

# RAJASTHAN HIGH COURT

Bhanwar Kanwar

Vs.

Civil Judge

Civil Writ Petn. No. 564 of 2003

(B. Prasad, J.)

17.09.2003

## ORDER

**B. Prasad, J.**

1. Heard learned counsel for parties.
2. This writ petition is filed against the order passed by the learned Election Tribunal whereby the election of the petitioner has been annulled on an election petition filed by the respondent No. 2 Smt. Chandra Kanwar. While setting aside the election, the Tribunal has also declared the respondent No. 2 Smt. Chandra Kanwar (election petitioner) to be elected.
3. The ground given for setting aside the election was that the nomination paper of Smt. Bhanwar Kanwar was wrongly accepted because the proposer, as required under Rule 58 (5) (e) of the Rajasthan Panchayati Raj (Election) Rules, 1994 (for short referred to "as the Rules"), should be a voter of that constituency of which the candidate seeks election, only such person should propose the name of candidate. The question which was required to be answered by the Election Tribunal was whether Mangi Lal was an elector of the Constituency of which the writ petitioner has sought election.
4. The Tribunal after considering the evidence on record has come to the conclusion that Mangi Lal did not belong to the Constituency for which the election was held. Therefore, it has been found that the nomination of the writ petitioner Smt. Bhanwar Kanwar was wrongly accepted. Since the nomination was wrongly accepted, the same deserves rejection. With the rejection of the nomination of Smt. Bhanwar Kanwar, the only other candidate was the defeated candidate. In view of the election law, she has

been declared elected.

5. Learned counsel for the petitioner urged that there was no evidence worth the name to support the conclusion that Mangi Lal was an elector of Ward No. 17. In fact, the evidence produced by the writ petitioner was to the effect that the name of Mangi Lal was entered in Ward No. 4. In this regard, the petitioner has relied on Annexure-9, a document produced by the petitioner at the trial being Exhibit-1. The petitioner has also relied on the fact that the election petitioner - respondent No. 2 had not produced the elector-roll of the constituency which could conclusively establish that "Akhadhana" - village of Mangi Lal fell within the territory of Ward No. 17. Thus, having omitted to produce the most material part of evidence, adverse inference should be drawn against him.

6. Larned counsel further urged that the law of election is technical law and unless the violation of law is established merely on preponderance of probabilities, the elections cannot be set aside. Learned counsel in support of this has relied upon a decision of the Honble Supreme Court in the case of *Hari Prasad Mulshankar Trivedi v. V. B. Raju reported in <sup>1</sup>* and has emphasized that the Honble Supreme Court has held that the jurisdiction of the election tribunal does not travel beyond the permissible limits. The entry in the elector-roll cannot be treated to be a jurisdictional error requiring this Court to intervene. He has relied on paras Nos. 25, 26, 27 and 31 which read as under :-

"25. As already stated, the prayer in the election petition was to declare the election of the respondents 4 and 5 void in the election petition under Section 100 (1) (a) for the reason that these respondents were not qualified or, disqualified to be chosen to fill the seat under the Constitution or the 1951 Act. There was no case for respondent No. 1 that these respondents suffered from any of the disqualifications mentioned in Section 16. Nor was there any ground taken in the election petition that they had not the positive qualifications as required by the Constitution or the Acts.

26. The only question is whether the ground taken in the election petition that since these respondents were not ordinarily resident in any of the Parliamentary constituencies of Gujarat, they had not fulfilled one of the conditions necessary to be satisfied for registration in the electoral roll, can be gone into by the High Court in trying an election petition.

27. We think that neither the decision of this Court in AIR 1970 Supreme Court

314 which took the view that violation of Section 23 (3) of the 1950 Act in entering or deleting the names of persons in the electoral rolls after the last date for making nomination relates to lack of power, nor the decision in AIR 1971 Supreme Court 2123 which also suggests that where there was lack of power, the question can be gone into by the Court trying an election petition, can, by analogy, be extended to an entry in the electoral roll on the basis of a wrong adjudication of the question of ordinary residence. Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic Case, (1967) 3 WLR 382, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context, (see Per Diplock, J. at p. 394 in the Anisminic Case). Whereas the pure theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. "At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic" And viewed from the aspect of public policy as reflected in the provisions of the 1950 and 1951 Acts, we do not think that a wrong decision on a question of ordinary residence for the purpose of entering a persons name in the electoral roll should be treated as a jurisdictional error which can be judicially reviewed either in a civil Court or before an election tribunal.

31. We think that the intention of the Parliament to oust the jurisdiction of the Court trying an election petition to go into the question whether a person is ordinarily resident in the constituency in the electoral roll of which his name is entered is manifest from the scheme of the 1950 and the 1951 Acts. It would defeat the object of the 1950 Act if the question whether a person was ordinarily resident in a constituency were to be tried afresh in a Court or tribunal, trying an election petition."

7. Thus, learned counsel for the petitioner has submitted that there was no jurisdiction vested in the election tribunal to have set aside the election. Further having set aside

the election, the election tribunal has erred in declaring the respondent Smt. Chandra Kanwar elected as that tantamount to defeating the wishes of electorates.

8. Further, learned counsel for petitioner submitted that the application of the election petitioner/respondent No. 2 filed under Section 13 (2) for production of document was rejected. However, the same document was got exhibited when a government official appeared. This marking, of the exhibit, at the instance of government official, was circuitously allowing what was expressly refused by the Court. Thus, the document Exhibit-1 should not be read in evidence because there had already been an order of the Court for not taking the document on record.

9. Per contra, learned counsel for the respondent No. 2/election petitioner has urged that the petitioner in this petition is asking for transgressing the limits of judicial review. The law relied upon by the petitioner himself in the case of V.B. Raju, AIR 1973 Supreme Court 2602 (supra) says what are the prescribed limits of judicial process. The underlining portion has been referred by the learned counsel.

10. Learned counsel for the election petitioner/respondent No. 2 has further submitted that the election petitioner Smt. Chandra Kanwar in her evidence in the Court has said in so many words :-

(Vernacular matter omitted .....Ed.)

11. According to learned counsel for the respondent No. 2, the returned candidate Smt. Bhanwar Kanwar in her statement in the Court in cross- examination has said that :-

(Vernacular matter omitted .....Ed.)

12. Thus, according to the learned counsel for the respondent No. 2, the writ petitioner has shown scant regard to the establish judicial process. She was supposed to know whether Akhadhana Village was in Ward No. 17 or not because her proposer came from this village. More particularly when the case was being tried in the Court, she should have known as to what was the exact position but she has adopted an evasive attitude. In any case, learned counsel has submitted that apart from other pieces of evidence, this oral piece of evidence is evidence by all means. There is oath against oath. There is no document on the record to show that Akhadhana village belongs to Ward No.4 and not to Ward No. 17 where Mangi Lal was recorded as a voter. The oral evidence of Smt. Chandra Kanwar could be relied and has been relied by the election tribunal.

13. From the Evidence Act, if we go through the definition of evidence as contained in Section 3 of the Evidence Act, it reads as under :-

"Evidence".- "Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents produced for the inspection of the Court;

such statements are called documentary evidence."

14. Thus, in terms of the Evidence as defined in Evidence Act, all statements which the Court permits or requires to be made before it by witnesses form evidence. If some part of the evidence has been relied, then it would not be permissible for the Court exercising jurisdiction under Articles 226 and 227 of the Constitution of India to go into the question of admissibility of evidence. The Honble Supreme Court has laid down the parameters which are permissible to be traversed by the Court while exercising jurisdiction under Article 227. Learned counsel for the respondent No. 2 in this regard has relied on a decision of the Honble Supreme Court in the case of *Essen Deinki v. Rajiv Kumar reported in* <sup>2</sup> wherein the Honble Supreme Court has held as under:-

"Exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the Courts below. The finding of fact being within the domain of the inferior tribunal except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

It is clear that error must be that of law and patently on record committed by the inferior tribunal so as to warrant intervention -it ought not to act as a Court of appeal."

15. Thus, the learned counsel has submitted that the reappraisal of evidence in exercise of jurisdiction under Article 227 of the Constitution of India is not

permissible. When the evidence is available on the record that could form the basis for decision. What is more important in the facts and circumstances of the case is that the statement of the returned candidate stands supported by the document which has been exhibited at the trial as Exhibit 2 (nomination paper). In the later part of this document, it has been recorded that Mangi Lal s/o Loona Ram is a resident of Akhadhana. Akhadhana has been deposed by Chandra Kanwar to be belonging to Ward No. 17. The question as has been held by the Tribunal against the petitioner. In exercise of writ jurisdiction, this question cannot now be gone into again.

16. Learned counsel for the petitioner has referred to Rule 85 of the Rules. This Rule provides for the hearing of the petition. This Rule says that the Judge shall not be required to record evidence in full but shall only make a memorandum thereof, sufficient in his opinion for the purpose of deciding the petition. Sufficient room has been provided by the legislation to the judge hearing a petition. He is required to make such records which are considered sufficient in his opinion for the purpose of deciding the petition. If the learned Judge has exercised his jurisdiction in the parameters as prescribed in this Rule, then whatever evidence he found available on the record and if he considered the same to be sufficient to decide the question, then it would not be for the Court deciding the question in writ jurisdiction to go into re-appraisal of the evidence.

17. Learned counsel for the respondent No. 2 has further urged that the argument of learned counsel for petitioner is misplaced wherein he has stated that in the democratic set up, the wishes of the people should be paramount. Learned counsel for respondent No. 2 has relied on a decision of the Honble Supreme Court in the case of *B. R. Kapur v. State of Tamil Nadu reported in* wherein the Honble Supreme Court has held as under :-

"This being the position, the action of the majority of the elected members of a political party in choosing their leader to head the Government, if found to be contrary to the Constitution and the laws of the land then the Constitution and the laws must prevail over such unconstitutional decision, and the argument of Mr. Rao, that the will of the people would prevail must give way. In a democratic society there are important reasons for obeying the law, which do not exist in other forms of government. Our political system still is not perfect and there is always the scope for many legislative reforms to be made. But the maintenance of life in modern society requires a willingness from most citizens for most of the time to observe laws, even when individually they may not agree

with them."

18. I have heard the learned counsel for the parties and have given my thoughtful consideration.

19. The most important question in this petition is whether the name of Mangi Lal figured in the voter list of Ward No. 17 or Ward No. 4. The voter list having not been filed by the parties, the Court felt persuaded that why not look into the record of the Returning Officer. The record was called and to the shocking surprise, contradictions were seen in the electoral rolls. The printed electoral roll said that it is for elections of 1999 for Ward No. 4 and the same was published for Ward No. 17 by a cover note. This list made the basis of election for Ward No. 17.

20. The question of referring these electoral rolls was not considered proper because they were not tendered in evidence.

21. In the instant case, the evidence as read by the petitioner forms part of the record in two categories, one is oral evidence and the other is documentary evidence. The respondent Smt. Chandra Kanwar in her statement, on a suggestion being made by the learned counsel for the respondents, has said that if Mangi Lal was a votary of Ward No. 17, then she does not know. The oral evidence is in two forms. One by the respondent No. 2 is a positive assertion and by the petitioner an evasive reply. If the Tribunal has prima- facie accepted the evidence of the respondent No. 2, then it cannot be said that the finding is based on no material on record.

22. Sufficiency of evidence cannot become the subject matter of discussion in exercising jurisdiction under Article 227 of the Constitution of India. Learned counsel for petitioner has relied on a decision of the Honble Supreme Court in the case of V. B. Raju, AIR 1973 Supreme Court 2602 (supra). In this case, the Honble Supreme Court has held that the question whether a person was ordinary resident in a constituency cannot constitute a jurisdictional question. It has further been held in this case that the purpose of judicial review has been one of public policy rather than one of logic. Thus, if it is seen that the law requires a votary of the same constituency to be the proposer. The public at large is expected to know that the person is a votary of a particular ward. There is evidence adduced to that effect. The person was not the votary of ward for which the elections were held. Then it cannot be said that such a question will form question of jurisdiction. Because to which ward a votary was, the public at large would know when votes are polled. Further elected candidate has pleaded ignorance. This shows that there is an attempt to play disguise with the Court.

Thus, any findings recorded by the learned Tribunal are not liable to be interfered. The questions raised are not the questions touching the jurisdictional question.

23. Learned counsel for petitioner has further urged that the voter list having not been produced, the question cannot be held to be conclusively laid down. The document Exhibit-A/1 has been surreptitiously brought on record, therefore, illegal evidence has been considered. As regards Exhibit-A/1, the objection was to be raised at the time when the document was exhibited. At that juncture, there appears to be no objection raised. If a document is exhibited without there being any objection, then raising an objection against such document in writ jurisdiction is not an argument which is available to the petitioner. It is true that the voter list has not been produced. They were summoned in the Court when the agreement of the parties were being had but then, there reference would not be proper at this stage. What is important is that apart from the voter list, there was oral evidence and if that has been relied, then it would not be open for this Court while exercising jurisdiction under Article 227 to enter into this question because it is not a case of total lack of evidence. Sufficiency of the evidence is not a question to be judged under Article 227 of the Constitution of India.

24. The proceedings under Article 227 of the Constitution are not the proceedings in appeal. They can only be treated as one where the Court can go into jurisdictional questions or an error apparant on the face of the record.

25. In the instant case, there being evidence available on the record, the same having been relied, it would not be open for the Court to go for reappraisal. Thus, it cannot be said that there was no material on the record of the learned Tribunal to come to the findings to which it has come. Therefore, the judgment cannot be said to be one which is liable to be proceeded in writ jurisdiction.

26. In this view of the matter, it is not considered proper to make any interference in the present proceedings and this writ petition is, therefore, dismissed.

Petition dismissed.

Cases Referred.

1. AIR 1973 SC 2602
2. (2002) 8 SCC 400: AIR 2003 SC 38
3. (2001) 7 SCC 231: AIR 2001 SC 3435