
(1973) 02 MAD CK 0052
In the Madras High Court

A.V. Palaniswami

APPELLANT

Vs

The Election Court (District Munsif) and Others

RESPONDENT

Date of Decision : 20-02-1973

Acts Referred:

Citation : (1973) 2 MLJ 60

Judgement

1. This Writ Appeal arises out of an election for the President of Appanaickenpatty Panchayat in West Coimbatore District. The election took place on 31 st July, 1970. The contestants were Palaniswamy (appellant) and Ramamurthi (fifth respondent in the appeal). According to the Returning Officer, the appellant secured 712 votes and the fifth respondent 710 votes. 60 votes were declared invalid, the total number of votes thus being 1,482. The fifth respondent filed an election petition before the Election Tribunal, namely, District Munsif, Tiruppur. The Election Tribunal directed a recount and found 704 votes as having been polled in favour of the appellant and 708 votes in favour of the fifth respondent. According to him ten votes which had been counted as valid by the Returning Officer were invalid so that the total number of invalid votes were found to be 70. That was what has been described as the first stage. The appellant filed a revision petition in this Court against the order of recount, but it was dismissed. When the matter went back to the Election Tribunal, the appellant again sought a recount of the 70 votes which were held to be invalid. A second recount was undertaken to find out whether any of them was really valid. One point which was agitated on behalf of the appellant before the Election Tribunal was that some of the votes which had been recorded on the back of the ballot paper should also be held valid. The Election Tribunal upheld this contention and found that, on that basis, 14 votes had to be added to the appellant and 14 votes to the fifth respondent. That did not therefore alter the position. Allowing the election petition, the Election Tribunal declared the fifth respondent as ejected.

2. Against this decision the appellant (Palaniswamy) filed Writ Petition No, 438 of 1972. It was heard by Ramaprasada Rao, J. The arguments related solely to the 70 votes. 21 of them were conceded by both sides to be invalid. 29 of them

contained voting marks on the reverse of the ballot papers. About the remaining 20 the parties were disagreed and they invited the decision of the Court. According to the learned Judge, Mr. Vedantachari, appearing for the appellant (Petitioner before the learned Judge) claimed that three votes (out of the 20) bearing Nos. 116344, 116385, and 116509 should be counted in his favour. On the other side, Mr. Venugopal appearing for the fifth respondent, claimed that similarly three votes (out of the 20) bearing Nos. 115580, 116063 and 116371 should be counted in favour of the fifth respondent. Otherwise there was no dispute that the appellant had secured 704 votes and the fifth respondent had secured 708 votes, as found by the Election Tribunal.

3. On the question whether a ballot paper which bears a mark on its reverse is acceptable, the learned Judge held that it was not a valid vote, and he followed his earlier decision in *Chinnaswamy Thevar v. Election Commissioner*, (District Munsif) Periakulam W.P. No. 1317 of 1971. Thus 29 votes went out of the picture, altogether. Regarding the three votes mentioned by Mr. Vedantachari, his contention was that the voter had really voted for the appellant by affixing the mark in the compartment of the pumpkin, the symbol allotted to the appellant, but that, in folding, there was a reflection of the impression in the compartment of the roadroller, the symbol of the fifth respondent. The learned Judge accepted this contention in respect of two votes, namely, 116344 and 118385. But, so far as 116509 was concerned, the learned Judge rejected the contention, observing:

A casual inspection of the same gives a reasonable impression that the two marks have been made by the voter and that such markings are as a result of a conscious effort to make them. Under the rules, if a ballot paper contains more than one marking on the face of it, then it ought to be rejected.

The result therefore was that only two more votes had to be added to the appellant (Palaniswamy) which would bring up the number of his votes only to 706, which would still be less than the 708 votes secured by the fifth respondent. In that view he did not think it necessary to go into the question raised on behalf of the fifth respondent that the three votes, 115580, 116063 and 116371 should be counted in favour of the fifth respondent. On his findings, the learned Judge dismissed the Writ Petition. Hence this Writ Appeal.

4. Before us Mr. Vedantachari, appearing for the appellant, questioned the correctness of the view of the learned Judge that the ballot papers which contained voting marks on the reverse would be invalid. Secondly he contended that the learned Judge had not considered the argument put forth by him that three other votes, 116665, 115845, and 116657 (out of the 20) should be held to be valid votes in favour of the appellant, though this ground had been raised in paragraph 9 of the affidavit filed in support of the writ petition. On behalf of the fifth respondent it was urged by Mr. G. Ramaswami and Mr. K. Doraiswami, that, if it should become necessary, the Court would have to hold that the three votes 115580, 116063 and 116371 (out of the 20 votes) should be held to have been cast in favour of the fifth respondent.

5. The first point which therefore falls for determination is whether a ballot paper, containing a voting mark on the reverse side of the ballot paper can be held to be a valid vote at all. This question has to be answered with reference to Rule 14 (2) of the Tamil Nadu Panchayat (Conduct of Election of President of Village Panchayat) Rules, 1970, issued in G.O. No. 845, Rural Development and Local Administration, dated 11th May, 1970, (page 122 of the M.L.J. Act Supplement) Rule 14 (2) says:

Each elector shall be given only one ballot paper. : The elector, on receiving the ballot paper, shall forthwith proceed to the voting compartment and there, with the aid of the instrument supplied for the purpose, make a mark on the ballot paper against the symbol Of the candidate for whom he intends to vote. The mark may be made any where in the compartment within which the symbol of such candidate is printed on the ballot paper. He shall then fold the ballot paper so as to conceal his vote and after showing to the Presiding Officer the distinguishing mark stamped on its back, put it into the ballot box kept for the purpose.

Rule 19 (2) relating to the counting of votes says:

A ballot paper shall be rejected--

- (a) if it bears any mark or writing by which the elector can be identified; or
- (b) if no vote is recorded thereon, or
- (c) if votes are given on it in favour of more than one candidate ; or
- (d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given; or
- (e) if it is a spurious ballot paper; or
- (f) if it is so damaged or mutilated that its identify as a genuine ballot paper cannot be established; or
- (g) if it bears a serial number, or is of a design, different from the serial numbers, or, as the case may be, design of the ballot papers authorised for use at the particular polling station; or
- (h) if it does not bear the distinguishing mark which it should have borne under the provisions of Sub-rule (2) of Rule 13; or
- (i) if it does not bear the signature of the Presiding Officer on the reverse side:

Provided that, where the Chief Presiding Officer is satisfied that any such defect as is mentioned in Clause (g), Clause (h) or Clause (i) has been caused by any mistake or omission, the ballot paper shall not be rejected merely on the ground of such defect.

Provided further that a ballot paper shall not be rejected merely on the ground

that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

It seems to us that the essential portion of the Sub-rule (2) of Rule 14 is that the elector...shall...with the aid of the instrument supplied for the purpose make a mark on the ballot paper against the symbol of the candidate for whom he intends to vote and in the compartment containing the symbol. The marking instrument in this case is a rubber stamp containing a circle with two diameters at right angles to each other. This rule by itself clearly shows that the mark should be made on the front side of the paper where alone the two compartments have been printed, one containing the pumpkin symbol and the other containing the road roller symbol. On the reverse side of the ballot paper there is no such compartment at all, and Rule 14 (1) also shows that the front side of the ballot paper is that which contains the two compartment and the other side is called the back of the ballot paper on which the Presiding Officer shall place the prescribed distinguishing mark (in this case the initials of the Presiding Officer) to show that it had been issued by him. We cannot understand how a contention could possibly be advanced that the ballot paper in which a mark is put with the instrument only on the reverse side, where there is no compartment, can be held to be a vote at all. It should be noted that even if one looks at the back of the ballot paper, the impression of the compartments on the front side cannot be seen through at all. Perhaps, if one holds up the ballot paper against sunlight or against the light of a bright lamp and looks at the back of the paper, one may be able to see the impression of the compartment which is on the front side, but that is not how one is expected to handle the ballot paper. Even an ordinary illiterate man must surely know that the two compartments have been printed only on one side of the paper which may be called the front side. The instructions in Rule 14(2) also appear in Tamil and the voter is expected to be acquainted with them.

6. There is another reason why the mark should be put only on the front side in which the two compartments have been printed. The voter should, after making the mark fold the ballot paper so as to conceal his vote and after showing to the Presiding Officer the distinguishing mark stamped on the back, put it into the ballot box kept for the purpose. Now the distinguishing mark (in this case the initials of the Presiding Officer) should have been placed on the back of the ballot paper. If the voter has to show to the Presiding Officer the distinguishing mark and at the same time he has recorded his vote on the back side of the ballot paper, it would not be possible for him to conceal the vote, because, when the Presiding Officer sees the distinguishing mark he would also be able to see for whom the voter has voted, and the secrecy of the ballot which is the most important element in voting would be lost. This reason, by itself, in our opinion, clinches the question.

7. If, contrary to the above instructions, a mark is made only on the back side of

the ballot paper, even though, it has been made with the aid of the instrument provided for the purpose, it cannot be considered as a vote at all, and, in our opinion, the ballot paper will have to be rejected under Rule 19 (2) (b) of the rules. In our view, that rule applies not merely to a case where no mark at all has been put by the voter anywhere to indicate his intention, but should also apply to a case like the one we are considering, where he has not put the mark on the front side, but has put it on the back side of the ballot paper. According to Rule 14 (2), the vote should be recorded on the front side, if there is no mark on the front side; it means that no vote has been recorded within the meaning of Rule 19 (2) (b). This is what both a man learned in law and a lay man would say. If Rule 19 (2) (b) is not given such a meaning, it would mean that no provision has been made in Rule 19 (2) for the rejection of a ballot paper which contains no mark on the front side, but contains a mark only on the back side, though it is clear from our discussion of Rule 14 (2) that such a ballot paper should not be counted at all. In this connection we would observe that Rule 19 (2) (d) is not apposite to reject such a vote. That rule entails rejection "if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given". That rule assumes that a mark has been made in the front side of the ballot paper, but it is doubtful to which candidate the vote has been given. We therefore, come, back to the position that, where no mark has been placed on the front side, it must be held, that, within the meaning of Rule 19 (2) (b), no vote is recorded thereon. It will also be noted that our interpretation of the rule is based on the underlying principles and not on mere technicality.

8. Since the meaning, in our opinion, is clear, it is really unnecessary to refer to the decided cases cited before us. We shall, however, briefly refer to them. Mr. G. Ramaswami, the learned Counsel for the fifth respondent, cited a passage from the decision of the Supreme Court in *Hari Vishnu Kamath v. Ahmed Ishaque* 10 E.L.R. 216 . In that case, in an election to the House of the People, ballot papers intended for the State Assembly were wrongly issued by the Presiding Officer. The voters, however, clearly cast their votes in favour of a particular candidate. But it was held that they were not valid votes. Their Lordships observe:

It is argued with great insistence that as the object of the Election Rules is to discover the intention of the majority of the voters in the choice of a representative, if an elector has shown a clear intention to vote for a particular candidate, that must be taken into account u/s 100 (2) (c), even though the vote might be bad for non-compliance with the formalities. But, when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of law, in the same position as an intention not expressed at all.

9. If the above is the position when the voters themselves had clearly expressed their intention, but the fault was only of the Presiding Officer, the present is an a fortiori case, where the vote containing a mark only on the back side must be

rejected for non-compliance with Rule 14.

10. In the Borough of Berwick-on-Tweed case 3 O'Malley and Henry Hardcastle, 178 at 182, a ballot paper which was marked on the back side was rejected, though it was possible to fold up the ballot paper so as to hide the mark. Similarly in the Bickrose Division case (4 O' Malley and Henry Hardcastle, no at 111) the following passage occurs:

A ballot paper had been rejected by the Returning Officer, which had been marked upon the back opposite Mr. Syke's name, and it was contended by Mr. Charles that inasmuch as the mark could be seen through the paper without turning it over, it was a good vote. "Mr. Baron Pollock : I have a very clear opinion that that will not do. If you take the whole context of the Act, and read the direction, the voter is to place a cross on the right-hand side opposite the name of each candidate for whom he votes, and that, together with the other provision with regard to the returning officer, clearly indicate that it must be on the face of the paper. We think that the vote was properly rejected on the ground that a cross upon the back is not a compliance with the Act.

11. These two cases are cited with approval in Parker's Election Agent and Returning Officer, Fifth Edition at page 209 (page 222 of the later edition):

A ballot paper marked on the back only should be rejected (Berwick-on-Tweed 3 O' H & H 182), (Buckrose, 4 O' M & H. in), even though such mark shows through the paper on to the front.

12. Similarly in Halsbury's Laws of England, Third edition, Volume 14 at page 140, it is observed:

A ballot paper marked in the back only should not be counted even though the mark shows through the paper on to the front.

In Kisan Januji Vs. Anilkumar Manilal and Another, , two ballot papers were rejected by the Returning Officer because it was found that on each of them mark was made on the reverse of the ballot paper over that part where the symbol of standing lion could be seen against light. This decision was upheld:

The ballot paper is intended to be used as such by making a mark with the instrument supplied on the face Of the ballot paper and not on the reverse... We are unable to accede to the proposition that merely because a symbol may be visible on a ballot paper on its reverse side, it is permissible for a voter to make a mark with the instrument supplied to him on the reverse side of the ballot paper. However illiterate a person may be, he is not ignorant nowadays of the procedure which is explained with pains not only by. the candidate but also by the officers.

13. As against this, Mr. Vedantachari, the learned Counsel for the appellant, has relied on Swarup Sing Vs. The Election Tribunal, Municipal Board, Aligarh and Others, and Dhanpat Lal Vs. Harisingh and Others, , In Swarup Sing Vs. The

Election Tribunal, Municipal Board, Aligarh and Others, , it was stated:

The ink used for impressing on the face of the ballot paper, the vertical and horizontal lines, the names of the candidates and the symbols has penetrated the ballot papers with the result that everything printed on the face of the ballot paper appears also on the back of it, although, of course, the order of the columns, the symbols and the name of the candidate...are reversed. The symbols are perfectly clear, but the names of the candidates cannot be read as each letter is reversed. A literate voter would therefore be able to distinguish between the front and the back of the form, but an illiterate voter might well be in doubt,

...An elector shall make a mark on the ballot paper opposite the name of the candidate or each of the candidates for whom he intends to vote.

It was pointed out:

For all practical purposes, so far as an illiterate voter is concerned, a mark opposite an assigned symbol is a mark opposite a name, and, in the peculiar circumstances of this case, I am of opinion that the mark made by the voter on the back of the ballot paper is a mark "on the ballot paper" within the meaning of paragraphs 43 and 44 of the 1953 Order.

Thus the decision rested on the peculiar facts of the case and can be distinguished on that ground, if necessary.

14. Similarly in Dhanpat Lal Vs. Harisingh and Others, , it was observed, "It is significant that in the present case the symbols were clearly visible on the back of the ballot paper", and that was the reason why it was held following the Allahabad case quoted above, that the vote should be counted. This decision again is distinguishable and can be distinguished, if necessary. It is relevant to note how this decision itself distinguishes cases like ours, thus:

...an over-all examination of these cases goes to show that the observations contained in these cases were based on the particular language of the Act, which was under consideration, for instance, in 7 Supreme Court Reports, Canada (1883), Section 45 of the Election Act, 1874, has been referred to. It provided that the mark by making a cross with a pencil must be placed on any part of the ballot paper within the division. Thus it is clear from this provision that the statute itself made it obligatory that the mark must be contained within the division containing the name of the candidate. As we have already stated in the earlier part of our judgment there is no such statutory prohibition in the rules against marking the ballot paper on the back.

15. Mr. Vedantachari also relied upon the decisions in Manni Lal Vs. Parmai Lal and Others, , and Pontardawe Rural District Council Election Petition (1907) K.B. 313, but they are not relevant.

16. We therefore, hold that the 29 votes on which the mark is put on the reverse

side of the ballot paper are not valid.

17. The second point which falls for determination is the decision about the three votes, 116385, 116344 and 116509. We have looked at these votes and we have no hesitation in agreeing with Ramaprasada Rao, J., that 116344 and 116385 are votes intended to be cast in favour of the appellant, but in folding, the impression of the mark has been formed on the road roller. Hence they should be counted in favour of the appellant, as held by Ramaprasada Rao, J. Equally, in respect of 116509, we agree with Ramaprasada Rao, J.

18. The next point which calls for decision is whether the three votes, 115845, 116665 and 116657 or any of them, should be counted in favour of the appellant. It is stated by Mr. Doraiswamy, who appeared for the fifth respondent before Ramaprasada Rao, J., that it was conceded before the learned Judge that these three votes were invalid. He submits that that was why the learned Judge has not made any reference to these votes at all. There is some force in the submission. However, we have examined these three votes, because they have been referred to in paragraph 9 of the affidavit filed in support of the writ petition and the point has been raised again in paragraph 8 of the grounds of appeal. NOW, in respect of 116665 there is no full mark as contemplated in Rule 14 (2). There is only a line in violet ink drawn inside the pumpkin. We are not satisfied that it was made at all with the aid of the instrument supplied for the purpose, and it would not be safe to consider it as a valid vote at all. It should be counted as no vote and should be rejected under Rule 19 (2) (b).

19. In respect of 115845 it appears to us that the mark made with the instrument and in violet ink has been made by the voter in the pumpkin compartment (of the appellant), but there has been a spreading of the ink also on the impression. The spreading of the ink cannot obliterate the fact that the mark has been put with the instrument and in violet ink in the pumpkin compartment, and, therefore, it seems to us that it discloses the intention of the voter to vote for the appellant and that this vote should be counted. The Tribunal refers to this vote as 115846 and says:

There is no seal on both the symbols. There is a small ink dot black in colour on the symbol of pumpkin.

We are unable to agree. This vote will be counted in favour of the appellant. As for 116657 no mark appears to have been made at all with the instrument supplied for the purpose. What appears is only a thick dot of ink or some other material on the reverse side and it has seeped through on the front side in the space provided for the pumpkin. Further, the mark is in black ink and not in violet ink. Violet is smeared on the instrument supplied for the purpose and, if the mark were fixed with that, we would expect violet ink. We accordingly reject this vote.

20. The result, according to our analysis, is that, in addition to the 704 votes, three votes should be added to the appellant, namely, 116344, 116385 and

115845. This would bring up the number of votes secured by the fifth respondent about which there is no dispute. In this view, it is really unnecessary to record our findings regarding the three votes, 115580, 116063, and 116371 claimed on behalf of the fifth respondent. However our findings are these : Regarding 115580 we find that the voter has put his mark with the instrument supplied for the purpose and in violet ink in the space provided for the road roller, but, in folding, some reflection of it has been formed on the pumpkin. The intention of the voter has clearly been expressed in favour of the fifth respondent and it should be counted in his favour. Regarding 116063 the same remarks apply. Similarly for 116371, also the same remarks apply. Hence all these three votes should be counted in favour, of the fifth respondent.

21. In the view we have expressed, it is unnecessary to record our opinion with regard to the contention of Mr. Vedantachari that, if the 29 ballot papers containing marks on the reverse side are taken into account, it will be found that the view of the Tribunal that the appellant has secured 14 votes and the fifth respondent has secured 14 votes and that this would not make any difference is not correct. For the sake of completeness we have examined these votes also, on the assumption that these votes cannot be rejected merely on the ground that the marks are found only on the reverse side of the ballot papers. Our findings are as follows : In 13 votes in Ward No. 3 bearing Nos. 116358, 116397, 116456, 116477, 116524, 116530, 116554, 116560, 116627, 116636, 116754, 116771 and 116821, if held against bright light, the markings are on the reverse side of the pumpkin compartment and hence, if they were to be held valid, they would have to be counted in favour of the appellant. Similarly six votes in Ward No. 3 bearing Nos. 116461, 116577, 116635, 116767, 116775, and 116777, if held against bright light, contain marks on the reverse of the compartment of the road roller; that is to say, they would have to be counted in favour of the fifth respondent. In 116729, the mark is on the reverse, and, if held against bright light, would fall most in between the two compartments and a little portion of it would fall on the reverse of the road roller compartment. This vote has to be totally excluded. Similarly another vote 116884 contains a mark which, if held against bright light, would be seen to fall partly in between the two compartments and partly on the reverse of the compartment of the pump-kin. This also will have to be excluded.

22. In Ward No. 1, 115866, if held against bright light, would be seen to contain an impression on the reverse of the pumpkin compartment, and would have to be included in favour of the appellant. 115852 contains a smudge mark which, if held against bright light, would fall on the reverse of the compartment of the pumpkin. The question is whether the smudge mark was made with the instrument. It looks as if it was made with the instrument and so it will have to be included in favour of the appellant. Five ballot papers, 115708, 115801, 115830, 115861 and 115910 contain marks of the voters with the instrument on the reverse of the road roller and would have to be included for the first respondent.

23. In Ward No. 2, 116122 contains a mark which, if held against bright light, would seem to fall mostly in the compartment of the road roller. Hence, it would have to be included in favour of the fifth respondent.

24. No vote has been shown to us by Mr. Vedantachari as containing any mark made with the instrument supplied for the purpose on the front side of the ballot paper, apart from the mark made with the instrument on the reverse side,

25. To sum up this aspect of the case, we would point out that if the votes containing marks on the reverse side have also to be included, the appellant would get 15 votes and the fifth respondent 12, and that would bring up the total number of votes of the appellant only to 722 and the total number of votes of the fifth respondent to 723. The votes of the appellant would still be less than the votes of the fifth respondent.

26. For the reasons we have stated above, the appeal fails and is dismissed. The parties will bear their own costs in the appeal.