

(2017) 10 KAR CK 0021
In the Karnataka High Court
Case No : 7457 of 2017 (LB-ELE)

H. B. SHAMITHKUMAR

APPELLANT

Vs

A. M. SOMANNA & Ors

RESPONDENT

Date of Decision : 16-10-2017

Acts Referred:

[Conduct of Election Rules, 1961](#), [Rule 73](#) — Rule 73(2)(d), [Rule 8](#) — Rule 8(9)

Citation : (2017) 10 KAR CK 0021

Hon'ble Judges : Raghvendra S. Chauhan

Bench : SINGLE BENCH

Advocate : JAGADEESH C. M., S. RAVISHANKAR

Final Decision : Dismissed

Judgement

1. The petitioner, Mr. H. B. Shamith Kumar, has challenged the legality of the order, dated 06.02.2017, passed by the learned Senior Civil Judge and C.J.M, Chamarajanagar, whereby the learned Election Tribunal has allowed the Election Petition filed by the respondent No.1, Mr. A. M. Somanna, and has set-aside petitioner's election and declared the respondent No.1 as duly elected as the President of Venkataiahna Chathra Grama Panchyath as on 03.07.2015.

2. Briefly the facts of the case are that the election to the "Venkataiahna Chatra Gram Panchayath" was held on 3. 07.2015. Both the petitioner and the respondent No.1, Mr. A. M. Somanna, were duly elected to the said panchayath. Subsequently, both the petitioner and respondent No.1 had filed their nominations for the post of President of the said Panchayath. The election for the post of President was conducted on 03.07.2015. According to the petitioner, the respondent No.1 had secured ten votes, whereas the petitioner had secured eleven votes out of twenty-one valid votes, cast by the members of the said Gram Panchayath. Therefore, the Returning Officer declared the petitioner as successful candidate to the office of the President of the said Gram Panchayath. However, being aggrieved by the petitioner's election to the post of President the

respondent No.1 filed an Election Petition before the learned Tribunal.

3. In order to establish his case, the respondent No.1 examined two witnesses, and submitted twenty-two documents. The petitioner examined himself as witness, and submitted a single document. After going through the oral and documentary evidence, by order dated 06.02.2017, the learned Election Tribunal allowed the said petition, set aside the election of the petitioner, and declared respondent No.1 as having won the election to the post of President. Hence, this petition before this Court.

4. Mr. Jagadeesh C. M, the learned counsel for petitioner, has raised the following contentions before this Court:- Firstly, while filing the election petition, the respondent No.1 is required to prove his submission through material facts. In order to substantiate this contention, the learned counsel has relied on the case of Harkirat Singh v. Amarinder Singh (AIR 2006 SC 713). However, the respondent No.1 had not mentioned all the material facts in the election petition. There was no mention of the placement of "X" mark in the invalid votes, or with regard to the "X" mark along with placement of right (H) mark, or with regard to dot (I) mark in the ballot papers. Moreover, the respondent No.1, nowhere claimed that such right (H) or dot (I) marks revealed the identity of the individual voters.

Secondly, according to the Rule 8(9) of the Karnataka Panchayath Raj Act (Election of Gram Panchayath President and Vice-President's) Rules, 1995 ("Rules", for short), the requirement of law is that "any extra mark put on a vote in a ballot paper should reveal the identity of the individual voter". According to the cross-examination of the R.W.1, Mr. Suresh, there is nothing in the extra marks placed on Ex. R.2 to Ex. R.22 which would reveal as to who has cast the vote in whose favour. Therefore, according to the learned counsel, the identity of the individual voter has not been "revealed", even if the extra mark were put on the ballot paper.

Thirdly, the learned Tribunal is not justified in considering these extra marks, put on the ballot paper of an individual voter, as making the vote "invalid". Since, the identification of an individual voter has not been revealed, the learned Tribunal has erred in rejecting these valid votes which were cast in favour of the petitioner.

Lastly, although the respondent No.1 had prayed for recounting of the votes, but the learned Tribunal did not direct the recounting of the votes. In the absence of recounting, the learned Tribunal was not justified in declaring the respondent No.1 as having won the election for the post of President of the Gram Panchayath.

5. On the other hand, Mr. Ravi Shankar .S, the learned counsel for the respondent No.1, has raised the following pleas before this Court:- Firstly, a distinction has to be made between a "material facts" and "particulars" of material facts. The "material facts", in the present case, according to the learned counsel, are that extra marks were placed on certain ballot papers. Therefore,

these ballot papers should be counted as "invalid votes". Despite the request made by the respondent No.1 to the said returning officer, the request was rejected by the Returning Officer.

Secondly, relying on the case of *Dr. Anup Singh v. Shri Abdul Ghani and Others*, (AIR 1965 SC 815), the learned counsel has pleaded that the burden of proof is not on the plaintiff to prove that the extra mark is placed on a ballot paper, which reveals the identity of any individual voter. It is sufficient that if the marks are so many and of such a nature that an inference of pre-arrangement can safely be drawn without further evidence. Thus, the Tribunal would be justified in drawing an inference that identity of the vote would be revealed by the placement of extra mark in the ballot paper. According to the learned counsel in the present case, out of twenty-one votes cast in the election, petitioner has secured eleven votes, and respondent No.1 has secured ten votes. But out of the eleven votes secured by petitioner, nine votes have the extra mark. There was not a single vote which was cast in favour of any other candidate, which bore extra mark. Thus, an inference can safely be made that there was pre-arrangement between the petitioner and those persons who cast the nine votes. Hence, the learned Tribunal was justified in drawing the said inference, and in allowing the petition filed by the respondent No.1. Therefore, the learned counsel has supported the impugned order.

6. In rejoinder, Mr. Jagdeesh C. M., has argued that every and any mark, or writing on ballot paper does not per se result in invalidation of the vote. The mark or identification should be such as to unerringly reveal the identity of the voter, and the evidence or prior arrangement connecting the mark must be made available. Any mark or writing of an innocuous nature, or meaningless import cannot be raised to the level of such suggestive mark, or writing as to reveal the identity of the voter. There must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or writing itself must reasonably give indication of the voter's identity. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement. In order to buttress this plea, the learned counsel has relied on the case of *Kum. Shradha Devi v. Krishna Chandra Pant and Others* [AIR 1982 SC 1569].

7. Heard the learned counsel for the parties and perused the impugned order.

8. In the case of *Harkirat Singh (Supra)*, the Hon"ble Supreme Court had observed as under: (i). The expression "material facts" has neither been defined in the Act nor in the Code. According to the dictionary meaning, "material" means "fundamental", "vital", "basic", "cardinal", central", "crucial", "decisive", "essential", "pivotal", "indispensable", "elementary" or "primary". (Burton's Legal Thesaurus, (Third edn. p.349). The phrase "material facts", therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, "material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be

"material facts" would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

(ii). A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

(iii). All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition.

Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

9. Thus, a distinction has to be made between "material facts" and "particulars" as pointed out by the Apex Court. "Material facts", are primarily basic fact which must be pleaded by the plaintiff in support of the case set up by him in order to prove his cause of action. "Particulars", on the other hand, are details in support of material facts pleaded by the parties. In the present case, the respondent No.1, as plaintiff, had clearly pleaded that extra marks were placed on certain ballot papers. Therefore, even, if the "particulars" that the "X" mark was accompanied by any extra mark was not pleaded, the absence of "particulars" fact would not undermine the validity and veracity of the election petition. The "material facts" of the entire case was that extra marks were placed on certain votes, therefore, these votes should have been declared as invalid. Hence, the same could not be counted in favour of the petitioner. Thus, the contentions raised by the learned counsel for the petitioner that "material facts" have not been mentioned is without any substance.

10. Rule 8 (9) of the Rules is as under: After receiving the ballot paper a member has to go towards the ballot and he has to cast his vote according to his wish by putting cross (X) mark before the candidate's name. After voting the ballot paper has to be folded in such a manner that it should not disclose in whose favour the vote has been casted and there after put the said ballot in the ballot box kept in the meeting hall. The voter shall not put his signature or he shall not put any marks so as to disclose his identity. If the ballots are found

signed or found any mark as specified supra or casted vote in favour of more than one candidate, such ballots has to be treated as invalid.

"Undoubtedly, as Rule 8(9) of the Rules uses the word "should not put any other mark which shows identity". The question before this Court is what is the meaning of these words "Shows identify" as used in Rule 8(9) of the Rules?

11. A similar question had arisen before the Apex Court in the case of Dr. Anup Singh (supra). The said case dealt with the interpretation of the words "by which the elector can be identified" used in Rule 73 (2) (d) of the Conduct of Elections and Election Petitions Rules (1951). The words "by the elector can be identified" are similar in tenor to the use of words "shows identity" used in Rule 8(9) of the Rules. While dealing with the word, "by which elector can be identified", the Hon"ble Supreme Court expressed three possible interpretations as under: (i) any mark or writing which might possibly lead to the identification of the elector,

(ii) such mark or writing as can reasonably and probably lead to the identification of the elector, and

(iii) the mark or writing should be connected by evidence aliened with an elector and it should be shown that the elector is actually identified by such mark or writing law dealing with three possible interpretation.

12. The Hon"ble Supreme Court opined as under: 11. We are of opinion that the words cannot bear the first construction, namely, that any mark or writing other than that permitted by R.37-A which might possibly lead to the identification of the elector would be covered thereby. When the legislature provided that the mark or writing should be such that the elector can be identified thereby, it was not providing for a mere possibility of identification. On this construction almost every additional mark or writing would fall within the mischief of the provision. If that was the intention the words would have been different, if a mere possibility of identification had been enough to invalidate the ballot paper, cl.(d) of R. 73(2) would have read something like this : "that there is any mark or writing other than that permitted by R. 37-A". But the words used by the legislature are "any mark or writing by which the elector can be identified", and this in our opinion implies that there should be something more than a mere possibility of identification, before a vote can be invalidated. This may happen when some prearrangement is either proved or the marks are so many and of such a nature that an inference of pre-arrangement may be safely drawn without further evidence.

(emphasis added)

12. We are further of opinion that the third construction on which the appellant relies also cannot be accepted. If the intention of the legislature was that only such votes should be invalidated in which the elector was actually identified because of the mark or writing, the legislature would not have used the words "the mark or writing by which the elector can be identified". These words in our

opinion do not mean that there must be an actual identification of the elector by the mark or writing before the vote can be invalidated. If such was the intention of the legislature cl. (d) would have read something like "any mark or writing which identifies the elector". But the words used are "any mark or writing by which the elector can be identified", and these words in our opinion mean something more than a mere possibility of identification but do not require actual proof of identification before the vote can be invalidated, though by such proof, when offered, the disability would be attracted.

13. It seems to us therefore that the second construction out of the three alternatives we have mentioned above is the real construction of these words. When the legislature used these words it was providing that any mark or writing by which the elector can reasonably and probably be identified would invalidate the ballot paper. The words "can be identified" in our opinion imply something more than a mere possibility of identification: at the same time they do not in our opinion require that before the ballot paper is rejected the elector's identity must be actually established.

13. Thus, according to the Supreme Court, it is not necessary for the plaintiff to prove the identity of each and every individual voter through the extra mark which may have been applied by the voter. It would be sufficient if the plaintiff proves that "there were marks of so many and of such a nature that a pre-arrangement could be shown to be in existence". The existence of "so many marks and of such a nature" would lead to "a reasonable possibility of identification". In such circumstances, per force, the vote would be declared as "invalid".

14. In the case of Kum. Shradha Devi (supra), a learned Division Bench of the Apex Court dealt with the interpretation of Rule 73(2)(d) of the Conduct of Election Rules (1961). The Hon'ble Supreme Court opined as under: As a corollary it is provided that if there is any mark or writing on the ballot paper which enables the elector to be identified the ballot paper would be rejected as invalid. But the mark or writing must be such as would unerringly lead to the identify of the voter. Any mark or writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter. It would imply that there must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a writing itself must reasonably give indication of the voter's identify. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement. (emphasis supplied)

15. Mr. Jagadeesh M., the learned counsel for the petitioner, has stressed that the marks or writing must "unerringly lead to the identity of the voter". However, a co-joint reading of a Dr. Anup Singh (supra) and of Kum. Shradha Devi (supra) leads to the conclusion that the test to be applied for declaring a vote as invalid is whether the marks or writing reveal a pre-arrangement which leads to a

reasonable possibility of revealing the identify of the voter or not? If the answer is in the affirmative, per force, the vote has to be declared as "invalid".

16. Admittedly, in the present case, twenty-one votes were cast, out of which nine votes bore extra mark in the form of either the right (H) tick mark, or dot (?) mark. Interestingly, all these extra marks were made only in the ballot paper cast in favour of the petitioner. No such extra mark existed in any other ballot paper cast in favour of any other candidate. Thus, since nine votes contained such extra mark, all in favour of the petitioner, a reasonable inference can be drawn that a "pre-arrangement" existed between the petitioner and the person who had cast their votes existed. Hence, there is no need to reveal the individual identity of the voter according to the principle laid down by the Apex Court, in the cases of Dr. Anup Singh Singh (supra) and Kum. Shradha Devi (supra). Therefore, the learned Tribunal was justified in concluding that such extra mark was made in order "to show the voter's identity". Hence, the learned Tribunal was legally justified in treating these nine votes as invalid ones under Rule 8(9) of the Rules. Therefore, these nine invalid votes cannot be counted in favour of the petitioner.

17. Admittedly, the petitioner claims to have received eleven votes in his favour, and claims that the respondent No.1 received merely ten votes. Due to the close difference between ten and eleven votes cast in favour of respondent No.1, and the petitioner, the respondent No.1, as the plaintiff, might have been tempted to pray for a recounting. But, considering the fact that out of eleven votes secured by the petitioner, nine votes are invalid, the difference between the votes cast in favour of the petitioner and the respondent No.1 is two and ten. With such a vast difference, there was no need for the learned Tribunal to direct the recounting of the votes. Therefore, even this contention raised by the learned counsel for the petitioner, that the learned Tribunal should have directed for recounting of the votes, cannot be accepted.

18. For the reasons stated above, this Court does not find any illegality or perversity in the impugned order dated 06.02.2017. This petition, being devoid of merit, is hereby dismissed. No order as to cost.