

(1985) 02 BOM CK 0011

In the Bombay High Court

Case No : Election Petition No. 1 of 1984

Dattatraya Eknath Lanke

APPELLANT

Vs

Returning Officer, Amravati and Others

RESPONDENT

Date of Decision : 26-02-1985

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 71(3), 75(3)
Representation of the People Act, 1951 — Section 169

Citation : AIR 1986 Bom 354 : (1985) 2 BomCR 185 : (1985) 87 BOMLR 405 : (1985) MhLj 875

Hon'ble Judges : V.A. Mohta, J

Bench : Single Bench

Advocate : V.G. Palshikar and V.V. Palshikar, for the Appellant; B.P. Jaiswal, Asstt. Govt. Pleader and S.Z. Patil and D.K. Pinjarkar, for the Respondent

Judgement

V.A. Mohta, J.—This is an Election Petition by an unsuccessful candidate u/s. 80 of the Representation of the People Act, 1951 (R.P. Act), challenging the election of respondent No.2 to the membership of Maharashtra Legislative Council from Teachers Constituency (Amravati Division). This election which was for only one candidate took place on 15th of July, 1984 on the basis of preferential voting system as provided in Part VII of The Conduct of Elections Rules, 1961 (Rules) framed u/s. 169 of the R.P.Act.

2. There were in all 12 candidates in the field. Purushottam Somwanshi (respondent No.2) - a returned candidate - secured after recount 3902 first preferential votes and the petitioner Dattatraya Lanke 3974. The number of the valid votes was 9455. Only one seat was to be filled in and hence counting had to be as per R.75. Quota sufficient to return the candidates was determined at 4728 as per R.75(1). As none reached quota in first count, further counting took place as per R.75(3). Candidate credited with lowest value at the end of each round of counting was excluded from the poll. The first victim was Babanrao Deshmukh (respondent No.12) who had secured 7 votes, the second being Jagannath Akarte (respondent No.11) who secured 45 votes. Despite transferring the value

of transferred votes of eliminated candidates in 10 counts, none reached the quota. In the eleventh count, Krishna Tare (respondent No.3) was excluded when the petitioner and respondent No.2 survived in the field. Total value of petitioner's votes came to 4307 and that of respondent No.2 to 4344. As per R.75(4) petitioner was eliminated and respondent No.2 was declared returned. At the end of second count 1 ballot paper, at the end of third count 11 ballot papers and at the end of eleventh and last count total 396 ballot papers were found to be non-transferable or exhausted.

3. There is no dispute about the manner in which the counting in fact took place. The Returning Officer did not count the further preferences of eliminated candidates. The controversy centres round a point - whether a ballot paper on which further preference is marked for an eliminated candidate becomes "exhausted paper", as defined by R. 71(3) or not. The petitioner's sole contention in substance is, if the eliminated candidate's second preference is in favour of a candidate who is already eliminated, then his third preference has to be taken into account and further that if this candidate is also eliminated then the fourth preference is to be taken into account. The Returning Officer (respondent No.1) denies the correctness of this stand and contends that these preferences cannot be counted as per Rules and hence there was no point whatsoever in ordering examination of those 396 papers treated as non-transferable or exhausted and hence request for recount on that ground was rightly rejected. Considering the controversy involved, the following issues were framed:

(1) Whether the petitioner proves that the returning officer - respondent No.1 - acted illegally in counting votes?

(2) What order?

4. Parties chose to lead no evidence. Pure question of interpretation of Rules arises in the petition. Question of scrutiny of those 396 papers will arise only in case the stand of the Returning Officer is held to be incorrect. In the first place, it will be necessary to notice certain basic features of the system of election by the single transferable vote. This system can be adopted in the election of only one representative or more than one. Even where more than one representatives is to be elected, each voter has only one vote, but that vote is transferable from one nominee to the next. As rightly observed by V.K. Aiyar in his book "Single Transferable vote" the alternative preferences are not votes per se and of equal grade. They are merely preferences in the order mentioned. Thus, a voter has only one single vote but is given a choice to provide for successive transfers of his vote. Recording only one preference or more than one does not change the value of the vote. Voting paper on transfer is of the same full value to the candidate in whose favour the last preference is recorded with only one difference and that is while it is certain vote to the first nominee, it is only contingent vote in favour of any other nominee immediately lower down. Transfer of votes and declaration of result on that basis is count-wise and permissible

transfer is only in favour of a candidate in whose favour consecutive or immediate next preference is recorded and no other. What is of essence is the successive transfer without any break. Either the ballot paper gets transferred at that count or not at all.

5. Now the Rules - R.71 deals with definitions. The terms "continuing candidate", "count", "exhausted paper", "first preference", "original votes", "surplus", "transferred vote" and "unexhausted paper" are all defined. Rule 73 deals with scrutiny of ballot papers, R.74 with arrangement of valid ballot papers in parcels and R.75 with counting when only one seat is to be filled. R.76 and onward Rules refer to counting when more than one seat is to be filled. Ballot paper bears the names of the candidates and the voter marks the preferences with figures 1,2,3 and so on. This marking is understood to be alternative in the order mentioned. The minimum number of votes required for election is called quota. Every ballot paper is deemed to be of the value of one at each count and the quota is determined by adding the votes credited to all candidates, dividing the total by two and adding one to the quotient ignoring the remainder, if any. First the scrutiny of ballot papers is made as per R.73. The valid papers are first preference recorded for each candidate, then their number is counted and their value is credited in favour of each candidate. If at the end of a count any candidate secures value equal to or more than quota, he is declared elected. In the present election, question of distribution of surplus value and its transfer does not arise. If no candidate reaches quota at the end of a count, the candidate securing the lowest value is eliminated at that stage and the unexhausted ballot papers in his parcel/sub-parcel/sub-parcels are to be arranged according to the immediate next available preferences recorded thereon for the continuing candidate (candidate who is neither elected or eliminated). The papers in each sub-parcel are counted and their values is credited to the candidate for whom such preference is recorded. Such sub-parcels are transferred to that candidate. Separate parcel for non-transferable papers or exhausted papers is also prepared. If after such transfer any of the continuing candidates secures the quota, he is declared returned. The following emerge as the basic features of the counting process:

- (1) Declaration of result at each count.
- (2) Transfer of vote also at each count.
- (3) Candidate-wise preparation of a parcel/sub-parcel of transferable ballot papers at each count.
- (4) Placement of these transferable ballot papers at each count in the parcel/sub-parcel of a candidate for whom consecutive preference is recorded.
- (5) Preparation of a separate parcel for papers which cannot be placed in any of the above parcels/sub-parcels.
- (6) Placement of such non-transferable papers in that separate parcel at each

count.

Thus, in the very scheme there are only two types of papers and that too count wise - (1) Transferable and (2) Non-transferable. The ballot papers must find place at that count either in the parcel/sub-parcel of a candidate who is in the run or in the parcel of non-transferable papers. They have no third place. Once a paper goes in the later type of parcel, it goes there finally and cannot come out. At the end of each counting, a particular ballot paper is either alive or dead. Once dead, it is forever and does not revive only because it records further preferences. Such ballot papers are thus set aside as finally dealt with and votes recorded thereon cannot be taken into account for any purpose whatsoever. There is nothing like stage of suspension.

6. The term "exhausted paper" is defined thus:

"71(3) "exhausted paper" means a ballot paper on which no further preference is recorded for a continuing candidate, provided that a paper shall also be deemed to have become exhausted whenever -

(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference; or

(b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures."

It is not being disputed before me that as per definition a ballot paper becomes exhausted at the relevant count and cannot be placed in the parcel of transferable papers in the following set of circumstances:

(1) When no further preference is recorded at all.

(2) When the same figure is recorded against more than one candidate.

(3) When the figure consecutively following the other figure is not marked.

It is further not disputed that the same result will follow even if further preferences are recorded thereon. What excepting the necessity of uninterrupted flow of continuity of preference is the principle behind this? If that be the correct position, how a ballot paper on which further preference is recorded for an eliminated candidate can go in the parcel of transferable papers? If not, its only place of allotment has inevitably to be in the parcel of non-transferable paper, from where it cannot come out. In this background the proper meaning to the words "further preference" used either in the term "exhausted paper" or "unexhausted paper" as defined by R.71(8) will have to be assigned. The term "transferred vote" as defined in R.71(7) reads thus:-

" "transferred vote", in relation to any candidate, means a vote the value or the part of the value of which is credited to such candidate and which is derived from a ballot paper on which a second or a subsequent preference is recorded for such

candidate."

The use of the words "second or a subsequent preference" in the above definition and absence of words "further preference" is significant. Further preference thus must have a restrictive meaning of being a consecutive or immediate next preference and no other. No doubt in R.75(3) the plural word "preferences" is used but it is apparent that the said plurality is related to the plurality of ballot papers and not to the plurality of preferences in the same ballot paper. The use of the words "next available" preceding the words "preferences" in R.75(3) gives clear indication of legislative intention. Other interpretation renders the words "next available" wholly redundant and redundancy, has always to be avoided as per known canons of construction.

7. Thus, a ballot paper on which further preference is recorded in favour of an eliminated candidate is also an exhausted paper and therefore becomes a non-transferable paper. Undoubtedly this involves wastage of additional preferences only due to unpredictable chance of some one being eliminated at a particular count, but that cannot be helped. That is a part of the game, nay indeed its essential rule without which the very system becomes unworkable. Therefore, the Returning Officer appears to be perfectly right in putting these ballot papers finally in the parcel of non-transferable ballot papers and in not acceding to the request for their scrutiny and recounting, only because further preferences are marked on those ballot papers.

8. There is thus no merit in this election petition which is dismissed. All that remains is the question of costs. Having regard to the fact that a pure question of law is raised in this petition and that the petitioner is a school teacher, I make no order as to costs. Parties to bear their costs. Security deposit be refunded to the petitioner.

9. The substance of this decision be forthwith intimated to the Election Commission and Chairman of the State Legislative Council and the authenticated copy of this judgment be sent to the Election Commission as mandated by S. 103, R.P. Act. Petition dismissed.