

(1953) 11 MAD CK 0015
In the Madras High Court
Case No : Writ Petition No. 748 of 1953

Chebrolu Honumayya

APPELLANT

Vs

Mettu Chinna Malla Reddi and Others

RESPONDENT

Date of Decision : 24-11-1953

Acts Referred:

Tamil Nadu District Municipalities Act, 1920 — Section 303(2)
Tamil Nadu District Municipalities Rules, 1920 — Rule 27A(1), 27A(4)

Citation : AIR 1954 Mad 779 : (1954) 1 MLJ 573

Hon'ble Judges : Govinda Menon, J

Bench : Single Bench

Advocate : M.K. Nambiar and N. Rajeswara Rao, for the Appellant; K. Kuttikrishna Menon, V. Balakrishna Eradi and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Govinda Menon, J.—This is an application for the issue of a writ of certiorari to quash the order of the Election Commissioner, Guntur, dated 5-8-1953 in O. P. No. 114 of 1052. The petitioner before me hereinafter known as the "petitioner" was the first respondent in the court below and the contesting respondent hereinafter known as the "respondent" was the petitioner in the court below. There was an election to ward No. 2 of the Guntur municipality in which the petitioner and the respondent were the rival candidates. The petitioner secured 362 votes whereas the respondent secured only 351 votes. On an election petition filed by the respondent, the election commissioner found that 40 votes cast for the petitioner contained marks by which the elector can be identified and 6 votes cast in favour of the respondent similarly contained marks by which the elector can be identified.

He held that these votes were hence invalid and should not be counted. Deducting them from the respective votes obtained by the candidates it was seen that the petitioner secured only 322 votes whereas the respondent secured 345. A further question was raised before him as to whether the respondent should be

declared to have been duly elected. On that the learned election commissioner found that 40 votes cast in favour of the petitioner were invalid by reason of a mistake committed by the polling officer and as the majority of the voters in the constituency have voted for the petitioner it was his ill-luck that the polling officer committed this mistake. He therefore considered that the proper course was to order a fresh election and ordered accordingly.

2. It is contended by Mr. M.K. Nambiar for the petitioner that the order of the election commissioner is without Jurisdiction & that he should not have discarded the 40 votes on which there were marks. The main ground of attack is based upon the interpretation of Rule 27-A (1) of the rules for the conduct of elections of municipal councilors. Rule 27-A as at present reads as follows:

"(1) A ballot paper shall be rejected if it (a) bears any mark by which the elector can be identified:

(4) The decision of the Election Officer as to the validity of a ballot paper shall be final, subject only to reversal on an election petition."

3. The old rule which was supplanted by rule 27-A (1) was in the following terms: "Any ballot paper which is not duly marked or on which is not duly marked or on which votes are given to more candidates than there are numbers to be elected or on which any mark is made by which the electors may "afterwards be identified" shall be invalid". Mr. Nambiar contends that since the word afterwards in the old rule has been omitted there has been a material change in the legislative directive given for deciding the validity of the votes. He also argues that in the old rules the words used are "shall be invalid" which means that the invalidity can be found out at any time. But in the new rule the words used are "shall be rejected" which would mean that the act of acceptance or rejection should take place at the time of counting and not thereafter and this is made clear by Sub-rule (4) which is to the effect that "the decision of the election officer as to the validity of a ballot paper shall be final." From these words, Mr. Nambiar argues that objection as to the receiptability or otherwise of a Vote should be specifically raised at the time of counting and if that was not done, it cannot be raised at a later stage for if no objection is taken at the time of counting then the election officer is deprived of the opportunity of deciding the validity or otherwise" of the election and if he does not make any decision on a point by reason of the fact that it was not raised before him it could not be raised later on.

4. As regards the first point raised, viz., that unless there is a mark by which the elector can be identified by a mere look at the ballot paper, it was not within the jurisdiction of the Election Commissioner to declare that such a ballot paper should be rejected, what happened here was --and that finding is not disputed by the learned counsel for the petitioner -- that numbers were put upon forty ballot papers which correspond to the numbers of the voters on the electoral roll, so that any one by comparing the number on the ballot paper with the number of

the electoral roll can identify the voter who cast the vote. But without such comparison it is not possible to identify the voter.

Therefore, Mr. Nambiar argues that by a mere look at the ballot paper it is not possible to identify the elector, for the ballot paper contains only a number and that cannot be a "mark" as contemplated in rule 27A(1), clause (a). But by putting a mere number on a ballot paper, the identity of the elector cannot be established and therefore under the existing rules such a ballot paper is a valid one as the secrecy of the ballot is not in any way affected unless recourse is had to it, comparing the number on the ballot paper with the number on the electoral roll.

On the other hand, under the old rules where the words used are "on which any mark is made by which the elector may afterwards be identified", if a number is put on the ballot paper it is possible afterwards to identify the elector by comparing it with the number on the electoral roll. Under these circumstances, the learned counsel argues that the omission of the word "afterwards" is very crucial. He admits that if the old rule had stood and been in force at present, then the 40 voting papers have to be rejected "because it is possible by comparing the numbers on the ballot papers with the numbers on the electoral roll to identify the voter afterwards. But under the present rule, at the times of counting without comparing the voting paper with the electoral roll it is not possible to identify the voter.

A mere look at the voting paper would not disclose the elector as it does not contain any mark which would -reveal the elector's identity. The question therefore is whether by the omission of the word "afterwards" there has been a change in the rule. I am not satisfied that the mere omission of the word "afterwards" has made any effective alternation in the rules. The word "afterwards" would connote a point of time after the putting of the mark. In my view the existing rule is more stringent than the rule which it has replaced.

The term "Any mark by which an elector can be identified" is much wider in scope and import than the term "any mark by which an elector may afterwards be identified". Under the new rule it is not necessary that the identification should be afterwards; whereas under the old rule it would be sufficient if the identification is afterwards. Both the old and the present rules were modelled upon the English Ballot Act, 35 and 36 Vict. Ch. 33, styled "An Act to amend the law relating to procedure at Parliamentary and Municipal Elections." Section 2 paragraphs 2 and 3 are the progenitors of both the old and the new rule for the conduct of municipal elections in this country. Paragraph 2 of that section reads as follows :

"Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything, except the said number on the back,, is written or marked by which the "voter can be identified", shall be void and not counted."

The last sentence of paragraph 3 of that section is in the following terms :

"The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return." It has to be noted that in paragraph 2 of Section 2 of the English Ballot Act, the word "afterwards" is not to be found. All that is stated is that if there is a mark by which the voter can be identified then the ballot paper shall be void and not counted. But the word "afterwards" occurs at a latter stage in the schedule for it is seen that in the form of directions for the guidance of the voter in voting, which shall be printed in conspicuous characters, and placarded outside every polling station and in every compartment of every polling station, one of the directions is as follows :

"If the voter votes for more than one candidate, or places any mark on the paper by which he may be "afterwards" identified his ballot paper will be void, and will not be counted."

Now Section 13 of the Act lays down that no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to the Act, or any mistake in the use of the forms in the second schedule to the Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. From this provision of law Mr. Kuttikrishna Menon contends that in England non-compliance with the provisions contained in the body of the Act is the important factor and not the violation of a rule contained in the schedule.

5. In interpreting these sections of the English Ballot Act and the rules thereunder in -- "Woodward v. Sarsons", (1875) 32 LT 867 : 44 LJ CP 293 (A), it has been held that where at a municipal election, the presiding officer at one of the polling stations marked on the face of 294 ballot papers the numbers on the burgess roll of the voters using them and such numbers might have been, but were not in fact, seen by the agents of the candidates at the-counting of the votes, and the returning officer rejected all the ballot papers so marked, the rejection of the votes was valid and that the votes were bad. At page 872, column 2 of the report.

Lord Coleridge C. J. after a discussion on Section 2 as well as the rules contained in the second schedule, observes as follows : "Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void and ought not to be counted. There was a mark on them by which on reference to the Burgess Roll the way in which the voter had voted could be identified." Therefore it is clear that even with an existing direction in England as contained in the second schedule by which It was stated that if a voter places any mark on the paper by which he may afterwards be identified the ballot paper shall be void and shall not be counted, it was held that the fact that the polling officer put numbers on the

voting paper would render such votes void; because u/s 2. paragraph 2 any mark by which the voter can be identified will make the voting paper void. A reading of (1875) 32 LT 861 (A) would show that it is not necessary that the identification need be afterwards.

I do not think it is necessary to extract passages from this oft-quoted decision because there are very many passages in it which are apposite so far as the decision of the present case is concerned, especially passages at pages 871 and 872. This decision was considered by this court in -- A. Sethurama Mudaliar Vs. M.P. Mangala Goundar, and was followed. In that case, at a municipal election the polling officer put on the back of the ballot paper the voter's number on the electoral roll with the result that anyone comparing that number with reference to the electoral roll which was available to everybody could identify the particular voter. It was held that all such voting papers were invalid.

Though it was contended that unlike in the English case the voters' own numbers on the electoral roll were placed not on the face but on the back, which would make a great deal of difference, the learned Judges did not agree with that distinction. The facts of Kanniappa Mudali and Others Vs. P.V. Raju Chettiar and Others, are very similar to those of the present case. In "Mahabaleswarappa v. Ramchandra Row" AIR 193G Mad 669 (C), a similar point arose. There also Cornish J. in his Judgment refers to the English Ballot Act, 35 and 36 Vict. Ch. 33 as well as the decision in (1875) 33 LT 867 (A) and comes to the conclusion that if on the ballot paper there is a mark by which the voter can be identified then such a ballot paper is invalid. At pp. 669-670 the learned Judge makes the following observations :

"The rule is modelled on Section 2 of the Ballot Act (35 and 36 Vict. Ch. 33) though the local draftsman has chosen to substitute the word "may" for the word "can" in the English Act and to introduce the superfluous word "afterwards" before the word "identified." But the effect of rule 20 and Section 2 is the same; it is to invalidate any ballot paper bearing on it a mark or writing indicating the identity of the voter."

It is therefore clear that by the omission of the order "afterwards" in the new rule 27-A(I) the effect is the deletion of a superfluous word and to change has been brought about in the structure. Therefore what was good law under the old rule should be deemed to hold good under the new rule as well. (1875) 32 LT 867 (A) was noted and followed recently by Venkatarama Aiyar J, in -- Sabella Sahaba Reddy and Others Vs. Karri Venkata Reddy and Others, .

6. In Halsbury's Laws of England, Lord Halsbury Edn., Vol. 12, at page 310, paragraph 609, the learned author says that the returning officer must reject every vote given upon a ballot paper containing any writing or mark by which a voter could be identified. In the -- "Borough of Exeter case", 6 M. & H. 228 (E), Channel J, makes the following observation:

"But I think that the statute makes void all ballot papers which have on them

marks other than those which indicate the intention to vote for a particular person, and which may be indications of the identity of the voter. And it seems to me that when you find a ballot paper which has got something clearly going beyond the intention to indicate for whom he votes, then you must hold that to be bad."

These general observations have special application to the facts of the present case. If there is any facility for identifying a voter at the time of counting or thereafter, then, in my opinion, rule 27-A(1) Clause (a) is infringed and that being the case such a voting paper is invalid. The learned election commissioner has taken the correct view in the matter and it is impossible to hold that he has acted in any way in excess of jurisdiction or committed any error which is apparent on the face of the record.

7. It was next argued that since Sub-rule (4) of rule 27-A is to the effect that the decision of the Election Officer as to the validity of a ballot paper shall be final subject only to reversal on an election petition, unless an objection is taken and the same is overruled at the time of counting it is not competent for anybody to raise an objection in an election petition. In this connection we have to remember that sub-rule (4) is practically in "pari materia" with the last sentence in paragraph 3 of Section 2 of the English Ballot Act, where also it is stated that the decision of the returning officer shall be final subject to reversal on petition questioning the election or return. What Mr. Nambiar argues is that there had been no such objection put forward at the time of counting and as such the objection should not be entertained.

In (1875) 32 LT 867 (A) it does not appear that any objection was taken at the time of counting. But as is seen from page 868 paragraph 11, it was only subsequent to the presentation of the petition that the petitioner obtained inspection of the ballot papers and observed certain marks upon them and thereafter contended that twenty-two votes ought to have been rejected by the returning officer by reason of the marks by which the voter could be identified. In the counter filed by the election officer before the lower court, in paragraph 3 he states that it is not true that at the time of counting of the votes by him, objections were raised before him that such ballot papers as contained marks by which the voter would be identified should be invalidated and that he did not pay any heed to such a request.

He further stated that at the time of the counting neither the unsuccessful candidate nor his agent raised any objection. We have therefore to take it that no objection having been raised it is open to the unsuccessful candidate to raise such an objection at the time of election enquiry. As I have already stated under the English Statute, it is possible for raising such an objection at the time of the enquiry. So also is the case under our rules. Under rule 1 of the rules for the decision of election disputes under the Madras District Municipalities Act, 1920, an election of a councillor can be called in question by an election petition presented in accordance with the rules to an Election Commissioner by any

candidate or elector against the candidate who has been declared to have been duly elected. It is therefore clear that an election petition can be filed not only by a defeated candidate but also by any elector. Such being the case it is not always practicable or possible for every elector to be present at the time of counting.

Therefore if the objection regarding the validity of the ballot paper has to be taken only at the time of counting, as argued by learned counsel and if it is not incumbent on all the electors to be present at the time of counting, then an ordinary elector cannot file an election petition as it is against what is contemplated under the rule. On that ground it has to be held that this contention has no force. The question of such estoppel was considered in *Rogers on Elections*, Vol. II at page 41, where it is stated as follows : "

"Two interesting points were raised. Firstly whether the petitioner was estopped from objecting to "the notice of election by reason of his knowledge of and acquiescence in, the defect at the time. It is submitted not because the estoppel of the petitioner would, in effect, estop the constituency from raising the question whether the result of the election had been affected by the irregularity, and their rights ought not to be taken away by his acts."

I am therefore of opinion that the fact that the point was not raised at the time of the counting is not a bar to the question being raised before the election commissioner.

8. In the view which I take on the points which I have already discussed, it is unnecessary for me to deal with the question raised by Mr. Nambiar as to whether it is possible for the respondent to justify the decision of the lower court on a point not mentioned in the order. The learned counsel relied upon Halsbury's Laws of England, Hailsham Edn., Vol. 9, page 889, footnote (e) for the contention that the court can take notice of nothing which is not contained in the body of the conviction or order in the case of a writ of certiorari for justifying or setting aside an order. My attention has also been invited to passages in -- *A. Vedachala Mudaliar Vs. The Central Road Traffic Board and Another*, as well as in -- "*Rex v. Natbell Liquors Ltd.*", 1922 AC 128 (G) observations in -- *Mallikarjuna v. Secretary of State*", 35 Mad 21 (HI) were also cited at the Bar. I do not think it necessary to discuss this aspect of the question because on the points decided by the lower court I am in agreement with the conclusions arrived at by it. This writ petition is therefore dismissed.