

(2012) 02 DEL CK 0081
In the Delhi High Court
Case No : LPA No. 438 of 2011

Balbir Tyagi

APPELLANT

Vs

Smt. A Dhanwanti Chandela and Anr

RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Delhi Municipal Corporation (Election of Councillors) Rules, 1958 — Rule 92
Delhi Municipal Corporation Act, 1957 — Section 15, 17, 25

Citation : (2012) 4 AD 593 : (2012) 190 DLT 277 : (2012) 128 DRJ 646 :
(2012) 3 ILR Delhi 113

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Sandeep Sethi with Mr. Rajesh Yadav and Mr. Dhananjay, for the Appellant; Rakesh Khanna, with Ms. Seema Rao, Rajiv Misra and Mr. Virender Singh, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, Acting Chief Justice

1. The appellant herein was elected as Municipal Councilor from Ward No. 116, Vikaspuri East, Delhi in the municipal election held in April, 2007, results whereof were published on 9th April, 2007. The respondent no.1 filed Election Petition under Sections 15 & 17 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "the Act") challenging the election of the appellant alleging that the appellant had indulged in corrupt practices and a prayer was made that the election of the appellant be declared null and void and in his place the respondent no.1 be declared as elected. This Election Petition was premised on three grounds namely:

(i) the appellant had appointed one Mr. Raj Pal as his polling agent at the polling station no.107 in ward no. 116 on the day of election i.e. 5th April, 2007 even when Mr. Raj Pal was a permanent employee of the Municipal Corporation of

Delhi and this amounted to corrupt practice under the provisions of Section 17 of the Act read with Rule 92 of the Delhi Municipal Corporation (Election of Councilors)Rules.

(ii) With a view to allure the voters a full page advertisement was inserted in newspaper "Jan Manas Weekly" edition dated 18-24th March, 2006, 25-31st March, 2007 and 1-6th April, 2007 and had paid a sum of ` 24,000/- for each publication and the expenses towards the said advertisement had not been shown in the statement of expenses.

(iii) The appellant appointed Mr. Rohtash, a permanent employee of Delhi Transport Corporation as a polling agent at the polling station No. 106 which also amounted to corrupt practices.

The appellant contested the aforesaid Election Petition denying each and every allegations. The Ld. Trial Court framed 8 issues on the basis of pleadings between the parties which are as under:-

1. Whether Raj Pal an employee of Horticulture Department of MCD had been appointed as an election agent of the Respondent No.1? If yes, its effect. (OPP)
2. Whether Rohtash an employee of DTC had been appointed as an election agent of the Respondent No.1? if yes, its effect. (OPP)
3. Whether the Respondent No.1 has failed to submit the details of expenses as required under Chapter 5 (A) of the DMC (Election of Councilors)Rules? If yes, its effect. (OPP)
4. Whether the Respondent No.1 has exceeded the prescribed expenses? If yes, its effect. (OPP)
5. Whether the petition has not been properly verified as required and there has been a violation of Section 15 of the DMC Act? (OPR-1)
6. Whether the election of Respondent No.1 from Ward No. 116, Vikaspuri (East), New Delhi-18 is liable to be declared void? (OPP)
7. In case if the aforesaid issue is decided in affirmative, whether the election petition is liable to be declared as elected from Ward No. 116, Vikaspuri(East) New Delhi-18? (OPP)
8. Relief.

Evidence was led by both the parties. The learned Trial Court after examining the evidence in the light of the argument advanced, decided these issues in favour of the appellant and dismissed the election petition vide orders dated 3rd April, 2010. Order of the learned Trial Court was challenged by the respondent no. 1 by filing writ petition under Article 226 & 227 of the Constitution of India. The Learned Single Judge has decided this writ petition vide judgment dated 26th April, 2001 reversing the findings of the Trial Court on issue no.1. As a result, the election petition of the respondent has been allowed and the election of the

appellant has been set aside. We may point out that though some observations are made regarding insertion of full page advertisement in the local newspaper in the impugned order but it does not appear that any categorical finding is given in this behalf. Therefore, at the time of argument before us it was conceded by the learned counsel for the respondent no.1 that the only dispute was in respect of the finding on issue no.1 and the fate of the case depends upon the outcome thereof.

2. As noted above, issue no.1 pertains to alleged appointment of Mr. Raj Pal, an employee of Horticulture Department, MCD as an election agent of the appellant. Before we discuss the findings of the learned Trial Court and that of the learned single Judge on this issue, we would like to refer to the relevant provisions. In the light of the evidence, it is to be discerned as to whether a case of corrupt practice by the appellant was made out or not. Section 17 of the Act provides the grounds for declaring the election to be void including the ground of corrupt practices which is reproduced below:-

17. Grounds for declaring elections to be void:- (1) Subject to the provision of sub-Section (2) if the court of the district judge is of the opinion-

a) That on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen as a councilor under this Act, or

b) That any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent or;

c) That any nomination appear has been improperly rejected, or

d) That the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent, or

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void, or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder.

The court shall declare the election of the return candidate to be void.

3. What constitutes corrupt practices is stipulated in Rule 92 of the Delhi Municipal (Election of Councilors)Rules and the same reads as under:-

92. Corrupt Practices: In addition to the corrupt practice specified in section 25, the following shall be deemed to be corrupt practice:-

The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any other person with the consent of a candidate any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election from any person:-

- (a) In the service of the Corporation; or
- (b) In the service of the Government and belonging to any of the following classes; namely:
 - (i) Gazette officers;
 - (ii) Stipendiary judges and magistrates;
 - (iii) Member of the armed forces of the Union;
 - (iv) Members of the police force;
 - (v) Excise officers;
 - (vi) Revenue officers other than village revenue officers known as lambardars, malaguzars or by any other name whose duty is to collect land revenue and who are remunerated by a share of or commission on the amount of land revenue collected by them but who do not discharge any police functions; and
 - (vii) Such other class of persons in the service of the Government as may be notified by the Government.

Explanation: for the purposes of this rule, a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as a polling agent or a counting agent of that candidate.

4. Allegation in the petition preferred by the respondent no.1 was that since Mr. Rajpal was in the service of the Corporation, appointing him as an election agent amounted to corrupt practice. Specific pleading in the election petition of the respondent no.1 in this behalf is as under:-

b. the respondent No.1 appointed the following as his following as his polling agents at the polling booth in ward No. 116 on the election day i.e. 5.4.2007 and at that point of time these persons were/are the permanent employees of Municipal Corporation of Delhi and even circulated the names of these polling agents to the Returning Officer of the polling booth/station, which amounts to mal practice, unhealthy and corrupt practice adopted by the respondent No.1 for purpose of winning the elections and which is also against the provisions of election rules:

NAME OF THE POLLING AGENT AT POLLING STATION

i. Rajpal son of 107

The person mentioned above is the permanent govt. employee. Under these circumstances the election of respondent No.1 is liable to be declared void.

5. It is not in dispute that Mr. Rajpal, at the relevant time, was working as Mali (permanent) with the Horticulture Department of MCD. In any case this fact was proved by PW-2 Kuldeep Singh, Section Officer, West Zone of Horticulture Department who produced the relevant record. In order to prove that Mr. Rajpal was appointed as a polling agent, the respondent no.1 also produced Mr. KPS Chauhan as PW-7. Mr. KPS Chauhan was the Presiding Officer of Ward No. 116, polling Station 107. He produced the attested copies of the original Form 8-B in which name of Mr. Rajpal was shown as polling agent alongwith another person Mr. Devender Chadha. As much turns on what is written in this form, we are reproducing the scanned copy of this form to appreciate the controversy which we would point out hereinafter:-

6. What is discernable is that the appellant Mr. Balbir Tyagi had appointed Mr. Devender Chadha s/o Shri B.K. Chadha as polling agent. After the name of Sh. Devender Chadha, there is slash (/) and thereafter name of "Rajpal" appears. It is not in dispute that " Rajpal" is not written in same hand writing. It is also an accepted case that "Rajpal" is written in different ink. Further PW-7 had admitted in his cross-examination that one form is meant for one agent. If a candidate wants to appoint another agent there has to be a reliever of the first agent and for that different form is to be filled and signed. PW-7 had also admitted in his cross-examination that at the time of accepting the form, which was given to him by the appellant/candidate, he had only seen the election identity card of Mr. Rajpal on the basis of which he was satisfied and appointed him as a polling agent. A suggestion was put to him that the name of Mr. Rajpal was inserted, added and interpolated by him later in connivance with respondent no.1 which suggestion he denied. He, however, accepted that there was no indication in the form that Mr. Rajpal was a reliever. He also accepted that no reliever for any other candidate had been appointed since there was no request.

7. In view of the aforesaid circumstances appearing on record shaking his testimony and having regard to the specific denial by the appellant about the insertion of name of Rajpal as polling agent with specific allegation, there was heavy burden upon the respondent to discharge onus in this regard. The learned Trial Court accordingly held that the respondent no.1 was not able to discharge this burden that Rajpal was appointed as reliever and thus held that issue no.1 was not proved. Accordingly, the election petition was dismissed. This order was challenged by the respondent no.1 by filing writ petition under Article 226/227 of the Constitution of India. By impugned judgment findings of issue no.1 are reversed holding that the appellant had appointed Rajpal as his relieving agent and thus committed corrupt practice. This order is in appeal before us.

8. Questioning the aforesaid findings of the learned Single Judge, Mr. Sandeep Sethi, Sr. Advocate and Mr. Rajesh Yadav, Advocate who appeared for the appellant argued that the findings of fact arrived at by the learned Trial Court could not be brushed aside lightly when the Trial Court had pointed out glaring loop holes. It was also submitted that the allegation of corrupt practices is in the

nature of criminal charge and has to be proved beyond reasonable doubt and it was unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. Learned Senior Counsel also referred to the judgment of Supreme Court in the case of Pradip Buragohain Vs. Pranati Phukan, as well as various judgments dealing with the same principle of law. It was also argued that in any case the only allegation was that Mr. Rajpal was appointed as polling agent (and not even relieving agent as per the allegation in the petition) but there was no allegation that he acted in that capacity which was also a necessary ingredient to be proved to show corrupt practice as per the provisions of Rule 92 of the Rules. For this purpose, the learned Senior Counsel specifically referred to the Explanation to Rule 92.

9. Mr. Rakesh Khanna, learned Senior Counsel appearing for respondent no.1 on the other hand referred to those aspects in the testimony which was highlighted by the learned Single Judge as well and submitted that once signatures of Rajpal on the form were admitted by him, it was for the appellant to explain as the onus stood discharged by the respondent no.1. He further submitted that the interpretation of Rule 92 as suggested by the appellant is not correct inasmuch as Rule 92 is a deeming provision which makes not only actual assistance of a Government employee but even attempt to obtain assistance from such an employee as deemed corrupt practice. He submitted that the nature of assistance mentioned in Explanation was another deeming provision which would not militate the main provision that includes even attempt to obtain the assistance as corrupt practice.

10. We have given our due consideration to the respective submissions. Section 17 of the Act stipulates certain grounds on which election of a candidate can be declared void and one of the grounds is commission of corrupt practice by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent. It is not in doubt that as per the said provision if the assistance of a person who is in the service of the Corporation is taken, then that is deemed to be a corrupt practice. First question is as to whether Mr. Rajpal was appointed as polling agent, because only then the question of obtaining his assistance or attempt to obtain assistance would arise. The learned Trial Court on the basis of the evidence categorically held that it could not be proved beyond reasonable doubt that Rajpal was appointed as polling agent or reliever.

11. Appreciating the testimony in the light of the provisions of the Act and the Rules as well as the practice which the Presiding Officer was supposed to follow, the learned Trial Court made the following observations:-

After having gone through the rival contentions and perusal of Form -8B, I am of a considered view that firstly there is no dispute that the name of Raj Pal finds a mention as Reliever for Balbir Tyagi in form 8-B and bear his signatures. Secondly, it is not denied that the Raj Pal is a mali in the Horticulture Department of the Municipal Corporation of Delhi and therefore, is an employee under Clause 9a) of Rule 92 of Delhi Municipal Councillors (Election of Councilors)Rules.

Thirdly, it is evident from Form 8-B Ex. PW1/7 duly proved by PW7 who is the Presiding Officer of Ward No. 116 that the same bear the signatures of Balbir Tyagi at one place. The name of Davinder Chadha has been put in a different ink and handwriting whereas the name of Raj Pal appears to have been inserted later in a different ink and in a different handwriting by putting a slash (/) after the name of Davinder Chadha S/o late B.K. Chadha. Fourthly, it is evident that the detail parentage of Davinder Chadha and his address has been mentioned in the Form 8-B whereas in case of Raj Pal neither his parentage nor his address finds a mentioned in the said Form. PW7 K.P.S. Chauhan the Presiding Officer in Ward no. 116 has deposed on the basis of the document placed on record. He has in his cross-examination admitted that he did not ask the reliever the name of his father and address and states that he had only seen the identity Card by which he was satisfied and he appointed the agent but he is not aware if Raj Pal was on duty on the said day. He has denied the suggestion that the name of Raj Pal has been inserted and interpolated Lateran .On a court question the witness has informed that there is no separate form for reliever polling agent and Form 8-B is given to the candidate and is filled up by the candidate or his agent but not explanation is forthcoming with regard to the difference in ink and the handwriting by way of which the name of Raj Pal has been inserted. Fifthly the Returning Officer Sant Ram Kapor who has been examined as PW5 has deposed on the basis of the official record and according to him Davinder Chadha S/o Late B.K. Gupta was in the Polling Agent for Balbir Tyagi but the name of Raj Pal has also been shown. The Returning Officer has specifically deposed that as per the procedure the Reliever can be appointed by the Presiding Officer but it has to be done in separate form and not in the manner as done in the present case. The Presiding Officer is unable to provide any explanation as to why the name of Raj Pal was not put in a separate form and therefore ,an adverse inference is liable to be drawn on the aforesaid aspect. Lastly, the respondent no.1 has in his affidavit of evidence specifically alleged manipulation and interpolation in so far as the name of Raj Pal is concerned. Having denied the aforesaid, the onus of proving that the name of Raj Pal had been inserted at the instance of Balbir Tyagi, shifts upon the petitioner which onus the petitioner has not been able to discharge. No explanation is forthcoming as to why a different form was not used while appointing Raj Pal as Reliever and also on the aspect of different ink and handwriting.

It is clear from the above that following infirmities were pointed out in the so called appointment of Rajpal as the polling agent:-

- (i) the form appears the name of Devender Chadha as polling agent and the name of Rajpal is to be in different ink and hand writing which appears to have been inserted later by putting a slash (/).
- (ii) Though details of parentage of Devender Chadha, polling agent, and his address is mentioned in the form, in the case of Rajpal, neither his parentage nor is address is mentioned therein.

(iii) According to PW-7 he had seen the identity card by which he was satisfied and appointed him as his agent. But he was not aware if Rajpal was on duty on the said date.

12. The learned Trial Court summed up the discussion in the judgment of the Trial Court:-

Therefore, in view of my aforesaid discussion, I hereby hold that no doubt Raj Pal is an employee of the Corporation and is covered under Clause (a) of Rule 92 of the Delhi Municipal Corporation (Election of Councilors)Rules, yet it was necessary for the election petitioner to have proved that it is the candidate Balbir Tyagi or his agent who had taken the assistance of the services of the employee of Corporation in furtherance of his prospects in the elections. The respondent no.1 having denied taking any services of Raj Pal and no explanation being forthcoming for the different ink and the hand writing on form B-8 coupled with the fact that the Presiding Officer had inserted the name of Raj Pal on the same form whereas according to the Returning Officer it should have been done in a separate form: raises a doubt in the mind of the court which the petitioner has not been able to clear and therefore, the arguments of the respondent no.1 that the name of Rajpal was surreptitiously added at a later stage by interpolation cannot be unfounded. Issue is decided against the election petition and in favour of the respondent no.1.

13. The learned Single Judge, however, did not accept the aforesaid finding. After going through the evidence all over again, opinion is formed by the learned Single Judge that the statement of PW-7 is creditworthy and when he had specifically stated that Form 8-B was signed by Devender Chadha as well as Rajpal and signatures of Rajpal were not disputed, it should be accepted that Rajpal was appointed as the polling agent. Thus, two things which weighed in the mind of the learned Single Judge in upsetting the aforesaid findings are the testimony of PW-7 which according to the learned Single Judge remained unshaken about the fact that he added the name of Rajpal at the instance of appellant and Rajpal signed in his presence and further that Rajpal who appeared as RW-4 has admitted his signatures.

14. We may point here that the appellant produced Sh. Rajpal as his witness who deposed that on the election date, he performed his official duties. This fact was also provided by the official witness. It will have to be remarked by us at this stage that if the PW-7 had seen the identity card of Rajpal, he could immediately find out that Rajpal was an employee of MCD and such a person could not have been appointed as polling agent. This raises doubt in the veracity of the statement of PW-7 lending credence to the case set up by the appellant that the name of Rajpal was inserted later which appears in different ink and different hand writing. PW-7 admitted that separate form for reliever was required but has not given any explanation why he allowed Rajpal to be the reliever, that too, when the name was in different ink and hand writing, if PW-7 is to be believed.

15. We are of the opinion that the approach of the learned Single Judge is not in accordance with law. We may first refer to the principle of law relating to prove the corrupt practices as lucidly numerated by the Supreme Court in Pradip Buragohain (supra). After scanning the relevant law on the subject the Court pointed out that conspectus of the pronouncements show that three distinct aspects emerged that need to be kept in view while dealing with the election dispute involving corrupt practices namely;

(i) the first and foremost of these aspects to be borne in mind is the nature of a criminal charge has to be proved beyond reasonable doubt. The standard of proof required for establishing a charge of corrupt practice is the same as is applicable to a criminal charge. This implies that a charge of corrupt practice is taken as proved only if there is clear cut evidence which is entirely credible by the standards of appreciation applicable to such cases. (See Rahim Khan Vs. Khurshid Ahmed and Others, , D. Venkata Reddy Vs. R. Sultan and Others, and Brig. Sawai Bhawani Singh Vs. M/s. Indian Hotels Company Ltd. and others, . (ii) The second aspect that distinctly emerges from the pronouncements of this Court is that in an election dispute it is unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. The Court highlighted the danger underlying the acceptance of oral evidence in support of a charge of corrupt practice.

(iii) The third aspect that is equally important and fairly well-settled is that while as a Court of first appeal there are no limitations on the powers of this Court in reversing a finding of fact or law which has been recorded on a misreading or wrong appreciation of the evidence or law, it would not ordinarily disregard the opinion of the trial Judge more so when the trial Judge happens to be a High Court Judge who has recorded the evidence and who has had the benefit of watching the demeanour of the witnesses in forming first hand opinion regarding their credibility.

16. Once we keep these principles in mind, we are one with the learned Trial Court that the respondent no.1 was not able to prove the charge of corrupt practice beyond reasonable doubt. Various anomalies and loopholes pointed out in the testimony in support of this allegation are sufficient to raise reasonable doubt. We have already pointed out above that it is not in dispute that " Rajpal" is not written in same hand writing. It is also an accepted case that "Rajpal" is written in different ink. Further PW-7 had admitted in his cross-examination that one form is meant for one agent. If a candidate wants to appoint another agent there has to be a reliever of the first agent and for that different form is to be filled and signed. PW-7 had also admitted in his cross-examination that at the time of accepting the form, which was given to him by the appellant/candidate, he had only seen the election identity card of Mr. Rajpal on the basis of which he was satisfied and appointed him as a polling agent. A suggestion was put to him that the name of Mr. Rajpal was inserted, added and interpolated by him later in connivance with respondent no.1 which suggestion he denied. He, however,

accepted that there was no indication in the form that Mr. Rajpal was a reliever. He also accepted that no reliever for any other candidate had been appointed since there was no request. On the other hand, the approach of the learned Single Judge was that of a Civil Court examining the preponderance and probabilities of the evidence. More significantly what cannot be lost sight is that it was not a statutory appeal against the order of the Trial Court. On the contrary, in a writ petition the Court was exercising the power of judicial review in the assumption of extra ordinary jurisdiction. Therefore, unless some perversity in the judgment of the Trial Court could be shown, the judgment of the Trial Court should not have been disturbed. Not only the re-appreciation of the same evidence by the appellate Court is not permissible, but merely because the higher court comes to a different conclusion then what has been arrived at by the Trial Court will not be a ground to substitute its finding. Since we are holding that issue no.1 was rightly decided by the learned Trial Court, it is not necessary to go into the question as to whether mere appointment of a government/MCD official as a polling agent is sufficient or " in order to prove the assistance" it is also to be proved that such an agent had acted as polling agent or a counting agent as well.

17. This appeal is accordingly allowed. The impugned judgment of the learned Single Judge is set aside and that of the learned Trial Court is restored.

18. The appellant shall also be entitled to costs of ` 10,000/- to be paid by the respondent no.1.