

(1989) 04 MP CK 0025

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 221 of 1989

Bacchanlal and Another

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 11-04-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 324

Madhya Pradesh Panchayat Act, 1981 — Section 117, 17, 30, 31, 31(2)

Citation : (1989) MPJR 728 : (1993) MPLJ 284

Hon'ble Judges : T.N. Singh, J;K.K. Verma, J

Bench : Division Bench

Advocate : A. Mishra, for the Appellant; N.K. Jain, for the Respondent

Final Decision : Dismissed

Judgement

T.N. Singh, J.

Two unsuccessful candidates have joined hands in this petition challenging the election held for the Office of Sarpanch of Gram Panchayat, Mohana, the result of which was declared on 6-2-1989 in favour of respondent No. 4, Chhote Singh son of Mangal Singh. When the petition was admitted, care was taken to limit the scope of controversy to the question whether the election process as a whole was vitiated as a result of the symbol "Lotus Flower" being printed on the ballot paper resulting in the voters being misguided. Accordingly, we are required to resolve in this matter that controversy only.

The crucial facts in regard to that controversy are mostly admitted, manifested albeit on the face of Annexure P/1 of the petition and R/1 of the common return of three respondents -- Collector, District Gwalior; Gram Panchayat Mohana, Tahsil Ghatigaon; and the Assistant Returning Officer. The ballot paper used in the election is Annexure P/1 on which 11 different symbols are printed vertically, in tandem, following indeed the order in which the symbols are mentioned in the relevant Rule 31(2) to which we shall advert in due course. It will suffice to note

here this much only that ten candidates had contested the election and each of them was allotted one of the prescribed symbols, but the symbol, "Flower" (as described in the Rules) was not assigned to any candidate though that was printed on the ballot paper. As per Result Sheet, Annexure R/1, total votes cast were 3470 and respondent No. 4 had polled the highest number of 769 votes; petitioner Bacchanlal polled 666 and the other petitioner Sultan Khan polled 115 votes. There is also no dispute between the two petitioners and respondent No. 4 that as many as 210 votes were declared invalid although in their return, respondents Nos. 1 to 3 have put the figure at 57. The said respondents in their return have also referred to the order of the State Government dated 12-9-1988 (Annexure R/2) in which is manifested a direction to all Collectors of the State to ensure that symbol No. 7 ("Flower") prescribed under Rule 31(2) of the relevant Rules is not allotted to any candidate because of the similarity of the symbol with "Lotus Flower" which the Election Commission of India has reserved for a political party. The Returning Officers were required to be informed thereunder for taking care against allotment of that symbol to any candidate for the Office of Sarpanch in the Election held for any Gram Panchayat in this State.

We may now refer conveniently to the relevant provisions of Madhya Pradesh Panchayat Act, 1981, for short, "the Act" and the relevant Rules aforesaid, namely, the Madhya Pradesh Gram Panchayat Election and Co-option Rules, 1988, for short "the Rules", framed by the State Government in exercise of powers conferred under the relevant provisions of Sections 17, 36 and 90 of the Act. According to the long title of the Act, it has been enacted to "consolidate and amend the law relating to establishment of panchayats with a view to simplify the law for the purpose of ensuring efficient panchayat administration in the State". It is not necessary to refer to its precursor, M. P. Panchayat Act, 1962, but it is pertinent still to note that the Act is meant to enforce the Directive Principles of the Constitution as Article 40 obligates "village panchayats" to be organised by State and to be endowed "with such powers and authority as may be necessary to enable them to function as units of self-Government". The term "Prescribed Authority" is defined in Section 2(xiv) and that is to be noted because an "Officer or authority as the State Government may, by notification, direct to discharge the functions of a prescribed authority" as per that provision, and he has a crucial role to play in the administration of the Panchayat. u/s 3, the three tiers of the "Panchayati Raj" are respectively, a gram panchayat for a village or group of villages; a janapada panchayat for a block; and a zila panchayat for a district. State Government is authorised u/s 5 to exercise "general control" on all panchayats. though as per Section 6, every panchayat is contemplated as a "body corporate", with all necessary trappings. While Section 9 speaks of "disqualification" for registration of voters in Gram Panchayat area, the conditions of registration of voters are described in Section 10. "Voter" registered under (he Act may offer himself to be "elected" or "co-opted" as a "pancha", or even "Up-sarpanch" or "Sarpanch, as per proviso to Section 11(1), as amended, but the "Prescribed Authority is empowered to "appoint" a Panch if

any Ward under any Gram Panchayat fails to elect a Panch and provision of co-option of a Panch is envisaged under Sub-Section (2) of Section 11. As per Section 16 (amended by Act No. 26 of 1988), provision is made for election of Sarpanch and Up-Sarpanch of a Gram Panchayat. While direct election to the Office of Sarpanch is envisaged u/s 15(1), under Sub-section (4) thereof an Up-Sarpanch is elected from amongst the Panchas. The Prescribed Authority is also authorised to "appoint" u/s 15(6) a Sarpanch or Up-Sarpanch should the Panchayat voters fail to elect the said office-bearers, subject indeed to the "declaration" envisaged u/s 30.

To the instant controversy is directly relevant the provision of Section 30 and as such, we propose to extract relevant portion there from :

"31. Power of State Government to stay or cancel election of election proceeding of Panchayat. -- (1) In this Section -

(a) "Section" -

(i) in relation to a gram panchayat means election or co-option of any panch u/s 11 or election of sarpanch and up-sarpanch u/s 15 as the case may be;"

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"(b) "Election Proceedings" means the proceedings for election commencing from the nomination of a candidate for election and ending with the declaration of the election or viz. date at such election.

(2) Notwithstanding anything to the contrary contained in this Act or the rules made thereunder, if the State Government is of the opinion that it is necessary in the public interest to stay or cancel the election or election proceedings, of any panchayat, it may, by an order and for reasons to be recorded in writing stay or cancel such election or election proceedings, as the case may be, and may resume the same:

Provided that no action under this subsection shall be taken except -

(a) Where the State Government on a report from the Collector of the revenue district concerned, or otherwise, is of the opinion that a situation has arisen which may render the conduct of free and impartial election not practicable; or ..."

The functions of Gram Panchayat are enumerated in Section 43 and the list is a long one impinging on various aspects of the social life in a village. Indeed, the powers conferred on a Gram Panchayat in relation to the functions enumerated in Section 43 described in Section 48 et. .seq. reflect manifestly wide ambit of the regulatory functions which a Gram Panchayat is meant to discharge as a unit of self-Government for the welfare of the large section of the population of the State living in villages.

What is required to be noticed particularly for the purpose of the present

controversy is that u/s 36, the State Government is empowered to make "rules for regulation and conducting the election and co-option" of members and office-bearers of the Panchayat. The other important provision of the Act to be noted is Section 117, under which "an election or co-option" can be "called into question only by a petition presented to the prescribed authority, and not otherwise".

We may note now the relevant provisions of the "Rules" of which Chapter VI is captioned "Conduct of Elections" and Chapter IX bears the heading "Poll and Voting for Election", but reference may also be made to Rule 21 of Chapter V under which Returning Officers, Assistant Returning Officers, Presiding Officers, Polling Officers and all other persons engaged in the conduct of election are required to work "under the general guidance, superintendence and control of the Collector". As per Rules 24 and 35 of Chapter VI, nomination papers are to be filed in Form G-V for the election of the Sarpanch, but in mat form, there is no provision of choice of any symbol by the candidate to be indicated, the relevant provision in that regard is contained in Rule 31, of which relevant portion is extracted:

"31. ...

(2) Where a poll becomes necessary for the office of the sarpanch the Returning Officer shall assign to each candidate any one of the following symbols, namely :

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(1) Cycle, (2) Lion, (3) Elephant, (4) Rising Sun, (5) Swastik in a circle, (6) Balance, (7) Flower, (8) Pot, (9) Bow and arrow, (10) Railway Engine, (12) Spade and Belcha, (13) Two leaves, (14) Torch, (15) Camel.

(3) If the list of symbols given in Sub-rule (1) in case of panch and in Sub-rule (2) in case of sarpanch is exhausted, the Returning Officer may in his discretion allot to the candidates concerned any symbol other than those specified in the list:

Provided that no symbol allotted to any political party of the State by the Election Commission shall be allotted to any candidate.

(4) The allotment by the Returning Officer of any symbol to a candidate shall be final".

Rule 41 of Chapter IX provides, "Votes shall be given by ballot" where a poll is taken at an election and Rule 43 speaks as follows :

"Every ballot paper shall be of such design as may be approved by the State Government. The name of the concerned candidate shall be written in Devnagari Script in ballot paper against his symbol. On the back side top of the ballot paper the number of ward shall be written in Devnagari Script".

Another provision of signal importance is rule 45 of which Sub-rule (1)(b) deserves to be extracted :

"45. Notices at polling stations -- (1) Outside and inside each polling station there shall be displayed prominently -

.... (b) a notice giving the name of each candidate in Devnagari script in the same order in which the name of such candidates appear in the list of contesting candidates at the election published under Rule 30 together with the description of the symbol which has been assigned to each such candidate under Rule 31."

It is no doubt true that in a democratic set up, real power is supposed to rest with the people, to be exercised by them through their elected representatives. It is equally true that a free and fair election is the soul of democracy and, therefore, free and fair opportunity must exist for a voter to exercise his franchise. However, by now law is well-settled that the right to vote even in a general election, which elects the Government for the conduct of affairs of the nation, is neither fundamental nor constitutional right, but is merely statutory right and is subject to limitations prescribed in the relevant statute, namely, the Representation of the People Act, 1951. Popular mandate expressed at the hustings is not to be lightly interfered with is also a salutary principle stressed importantly and repeatedly. (See N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, ; Jagan Nath, AIR 1954 SC 210; Charan Lal Sahu Vs. Nandkishore Bhatt and Others, ; Jyoti Basu, AIR 1982 SC 983; Arun Kumar Bose Vs. Mohd. Furkan Ansari and Others, and P. Nalla Thampy, AIR 1984 SC 135).

There is, however, an important distinction to be noted in respect of election held under the Representation of the People Act because of the constitutional bar envisaged under Article 329(b) by which the remedy of an election petition contemplated under that Act is envisaged as having the status of constitutional remedy thereunder. That position is noted in Punnuswami's case (supra) wherein challenge to validity of an election under that Act by way of a writ petition under Article 226 was held impermissible. Such a constitutional bar is not operative in case of any other "election" and, therefore, in other cases High Courts are competent to entertain complaints against misuse or abuse of power by any statutory functionary or of non-compliance of any statutory provision, in relation to the "election" in question. In the context merely of the rule of convenience that when there is an adequate and efficacious statutory remedy writ power is not used, the grievance in such a case is tested. Indeed, the occasion for the use of writ power may arise at different stages of an election process and whether or not and to what extent the power can be used shall be determined by the facts and circumstances of the case and of the relevant statutory provisions. In Hari Vishnu Kamat's case AIR 1955 SC 232," seven learned Judges of the Apex Court unanimously took the view that certiorari could issue from the High Court against decision rendered by an Election Tribunal on the Election Petition filed under the Act as the Tribunal was amenable to High Court's writ jurisdiction and the High Court's writ power was unaffected by Article 329(b) against decisions of the

Tribunal. Two contentions were raised in that case and they have a material bearing on the issue agitated in the instant petition as well. Firstly, whether Rule 47(1)(c) of the relevant Rules was mandatory and secondly, whether the result of the election had been materially affected. What happened in that case is that in certain polling stations voters were given ballot papers with brown bar intended for the State Assembly instead of ballot papers with green bar which were to be used for House of the People and according to the said Rules, "a ballot paper contained in a ballot box shall be rejected if it appears in serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used". Although in that case, subsequent approval was obtained from the Election Commission for validating the votes cast on wrong ballots, Rule 47(1) being held mandatory, that exercise was regarded fruitless. Object of the provision, it was held, determined its character; its object was to indicate the manner in which voter's intention was to be determined and that was of fundamental importance. Because the tainted ballot papers exceeded the difference between the elected candidate and his nearest rival, it was also held that the election could not be upheld as the result thereof had been materially affected by those tainted votes cast in the election.

Another decision of equal relevance is the *Mahadeo Vs. Babu Udai Pratap Singh and Others*, in which the question arose of non-compliance of Rule 56(2)(g) of the Conduct of Election Rules, 1961, framed under the 1951 Act, aforesaid. In that case, the name of the election-petitioner had been misprinted on the ballot papers though the symbol chosen by him was correctly shown and that was held to be a case of "irregularity" and not sufficient to hold the election as a whole vitiated. In *K.S. Abdul Azeez Vs. Ramanathan Chettiar and Others*, , non-specification of choice of three alternative symbols (as per requirement prescribed in the Form) was held to be defect of insubstantial character and on that ground, rejection of nomination paper by Returning Officer for that defect was held illegal. The candidate, in filling up his nomination paper, indicated "Star" as the only symbol he had opted for, but that was a symbol reserved for a political party. It was held that choice of symbol was not meant to play an important part because any political party was entitled to assign its symbol to any candidate till the date of withdrawal. Nomination papers could not, therefore, have been rejected during the interval.

One of the questions agitated in *H. V. Kamath (supra)* was re-examined in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, in another context. The Election Commission had cancelled election in the entire Parliamentary constituency on complaints being found true about use of violence in certain segments of the constituency and declaration of result of election being withheld by the Returning Officer on that account Their Lordships were moved in appeal when the High Court refused to interfere on the writ side with the order of the Election Commissioner, repelling the contentions raised on merits. The majority, speaking through Krishna Iyer, J. while upholding

High Court's decision that Election Commission could have acted under Article 324 of the Constitution observed still that the provision did not exclude principles of natural justice. However repoll having been held in (he meantime and the result thereof being challenged in an election petition, the appeal was dismissed taking the view that the Election Tribunal had wide powers to give any kind of relief to the injured candidate. However, more appositely, reference may be made to this Court's recent Bench decision in Radheshyam Sharma's case 1989 MPLJ 208 : 1989 MPJR HC 174 wherein an election held in a co-operative society was challenged on writ side. In the context of specific provision in the M. P. Co-operative Societies Act, enabling a "dispute" to be raised and decided in respect of such election, this Court observed that interference on writ side can be made in an election matter when it becomes the question solely of upholding and maintaining democratic structure of the Institution in accordance with Directive Principles of the Constitution for ensuring purity in the election process, and not when the question is of deciding a "dispute" in a particular case. This Court would act, it was held, when the impugned election cannot be said to be an "election" in the eye of law in that if the Election Officer had done any act not contemplated under the relevant statutory provisions or had exercised any power without authority in that regard being granted to him thereunder or had acted mala fide to defeat those provisions.

In the premises aforesaid, the broad question that arises for our consideration in this case is, whether it can be said that for printing on the ballot paper an unallotted symbol, "Flower", which resembled a prohibited symbol ("Lotus Flower"), the election process became vitiated in its entirety for a two-fold reason : whether any mandatory statutory provision had been violated or whether voters were denied in any manner adequate opportunity of exercising freely and effectively their franchise to such extent that the result of the election was materially affected. Let us, in this context, recapitulate relevant aspects of pleadings and the facts established. Admittedly, respondent No. 4 won the election by a margin of 103 votes by which petitioner Bacchanlal was defeated, but it has not been pleaded and established on facts that those 103 were declared invalid as those voters had exercised the franchise for the unallotted symbol printed on the ballot paper. Admittedly, as many as 3470 votes were cast in the election as per Annexure R/1 and on pleadings a total number of votes declared invalid according to Annexure R/1 was 157, though 210 according to the candidates. On these facts and pleadings, it is difficult to accept the plea that the electorate was misled generally by the unallotted symbol being printed on the ballot papers. Although scope exists for the petitioners to challenge the result of the election declared in favour of respondent No. 4 in the election petition contemplated u/s 117 of the Act by establishing in the course of examination of invalid ballot papers that it so happened, there is certainly no scope for them to challenge before us that the election process as a whole, in the instant case, is vitiated. The facts pleaded and established do not at all manifest that a situation had arisen in the election challenged in which voters, generally, were denied

adequate opportunity of freely and effectively exercise their franchise on account of an unallotted symbol being printed on ballot papers used in the election.

Let it be remembered that though Gram Panchayats have a constitutional status of a sort and under the Act they are charged with functions of enormous variety as an unit of self-Government, their powers and the scope, ambit and manner of discharge of their duties, responsibilities and functions are not comparable at all to the larger units of Government at the State and the Centre, namely, the State Assemblies and the Parliament Section 43 proviso, expressly contemplates that "funds" are to be provided to them by the State Government and they are to act as "agents" only of the Government Further, a constituency of a Gram Panchayat has a much small geographical and democratic coverage compared to the larger unit, and as such whether in the matter of constitution or of conduct of affaire of Panchayats, the provisions of the Act reflect Legislature's preference for rules of a "guided democracy" to be made applicable to Panchayats. It is unfortunate that no minimum educational qualification is provided for a Panch, Up-Sarpanch or Sarpanch and the only important disqualification to hold Sarpanch's office is of the candidate being a M.L.A./M.P. or Chairman of a Co-operative Society.

12A. It is not our intention or province to question the wisdom of the Legislature in insulating the Panchyats from the influence of political parties, but that intention is clearly manifested in (he proviso to Sub-rule (3) of Rule 31 of the Rules. It is to be also noted that "the Rules" do not contain provisions similar to those to be read in the Election Symbols (Reservation and Allotment) Order, 1968, framed under the Conduct of Elections Rules, 1961. That there are vital and large differences between the schemes of the two sets of Rules is indisputable. A candidate for a Panchayat election is "allotted" one of the symbols specified in the relevant Rules and beyond the list also, at the discretion of the Returning Officer. A ballot paper for a Panchayat election can be prepared in a common form that can be universally used in all Panchayat elections in the State. Rules 41 and 43 are clear manifestation of that position. The name of the candidate contesting any Panchayat election is not required to be printed and is required only to be "written" in the ballot paper against his symbol which can only be one of those prescribed. The practical application of Rules 31 and 43 is projected in the ballot paper (Annexure P/1) wherein names of candidates are written in Devnagari in Hindi script against symbols allotted to them.

According to us, the context, setting and also object of the Proviso to Rule 31(3) a forequoted, gives no scope for the contention of the petitioners to be accepted. There appears to us no substance in the contention pressed that mere printing on a ballot paper, a symbol reserved for any political party (prohibited under the said proviso), renders void and illegal such a ballot and that such a ballot cannot, therefore, be used ina legal and valid election. Rule 43 gives ample power to State Government to design and print a ballot paper and what is prohibited is only "allotment" of a prohibited symbol, under the proviso to Rule 31(3). It is clear that the prohibition is directed against use of that symbol by any candidate

and if the prohibited symbol is not allotted to any candidate that is not, and cannot be said to be, used by any candidate in the election in question. It is elementary that a voter exercises his franchise in respect of a candidate and that a symbol is used by a candidate to be easily identified by the voter. The obvious necessity of use of symbol arises owing to the prevailing mass illiteracy in our country, and it is wrong to suppose as held in *K. S. Abdul Azeez (supra)*, that our election law attaches primary importance to symbol and not to the candidate. In the Panchayat election the primacy of a symbol is expressly denigrated, obviously by the statutory consideration that a candidate has not been given a choice as respects a symbol and political parties with proclaimed symbols are kept out of the fray. No artificial meaning can be attached to the simple word "allotted" in Rule 31 and as such mere printing of an unallotted symbol on a ballot paper cannot amount to the provision of Rule 31(3) being infringed. The mandate thereof prohibits allotment and not printing of a symbol allotted to a political party of the State.

However, in our opinion, the provisions of Rule 45(1)(b) a forequoted, have also to be read with those of Rules 31 and 43. If there is no complaint about non-observance of Rule 45(1)(b), there can be no complaint that any voter was denied free and adequate opportunity in the matter of exercising his franchise effectively because of printing on a ballot paper of an unallotted symbol. All voters coming to a Polling Station to exercise their franchise are given notice in terms of Section 45(1)(b) completely, adequately and effectively of the field open to a voter for the exercise of his right. All candidates who have offered themselves for election, in respect of whom the choice is to be made by the voter, are indicated in the list exhibited outside and inside each Polling Station by their names and also by their respective symbols. Even if a voter is illiterate, in terms of the "notice" under Rule 45(1)(b) it is made clear to him as to which are the symbols duly allotted to a candidate so that he can exercise his franchise in respect of a candidate to whom any of the symbols mentioned in the list is allotted. In our view, Rule 45(1)(b) takes sufficient care of the position that all voters, literate and illiterate, are afforded equal, reasonable, full and complete opportunity to exercise effectively and freely their right to vote in respect of a candidate of their choice. In the instant case, it is necessary to stress that there is no complaint, however, of non-observance of the provisions of Rule 45(1)(b).

What survives is the consideration to be given to Sections 31 and 117 because those have definite relevance to the question of availability or otherwise to the petitioners of the plea that in the exercise of the Court's jurisdiction under Article 226 of the Constitution, necessary relief can be given to them. Section 31 bears striking resemblance to some extent to Article 324 of the Constitution as respects nature of the power contemplated thereunder. There is sufficient scope for a voter as also indeed, to a candidate, u/s 31, to approach the Collector or even the State Government directly, to take action thereunder to "stay or cancel" the election or election proceeding on the ground that a situation had arisen rendering impracticable conduct of free and impartial election, for any reason.

We have no doubt that the complaint of the nature made before us could be enquired u/s 31(2) as to the question whether free and impartial election has been or could be held. Whether for printing of an unallotted symbol on a ballot paper, the election held was not "free and impartial" in a given situation, is a question that State Government can enquire and decide. When a decision is rendered on such a question, that decision would be amenable to our certiorari jurisdiction. Therefore, doors of this Court are not to be left ajar to complaint or nature made in the instant petition to be entertained and determined on the writ side as that would require enquiry into disputed questions of fact.

We have no doubt that two remedies, envisaged respectively under Sections 31 and 117 are mutually exclusive and as such, when a case for interference u/s 31 is made out, there may not be any necessity of taking recourse in a particular case to the dilatory procedure of disposal of an election petition contemplated u/s 117. Powers u/s 31 have a wider amplitude in that an election can be stayed or even cancelled, before the process is completed. We have no doubt that when an election is stayed or cancelled in "public interest", that shall be done to give effect to popular mandate or popular will on the basis of complaint of mass rigging or failure otherwise of the election process on account of any serious defect in procedure. Indeed, when power is exercised u/s 117 and an election duly held is challenged, relief in that proceeding can only be granted on proof of the result of the election in question being materially affected. Obviously, the scope of challenge in an election petition u/s 117 is different because of the entitlement in that regard being enumerated exhaustively in the M. P. Panchayat (Election Petition, Corrupt Practices and Disqualification from Membership) Rules, 1962, framed under the Act.

In the instant case, the petitioners have failed to establish any case of violation of any provision of the Act or the Rules, much less, of any mandatory provision. It cannot be said on facts pleaded and established that the election in question has not been held in accordance with the provisions prescribed or that the Election Officer has acted mala fide or that he acted in a manner either not contemplated under the Act and the Rules or in violation thereof. No material is available to suggest that the election process as a whole has been vitiated, except that 157 or 210 votes out of 3470 cast were declared invalid. Our certiorari jurisdiction can be invoked as per Section 31 only in "public interest"; and not for defeating popular will by cancelling the election in this case in which a large number of voters have effectively exercised their franchise.

For the reasons aforesaid, the petition fails and it is dismissed. In the facts and circumstances of the case, we make no order as to costs.