free exercise of their right to vote];

(c) [coercing or intimidating or threatening directly or indirectly] any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;

(d) seizure of a place for counting of votes by any person or persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

(e) doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.

(2) An offence punishable under sub-section (1) shall be cognizable.

18. As far as impersonation or double voting is concerned, such actions would amount to improper reception of votes which is a separate ground for declaring an election to be void under Section 100 (1) (d) (iii) of the said Act. This ground was not pleaded in the petition, nor was any issue framed thereon for the trial. As can be seen from the explanation to Section 135 A, the main element of booth capturing is use of force or intimidation. As against that impersonation or double voting involves cheating or deception. Thus, these two grounds deal with two different aspects of corrupt practices. That being the position, the question is as to whether the respondent No.1 could have been permitted to lead any evidence in this behalf without raising the ground in this election petition. This is particularly on the background that the earlier application I.A. No.6/2010 calling for the register of voters' counterfoils (Form 17-A) from the 38 polling stations of Itanagar had not been entertained at that stage under the order dated 31.03.2010 which was prior to recording of evidence.

19. The evidence which had come on record clearly showed that the first respondent received overwhelming votes in some polling stations, whereas the appellant received similarly overwhelming votes in other polling stations. The statement of the first respondent that the appellant had appointed fake polling agents for the first respondent was a clear after thought, since if it was so, he would pleaded the same in the election petition itself. He has not mentioned the names of the persons allegedly involved in booth capturing. Even with respect to impersonation, the only instance pointed out was that of one Markio Tama, but it was not stated in the petition or in evidence as to who voted in his place. It is thus obvious that having failed to place any material with respect to either booth

capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register from Itanagar Constituency, in support of his grievance of double voting. In the absence of any evidence with respect to the persons who at the instance of the appellant allegedly captured the booths or made double voting or impersonation in Tali Constituency, no such inference could have been drawn against the appellant. The learned Single Judge, therefore, was clearly in error in allowing the second application made by the first respondent.

20. Besides, the ground of improper reception requires a candidate to show as to how the election in so far as it concerns the returned candidate was materially affected, in view of the requirement of Section 100 (1) (d) of the Act of 1951. First respondent has stated that there were some 1304 double entries of voters. The allegation of respondent No.1 on evidence was only with respect to Roing and Ruhi polling station. The votes received by the appellant in both these polling stations put together come to 1873. The appellant has won with a margin of 2713 votes. That being so the second application could not have been entertained even on that ground in the absence of prima facie case that the result of the election had been materially affected.

21. The learned Judge has referred to and relied upon the judgments of this Court in Hari Ram Vs. Heera Singh (supra) and Fulena Singh Vs. Vijoy Kr. Sinha (also supra) to hold that in a rare case an order of production of such record concerning the voters register could be passed. Learned Judge however made no attempt to apply the principles laid down in those cases to the facts of the present one, as can be seen from the narration above. In Hari Ram, (which is a decision of three judges) the situation was almost similar. The High Court had passed an interlocutory order directing the Returning Officer to produce the marked electoral rolls for inspection, which was on the background that the first respondent had won that election by a very small margin of 238 votes. In para 3 of the judgment, this Court accepted the contention on behalf of the appellant as well founded that the High Court erred in allowing the prayers at an interlocutory stage without examining whether proper foundation was laid for inspection which would otherwise result in adversely affecting the secrecy and sacrosanct nature of electoral process. In para 6 of Hari Ram, this Court observed as follows:-

6. To begin with, the High Court seems to have been under the impression that the Court had ample powers to direct production of any document Under Section 165 of the Indian Evidence Act. In doing so with due deference, the High Court overlooked that the Representation of People Act

was a special Act and provisions of the Evidence Act or the CPC would only apply where they are not excluded. Thus, at the very outset, with due respect, the approach of the High Court was legally incorrect..... In Hari Ram also there was a grievance that there were a number of dead persons for whom votes were cast. No details and particulars were given that votes were actually cast for dead persons. This Court held that it was nothing but a fishing inquiry and it clearly violated the sanctity and secrecy of the electoral process.

22. (i) Rule 93 of the Conduct of Election Rules, 1961 governs the production and inspection of election papers. Sub-rule 1 thereof is relevant for our purpose and it reads as follows:-

93. Production and inspection of election papers - (1) While in the custody of the district election officer or, as the case may be, the returning officer -

(a) the packets of unused ballot papers with counterfoils attached thereto;

(b) the packets of used ballot papers whether valid, tendered or rejected;

(c) the packets of the counterfoils of used ballot papers; (d) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and [(dd) the packets containing registers of voters in form 17-A;] (e) the packets of the declaration by electors and the attestation of their signatures; shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

(ii) Sub-rule (dd) above has been added in this rule by notification dated 24.3.1992. Form 17-A mentioned therein is related to Rule 49 (L) which is concerning the procedure about the voting by voting machines. Sub-rule 1 (a) of Rule 49 (L) requires the polling officer to record the electoral roll number of the elector as entered in the marked copy of the electoral roll in a register of voters which is maintained in Form 17-A.

23. This rule (as it then stood) came to be construed by a Constitution Bench of this Court in *Ram Sewak Vs. H.K. Kidwai* reported in AIR 1964 SC 1249. This Court held in para 7 as follows:-

7. An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

The judgment in *Ram Sewak* has been followed all through out, and the proposition with respect to inspection have been repeated in a catena of decisions of this Court, namely that inspection of ballot papers and counterfoils should be allowed very sparingly, and only when it is absolutely essential to determine the issue. As held by this Court in *Bhabhi Vs. Sheo Govind* reported in AIR 1975 SC 2117, discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void.

24. The impugned judgment has relied upon the judgment of this Court in *Fulena Singh* (supra). In that matter also there was an allegation of double voting, and the inspection of register of voters in Form 17-A was sought. In para 13 of the judgment the Court noted the submission on behalf of the respondent that the

registers of voters in Form 17-A do not enjoy the same immunity as that of the other papers mentioned in clauses (a) to (d) and (e) of Rule 93 (1). This Court did not accept that submission, and held that inspection of election papers mentioned in detail in the entire Rule 93 (1) is not a matter of course unless a clear case is made out. The Court, therefore, disallowed the inspection of register of voters in Form 17-A. Thus, the reliance on Fulena Singh (supra) in the impugned judgment was also wholly erroneous

25. This being the position, in our view the order passed by the learned Single Judge is illegal and unsustainable. We are, therefore, required to set-aside the same.

26. Accordingly, we pass the following order:-

(i) The appeal is allowed. The judgment and order dated 14.09.2010 passed by the learned Single Judge of Gauhati High Court in Misc. Case (E.P.) No.05(AP)/2010 in Election Petition No.01(AP)/2009 is hereby quashed and set- aside.

(ii) The Misc. Case (E.P.) No.05(AP)/2010 is hereby dismissed. (iii) Parties will bear their own costs.