

(1956) 04 MAD CK 0046
In the Madras High Court

A.B. Abdul Gaffoor Sahib

APPELLANT

Vs

The Election Commissioner and Another

RESPONDENT

Date of Decision : 11-04-1956

Acts Referred:

Citation : (1957) 70 LW 48 : (1956) 2 MLJ 575

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Division Bench

Judgement

Rajagopala Ayyangar, J.—This petition arises out of the proceedings for the election of a Municipal Councillor for the 8th ward of the Dindigul Municipality.

2. There was an election for the 8th ward of the Dindigul Municipality, the poll being on 27th October, 1955. There were only two candidates who

stood viz., the petitioner and the respondent. The petitioner was declared elected as having obtained the majority of votes, he having secured 577

votes as against the 545 votes, by the respondent. The respondent thereupon filed a petition to set aside the election of the petitioner, the main

ground being that the petitioner had connived at the commission of election offences falling under Chapter 9-A of the Indian Penal Code, the main

charge being one of false personation. He also claimed a declaration that he had been validly elected. The returned candidate contested the

charges made against him, and also pleaded recrimination making the same charges of false personation against the petitioner in the election

petition. The petition was filed before, and was tried by the Subordinate Judge of Dindigul, who was the Election Commissioner under the Rules

framed for the decision of disputes in relation to Elections, under the Madras

District Municipalities Act.

3. The Election Commissioner found that of the 45 charges of false personation put forward by the petitioner in the Election Petition, only 5 were

proved. He also found that there was connivance by the candidate, or his election agent in such false personation. On these findings he set aside

the election of the returned candidate. He further repelled the charges of false personation pleaded against the petitioner in the Election Petition,

i.e., the defeated candidate, and he granted to the defeated candidate, a declaration that he was elected to the seat in the Municipal Council. It is

this order of the Election Commissioner that is challenged in this Writ Petition.

4. Two points were made by Mr. Nambiar, learned Counsel for the petitioner. The first was that there was no material before the Commissioner to

sustain the finding that the returned candidate was guilty of conniving at the false personation. The Election Commissioner after finding that there

were 5 proved instances of false personation, dealt with the question of connivance thus:

It is argued on behalf of the respondent that the proof required under the Election Rules is the same as in the Indian Penal Code, and since there is

no mens rea on the part of the agent, the offence u/s 171-D had not been made out. In Emperor Vs. Badan Singh, the Full Bench has held that

where a candidate at an election, who was according to the procedure to be followed, to identify the voters, recklessly attested the signature slip

without taking care to ascertain whether the thumb impression was that of the voter, was guilty of the offence.... In this case there can be no doubt

that with the connivance and abetment of the respondent's agent, the above impersonations had occurred.

5. The contention urged by Mr. Nambiar is that the evidence in the case completely established the bona fides of his client's election agent, and

therefore, the Court below erred in thinking that mens rea in the shape of guilty knowledge or recklessness was established. He particularly relied

upon the evidence of the polling agent of the respondent, who was the person present on his behalf at the ward where this false personation took

place. This witness stated in his evidence:

The Polling Officer asked the Bill Collector whether he could identify the persons. After enquiring, Gafoor's (the petitioner's) agent used to attest

as witness.

6. On the basis of this passage, learned Counsel urged that as his agent had made enquiries of the Bill Collector, who might, presumably know who the voters were, and could identify them, and had signed in Form 6-A in assertion of his identification of these voters, he should be deemed to have acted bona fide and after due enquiry. On the other hand, however, I find the following in the evidence of the Polling Agent of the returned candidate who has signed in Form 6-A. One of the persons who was impersonated was a voter, by name, Nanjayya. There were two persons of the same name, who had the serial Nos. 579 and 580 allotted to them in the Electoral Roll. It was, however, clearly established that both these related to the same individual, and, that the individual was the person who was examined as P.W. 3. In serial No. 579, this Nanjayya was described with the title "Patthar", but in serial No. 580 without that addition. It is in evidence and not disputed that P.W. 3 did vote as against the serial No. 580. There was however a vote found recorded against serial No. 579. This latter, therefore, must have been an impersonated vote. As regards the person who voted as the voter bearing serial No. 579 the evidence of the Polling Agent of the returned candidate who had identified that voter as Nanjayya in Form 6-A (marked as Exhibit A-10) is this:

The voter in Exhibit A-10 Amruddin. I saw him. If he is shown to me I can identify.

7. It is therefore clear that one Amruddin has voted for the voter No. 579, in the place of Nanjayya, and that the polling agent of the returned candidate had identified this voter as Nanjayya, though he knew that he was Amruddin. I consider therefore that there was sufficient material before the Election Commission for his finding that the Agent of the returned candidate connived at the impersonation. The Election Commissioner was, therefore, correct in holding that the election of the returned candidate was void, and in setting it aside.

8. The next point is whether the order declaring the defeated candidate as duly elected was within the jurisdiction of the Election Commissioner under the Rules. The learned Commissioner has purported to make this declaration by virtue of the power contained in Rule 11(2). This sub-rule runs thus:

11. (1) At the conclusion of the enquiry, the Election Commissioner shall declare whether the election of the returned candidate or candidates is void under Rule 10.

(2) If he declares the election of the returned candidate or candidates void, he shall further pass an order either (a) declaring that any other party to the petition, who has under these Rules claimed the seat, has been duly elected, or order a fresh election.

9. From the facts which I have set out above, it would be seen that on the findings of the Commissioner the number of votes cast in favour of the returned candidate were 577 less 5 votes which were impersonated, or 572, as against the 545 secured by the defeated candidate. Therefore,

unless there is some law or process by which the votes cast in favour of the returned candidate could be treated as having been thrown away, the

defeated candidate who had obtained a minority of votes cannot be declared as elected. Though the Rule 1 in terms does not set out the conditions

subject to which the declaration that a person other than the returned candidate has been elected may be made, this provision has to be read along

with other provisions both in the Election Dispute Rules as well as the Rules for the Conduct of Elections. Rule 28 of the Conduct of Election Rules

is in these terms:

28. (1) After the Election Officer has completed the scrutiny and counting of votes, he shall prepare a return of the results of the polling in Form

No. 9 and shall, subject to the provisions of Rule 33, declare that the candidate or candidates to whom most valid votes have been given has or have been duly elected.

10. It will be seen that no candidate may be declared elected by the Election Officer unless he obtained a majority of lawful votes. If that was so at

the stage of the election, and that is the entire principle behind the holding of elections, it cannot be that when one comes before a Court, having

been defeated at the polls a person may be declared elected without obtaining a majority of lawful votes. In this connection reference may be made

to the provision of Rule 9 of the Rules for the Decision of Election Disputes : It provides:

Where at any enquiry into an election petition, any candidate other than a returned candidate claims a seat for himself, the returned candidate or

candidates or any other party to the proceeding may give evidence to prove that the election of the said candidate would have been void if he had

been a returned candidate, and a petition had been presented complaining of his election.

11. This rule permits of recrimination to avoid a declaration claimed by the defeated candidate. That itself shows that if there are two candidates

standing for election and the election of the returned candidate is set aside by reason of the proof of one of the invalidating grounds mentioned in

the Rules, the defeated candidate is not automatically to be declared elected. Just as there cannot be a declaration by a Returning Officer that a

candidate had been duly elected, when he had not obtained a majority of lawful votes, similarly a defeated candidate also cannot be declared

elected unless he secures a majority of lawful votes. This would be possible only if every vote cast in favour of the returned candidates were

treated as an invalid vote. There is no principle of law and no provision in the Rules by which this could be done. So to hold, would be really to

punish the voters who vote for a candidate duly qualified, but whose election is set aside on a ground for which the majority of voters are not

responsible.

12. I had to consider the same question in Writ Petition No. 110 of 1954, where as here, the Election Tribunal declared a candidate who had

secured a minority of votes as duly elected merely because the election of the returned candidate was declared void, he being disqualified to stand

for election. Dealing with this point, I stated:

No doubt, under Rule 12(2) the grounds upon which the Election Commissioner can declare any other party to the petition, who has under the

rules claimed the seat, to be duly elected, are not specified. But under the Rules for the Conduct of Elections, that person only may be declared

duly elected, to whom the largest number of valid votes had been given. The mere fact that the nomination of a candidate is held to be improper

does not mean that the votes cast for him are also invalid or thrown away, and unless these votes cast for the returned candidate are eliminated on

some known principle of law, a defeated candidate cannot be elected to the seat. The principle of law is that a person other than the one, who has

been elected at the election, might be given the seat only by eliminating the

votes cast to the returned candidate on the ground that either the votes have been improperly recorded, or shown to have been procured by bribery or undue influence, or corruption. In other words, you must disqualify a voter, or find some irregularity in the vote before treating it as an invalid vote. The only other class of cases where such votes have been discounted are those where the disqualification was patent, and the voters, with notice of the disqualification brought home to them, without possibility of any doubt, have still chosen to exercise the franchise in favour of a person with such patent and obvious disqualification. See *Beresford Hope v. Laly Sandhurst* (1889) L.R. 23 Q.B.D. 79 and *Hobb v. Morey* (1904) 1 K.B.D. 74. Any other rule would mean that the electorate is being penalised for no default of theirs, and the Court would be thrusting upon it a person whom the majority of the electors obviously do not want. The tribunal had, therefore, no jurisdiction to pass the order declaring the first respondent to be elected to the office of President. The only order which the Court could have passed on its findings, was to set aside the election and direct a re-election.

13. I venture to repeat this.

14. Learned Counsel for the respondent, however, drew my attention to the decisions of Justice Bardswell in *M. Shanmuga Mudaliar Vs. S.*

Subbaraya Mudaliar and Another, , and Justice Jackson in Gangadu v. Abraham (1933) 66 M.L.J. 421, where the learned Judges refused to

interfere by the issue of writs of certiorari with an order of an Election Commissioner, who had declared a defeated candidate elected though the

latter had obtained a minority of votes. With great respect to the learned Judges, I cannot subscribe to the proposition that an Election Tribunal has

jurisdiction to declare a person who obtained a minority of votes as duly elected without a finding that the votes cast for the returned candidate

were thrown away. The considerations which I have adverted to above, as well as the decisions which I have quoted were not evidently brought to

the notice of the learned Judges. In my judgment, the discretion of the Commissioner to declare a defeated candidate elected is not an absolute or

arbitrary discretion, but a judicial one, and is conditioned by its complying with the provisions of Rule 28 of the Election Rules, read with the

findings on the matter set out in Rule 9 of the Rules for the Decision of Election

Disputes.

15. The result is that the rule is made absolute, and the order of the Election Commissioner, in so far as he declared the 2nd respondent elected is set aside. The only order which the Election Commissioner could have passed was to declare the election of the returned candidate void, and order re-election, and this will be substituted in the place of the order of the Election Commissioner.