
(2002) 04 GAU CK 0001
In the Gauhati High Court
Case No : Election Petition No. 15 of 2001

Hafiz Rashid Ahmed Choudhury

APPELLANT

Vs

Mission Ranjan Das and Others

RESPONDENT

Date of Decision : 25-04-2002

Acts Referred:

Representation of the People Act, 1951 — Section 123, 123(1), 123(1)(A), 123(1)(B), 123(2)

Citation : (2002) 1 GLT 680

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : A.M. Mazumdar and A.B. Choudhury, for the Appellant; N.M. Lahiri and N. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—The election of the Respondent No. 1, returned candidate, to the Assam Legislative Assembly from the No. 3 North Karimganj Legislative Assembly Constituency has been sought to be" challenged by means of the present election petition.

2. The truncated election petition, truncated by the order dated 7.2.2002 passed by this Court on an application for striking off would go to show that the general election to the Assam Legislative Assembly from all the 126 constituencies including the No. 3 North Karimganj Legislative Assembly Constituency (hereinafter referred to as the "Constituency") was called by the Election Commission with the following schedule:

- i) Date of filing nomination papers; 16.4.2001 to 23.4.2001
- ii) Scrutiny of nomination paper : 24.4.2001
- iii) Withdrawal of nomination paper : 26.4.2001
- iv) Date of Polling : 10.5.2001

v) Date of counting of votes : 13.5.2001

3. The election Petitioner contested the said election from the Constituency as a U.M.F. candidate. Eight other candidates including the Respondent No. 1 were also in the fray. At the conclusion of the poll and after counting of votes was over, the Respondent No. 1 was declared elected having secured a total of 45,429 valid votes polled. The election Petitioner on the other hand secured 28, 108 votes. The difference, therefore, is of 17,321 votes. Not successful at the hustings, the instant election petition has been filed.

4. The pleaded case of the election Petitioner that has survived for trial is that the U.M.F. party at the relevant point of time was a registered un-recognised party. According to the election Petitioner, in the election held in the year 1998 the party contested the Lok Sabha election under the symbol of "Boat". On the basis of the performance of the party in the said election, the U.M.F. was once again granted the status of a "recognised" party by the Election Commission and the symbol of "Boat" was reserved for it. In the 1999 election to the Lok Sabha, the party candidates again contested the election under the reserved symbol "Boat" but due to poor performance in the said election the party lost its status as a "recognised" party as well as the symbol "Boat". According to the election Petitioner, following the "de-recognition", " Boat" which was earlier a reserved symbol ought to have been included in the list of free symbols under the provisions of para 17 of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the "Symbols Order". However, the same was not done and the symbol "Boat" was not included in the list of free symbols. On the aforesaid basis, the Petitioner contends that para 17 of the Symbols Order had been violated by the aforesaid omissions and commissions of the Election Commission of India. Furthermore, according to the election Petitioner, though the symbol "Boat" was allotted to two U.M.F. candidates who had contested the 2001 election from the No. 44 Jania and No. 45 Baghat Legislative Assembly Constituency in the Barpeta District, the Returning Officer of the Constituency in question did not allot the said symbol of "Boat" to the election Petitioner in spite of request.

5. The election Petitioner has further alleged that in the election manifesto of the party which was published soon after announcement of the poll schedule, the symbol "Boat" was shown as the election symbol of the party. Huge expenses were incurred by the election Petitioner in printing posters, leaflets, banners etc. showing the symbol of "Boat". That apart, the election Petitioner has alleged that the symbol allotted to him i.e., "Cup & Saucer" had caused a lot of confusion amongst the electorate who had come to identify the election Petitioner with the symbol "Boat". The Petitioner alleges that as a consequence of the aforesaid wrong allotment of symbol, the Petitioner was deprived of a large number of votes which would have been cast in his favour had the symbol of "Boat" been allotted to him. On the said basis, it is contended that the result of the election had been materially affected inasmuch as, if the symbol of "Boat" had been

allotted to the election Petitioner he would have certainly obtained more valid votes than the returned candidate.

6. In the election petition filed it has also been alleged that one Suresh Barman, election agent of the Respondent No. 1 went to the house of many electorates of the constituency in the night previous to the date of poll i.e. on 9.5.2001 at about 11.30 p.m. and offered money to the electorates inducing them to cast their votes as well as of their family members in favour of the returned candidate. Three persons have been named in the election petition in respect of whom such actions of the election agent has been alleged. On the above basis, it is contended by the election Petitioner that the election of the returned candidate is void on account of commission of corrupt practice as defined u/s 123(1)(A)(b) and 123(1)(B)(b) of the RP Act, 1951.

7. The further allegation, as evident from the pleadings contained in the election petition, is that on 10.5.2001 i.e., the date of poll one Hemanta Bhattacharjee, Addl. Superintendent of Police, Karimganj accompanied by the Respondent No. 1 visited many polling stations of the constituency and threatened and intimidated the voters in order to scare them away. The election Petitioner has mentioned that such alleged illegal actions took place in polling stations Nos. 5A, 8, 21, 22, 22A, 23, 25, 26, 34, 39, 54, 55, 62, 63 and 72. It is alleged that the aforesaid police officer had terrorized the voters and had even resorted to beating of the voters in the aforesaid polling stations as a result of which many of the genuine voters who have come to cast their votes in favour of the election Petitioner could not exercise their franchise. The election Petitioner has further averred that the aforesaid illegal acts were brought to his notice by his election agent and also by his supporters and workers at the time when the election Petitioner had visited the polling stations between 12.30 p.m. and 3.00 p.m. on the date of the poll. On the aforesaid facts, the election Petitioner has pleaded a case of corrupt practice within the meaning of Section 123(2) of the RP Act.

8. The further allegation of the election Petitioner is that on the date of poll between 1 p.m. to 3 p.m. in polling station Nos. 78, 79, 79A, 88, 89, 90, 92, 92A, 104, 114, 114A, 115, 116, 120 and 120A the supporters, workers and agents of the Respondent No. 1 threatened and criminally intimidated many of the voters who had gone to cast their votes in favour of the election Petitioner and such voters were also physically prevented from entering the polling stations. Consequently, such voters had to go away without casting their votes. It is the further allegation of the election Petitioner that many of such voters who could not exercise their franchise earlier returned to the polling stations and though on the second attempt they could enter the polling stations, they had found that the votes against their names had already been cast. Complaints were made to the Presiding Officers of the concerned polling stations who, however, expressed their helplessness in the matter. It is averred by the election Petitioner that number of such voters who could not exercise their franchise would be about 3000.

9. The last allegation on which the election petition has been structured is that the Respondent No. 8, one Sultan Ahmed Choudhury, who was a candidate at the election from the Constituency had decided to withdraw from the contest. The Petitioner has averred that if the aforesaid Respondent No. 8 withdrawn from the contest, the election Petitioner would have been in an advantageous position as the votes which would have been cast in favour of the Respondent No. 8 would have gone, in favour of the election Petitioner. The election Petitioner has alleged that on 25.4.2001 at about 11.30 p.m. the Respondent No. 1 went to the residence of the Respondent No. 8 and requested him not to withdraw from the contest and in return promised to pay him a sum of Rs. 50,000/- immediately after the election is over. It is further alleged that the Respondent No. 1 had requested the Respondent No. 8 to extend his support to him by" persuading his workers and supporters to vote for the Respondent No. 1. The aforesaid information, according to the election Petitioner, was conveyed to him on 14.5.2001 by one Abdul Hye, election agent of the Respondent No. 8 when the said Abdul Hye had come to pay a courtesy call on the election Petitioner. According to the election Petitioner, the aforesaid statement was made by Abdul Hye at about 6.30 p.m. on 14.5.2001 at the residence of the election Petitioner in the presence of Maulana Ahmadul Haque, Hafiz Bazlur Rahman Choudhury and Moulana Abdul Malik. On the aforesaid basis the Petitioner has alleged commission of corrupt practice by the returned candidate within the meaning of Section 123(1)(A)(a) of the RP Act, 1951.

10. The returned candidate/Respondent No. 1 had filed a written statement contesting the claims made by the election Petitioner. In so far as the pleadings of the election Petitioner with regard to allotment of symbol is concerned, in the written statement filed, the Respondent No. 1 has denied all the averments and allegations made. It has been contended that the recognition of U.M.F. was withdrawn by the Election Commission on 29.6.2000 by means of a detailed written order. According to the returned candidate, once the recognition was withdrawn, the party lost its right to use the symbol of boat as a reserved symbol. No right to use the said symbol of "Boat" can be claimed by the election Petitioner. According to the returned candidate, as symbol once reserved cannot be used again as a free symbol as this may result in confusion in the minds of the people. The returned candidate has further averred that it is for this reason that the Election Commission, whenever it cancels a reserved symbol earlier allotted to any political party does not allow the same to be used as a free symbol. It is for the said reason that the symbol "Bullocks" used by the Indian National Congress and the symbol "Cow & Calf reserved for the said party prior to its split had been frozen, it is averred. That apart, it is contended by the returned candidate that the order dated 29.6.2000 passed by the Election Commission had not been challenged by the election Petitioner or his party. The returned candidate has further averred in the written statement filed that the election Petitioner fully knew that after the order was passed by the Election Commission, he or his party had no right to use the symbol of "Boat" and, as

such, the alleged printing of the said symbol on the election manifesto, leaflets, booklets, posters etc. as claimed is not at all relevant. The averments made in the election petition that due to non-allotment of the symbol of "Boat" and allotment of the symbol of Cup & Saucer" voters were confused and that the same had materially affected the result of the election has been denied by the returned candidate. Similarly the claim of the election Petitioner that if the symbol "Boat" had been allotted to him, he would have secured more valid votes than the returned candidate has been denied.

11. In the written statement filed the allegation made with regard to commission of corrupt practice of bribery within the meaning of Section 123 of the RP Act, 1951 by the election agent of the Respondent No. 1 has been denied. The allegation of commission of corrupt practice on account of the alleged acts of Sri Hemanta Bhattacharjee, Addl. Superintendent of Police has also been denied. In so far as the allegations of booth capturing as made in paragraph 28 of the original election petition is concerned, while denying the allegations made, it has been asserted on behalf of the Respondent No. 1 that the election Petitioner has not averred that any of such voters who allegedly found the votes against their names to have already been cast, had not asked the Presiding Officer to accept their "tendered votes". The allegations of commission of corrupt practice of bribery within the meaning of Section 123 of the RP Act in so far as the Respondent No. 8 is concerned has been denied. Apart from denying the allegations made the returned candidate has stated that the Respondent No. 8 was set up as a dummy candidate of the election Petitioner; the aforesaid Respondent No. 8 and his election agent Abdul Hye are close relatives of the election Petitioner and the Respondent No. 8 was set up as an independent candidate by the election Petitioner in order to facilitate use of vehicles allotted in the name of the Respondent No. 8 by the election Petitioner. Such use was in fact resorted to at least in respect of vehicles bearing registration Nos. TRL 2883 and AS-10-2770. The statements allegedly made by Abdul Hye regarding offer of money to the Respondent No. 8 for not withdrawing from the electoral fray, in the presence of the persons named in the election petition, has been categorically denied.

12. On the basis of the pleadings of the parties five issues have been framed for trial by order dated 17.2.2002. The aforesaid issues may be usefully extracted hereinafter:

1. Whether the allotment of symbol "Cup & Saucer" to the election Petitioner instead of the symbol "Boat" was made contrary to the provisions of" Election Symbols (Reservation and Allotment) Order, 1968 and whether the same has materially affected the result of the election;

2. Whether Mr. Suresh Barman, the election agent of the Respondent No. 1 offered money to the three persons named in paragraph 26 of the election petition inducing them to vote in favour Respondent No. 1 and whether corrupt practice u/s 123(1) of the RP Act, 1951 has been committed.

3. Whether on the date of the poll 10.5.2002 Sri Hemant Bhattacharjee, Addl. Superintendent of Police, Karimganj with the knowledge and consent of Respondent No. 1 have threatened and intimidated the voters of Polling Station Nos. 5A, 8, 21, 21 A, 22, 22A, 23, 25, 26, 34, 39, 54, 55, 62, 63 and 72 as a result of which the voters as mentioned in para 27 of the election petition of the aforesaid Polling Stations could not exercise their franchise. If so whether the said action amounts to corrupt practice within the meaning of Section 123(2) of the RP Act, 1951.

4. Whether on the date of polling between 1 p.m. to 3 p.m. the supporters and workers/agents of Respondent No. 1 with the knowledge and consent of the said Respondent threatened and intimidated the voters of Polling Station Nos. 78, 79, 79A, 88, 89, 90, 92, 92A, 104, 114, 114A, 115, 116, 120, 120A as named in paragraph 28 of the election petition as a result of which the voters in the said polling stations could not cast their votes, and whether when the said voters eventually entered the concerned polling stations between 3-4 p.m. they could not cast their votes as votes against their names were already cast by the workers and supporters of the Respondent No. 1 with knowledge and consent of the said Respondent. If so whether the election of the Respondent No. 1 is void on account of commission of corrupt practices within the meaning of Section 123(8) of the RP Act, 1951.

5. Whether on 25.4.2001 the Respondent No. promised to pay a sum of Rs. 50,000/- to Anr. contesting candidate namely Sultan Ahmed Choudhury in order to induce him not to withdraw from the election and instead provide whole hearted support to the Respondent No. 1 if so whether the election of Respondent No. 1 is liable to be declared null and void for commission of corrupt practices within the meaning of Section 123(1) of the RP Act, 1951.

13. Having set out the pleadings of the respective parties and the issues framed on the basis of the said pleadings, it may be appropriate now to set out the evidence adduced by the parties. While setting out the said evidence, it may be convenient to proceed serially on the basis of the issues framed.

In so far as the first issue is concerned, the only witness examined by the election Petitioner is the election Petitioner himself. According to the election Petitioner, in the election held in the year 1996 to the State Assembly his party, i.e. U.M.F. had contested the election on the "Boat" symbol. The aforesaid symbol was selected by the party from the list of free symbols. The party again contested the 1998 parliamentary election under the "Boat" symbol. On the basis of the performance of the party in the 1998 parliamentary election the "Boat" symbol was reserved for the party. However, in the 1999 Parliamentary election the party fared badly and the recognition of the Election Commission was once again withdrawn along with the reserved symbol of "Boat". According to the election Petitioner, for the election held in the month of May, 2001 he had claimed the "Boat" symbol. However, he was not allotted the said symbol as the same was not included in the list of free symbols available. Accordingly, out of

the available symbols, "Cup & Saucer" was chosen by the election Petitioner. The election Petitioner has stated in his deposition that though recognition to the party was withdrawn, the symbol "Boat" remained allotted to the U.M.F. party. He has also averred that in respect of two constituencies namely, Jania and Baghat in the Barpeta district for the election held in May, 2001, the candidates fielded by the party were allotted the "Boat" symbol.

14. Deposing further, the election Petitioner has stated that the party workers and supporters had associated the party candidates including the Petitioner with the "Boat" symbol and in fact, manifestos were released by the party showing the symbol of "Boat". The election Petitioner who has in his deposition claimed that he had started his election campaign almost a month before the election, has further claimed that it was known to all voters that he would be contesting the election under the "Boat" symbol. Consequently, when the "Boat" symbol was refused and the symbol "Cup & Saucer" was allotted, the voters were confused. The election Petitioner has stated in his deposition that his defeat in the election was primarily on account of the confusion and uncertainty created " amongst the electorates due to allotment of the symbol "Cup & Saucer". In cross-examination, the election Petitioner examined as PW-1 has deposed that in the manifesto released the symbol "Boat" was shown on the back page and that apart from the manifesto, some leaflets were also issued by him showing the symbol of "Boat". He has also stated in cross-examination that in the course of his visits to different places in the constituency, on being asked, he had informed the voters that he would be contesting the election under the symbol of "Boat".

15. The material witnesses examined by the election Petitioner in so far as the issue No. 2 is concerned, are the election Petitioner himself, PW-3 and PW-5.

The election Petitioner in his deposition has stated that apart from the persons named in the election petition to whom offer of money was made by the election agent of the returned candidate in reaching for votes in favour of the said returned candidate, there were many other persons to whom similar offers were made, though not named in the election petition. According to the election Petitioner, he came to know about the aforesaid incident involving the three persons named in the election petition on 10.5.2001 in the course of his visit to the polling station in question.

PW-3, Mukkadas Ali is one of the persons named in paragraph 26 of the election petition to whom the offer of money was allegedly made by the election agent of the returned candidate. According to this witness, in the evening prior to the election day, the returned candidate had sent his election agent against Suresh Barman along with two other workers to his village. PW-3 has deposed that the election agent of the returned candidate along with Ors. had offered him money in exchange for votes in favour of the returned candidate. But such offer was declined by the PW-3. In cross-examination, PW-3 has stated that the aforesaid incident was reported by him only to the election Petitioner and to no one else.

PW-5, who is Anr. of the persons named in paragraph 26 of the election petition has stated that in the evening of the day before the poll, one Barman and two BJP workers had visited their village at about 11.30 p.m. and he was told that in case he cast his vote in favour of the BJP candidate he would be given some expenses. Such offer was, however, declined by this PW-5.

16. The material witnesses in respect of the issue No. 3 framed for trial are PW-I, PW-2, PW-4, PW-9, PW-11 and PW-12.

According to PW-1, on the date of poll, one Hemanta Bhattacharjee, Addl. Superintendent of Police, Karimganj, in some cases along with the Respondent No. 1 while in other cases acting alone but with the consent of the Respondent No. 1, visited many polling stations in the rural areas and terrorized the voters even by ordering lathi charge. As a result, it is stated by PW-1, many of the voters could not exercise their franchise. PW-1 has further stated that he had not seen any of the aforesaid incidents himself but on one occasion he had crossed Hemanta Bhattacharjee on the road and on immediately reaching the polling station he found people fleeing away from the said polling station. The aforesaid polling station has been stated to be Barshilla mallijuria polling station No. 26. PW-1 has further deposed that he was informed about the said acts of the aforesaid Addl. Superintendent of Police by his workers and supporters in different polling stations when he had visited the same on the polling date. PW-1 has further deposed that he submitted a written complaint in this regard to the election observer in the Circuit House at about 4.30 p.m. on 10.5.2001.

PW-2 Hussain Ahmed Choudhury, election agent of the election Petitioner, in his deposition has stated that on the election date he had visited about 20-30 polling stations. PW-2 has deposed that he had visited Dashgram polling station and he found Hemanta Bhattacharjee, Addl. Superintendent of Police resorting to lathi charge as a result of which, many of the voters could not cast their votes. He has further deposed that in rural areas where the election Petitioner had a sizeable following the same was the position. When he had come back to the town after visiting the rural areas the polling time was almost over and he was informed by many voters that they could not cast their votes. PW-2 has also claimed in his evidence that he had submitted a complaint to the Returning Officer and further that at about 1-1.30 p.m. of the polling day, he had met the election Petitioner at Dashgram polling station when he reported to him about the acts of the Addl. Superintendent of Police. In cross-examination, PW-2 has however stated that he did not see any lathi charge by the Addl. Superintendent of Police but he was informed about the said incidents.

PW-4 in his evidence has stated that on the date of poll he had gone to cast his vote in polling station No. 26 and that there was some trouble on the said date. There was a re-poll and on the date of re-poll i.e. 13.5.2001 the police has committed some excesses.

PW-9 who had been examined by the election Petitioner to establish the facts

under issue No. 3 as framed has in his evidence stated that on the date of poll at about 12-12.30 p.m. he along with his mother and sister had gone to the polling station to cast their votes. As they were approaching to the polling station they found people running hither and tither. On being asked they were informed that police personnel were beating the voters. Consequently, this witness along with his mother and sister did not go further and returned home.

PW-11 examined by the election Petitioner, has stated in his evidence that on the date of poll i.e., 10.5.2001 he had gone to cast his vote at about 10.00 a.m. Voting commenced in the polling station at about 11.00 a.m. A Police vehicle came and the police after dis-embarking from vehicle started beating the people who were assembled. All the persons who had gathered at the polling station ran away and after the incident very few returned. The lady voters, in particulars, did not come back to exercise their franchise.

PW-12 examined in the case has stated in his evidence that he had gone to the polling station at about 8 a.m. in the morning along with other villagers to cast his vote. As it was raining very heavily, he came back and returned to the polling station at about 12-12.30 p.m. At about 2.30 p.m. Police along with the responders No. 1 arrived at the polling station and drove the people away. Consequently, he was unable to cast his vote along with many others. In cross-examination, this witness stated that he was present in the polling station from about 8-10.30 a.m. This witness in cross-examination has further stated that after the incident he had met the election Petitioner and PW-2 at about 3-3.30 p.m. and had informed them about the incident.

17. In so far as the issue No. 4 is concerned, the material witnesses examined are PW-1, PW-6, PW-7 and PW-8.

PW-1 in his deposition has stated that in the polling stations mentioned in paragraph 28 of the election petition between 1 p.m. and 3.00 p.m. as the rain stopped many voters had turned up. However, the supporters and workers of the returned candidate had formed a human barricade and had prevented voters from entering the polling station. Inside the polling stations stamping of ballot papers was going on. Later some elderly persons managed to enter to cast their votes but they had found that votes against their names had already been cast. On the aforesaid facts, the election Petitioner in his deposition has alleged booth capturing.

PW-6, examined by the election Petitioner, in his evidence has stated that on the date of the poll he had gone to the polling station No. 115 at about 1-1.30 p.m. On reaching the polling station he found some commotion and confusion and found the volunteers wearing badges of BJP. According to this witness, the volunteers had asked him to go away and come back later to cast his vote. According to PW-6, he left the polling station and when he came back once again at 3.30 p.m. along with his wife, the officer on duty on the polling station informed him that votes against their names had already been cast. In cross-

examination, this witness admits that he was conversant with the practice of casting "tendered votes". He has also stated in his cross-examination that he had requested the Presiding Officer to allow them to cast their votes as "tendered votes" but the said request was not accepted.

PW-7 has stated in his deposition that he went to the polling station at about 12-12.30 p.m. in the after noon. But as the polling station was over-crowded he came back home. PW-7 claims that he went to the polling station again at about 3 p.m. along with his mother and sister but they found the votes against their names had already been cast.

PW-8 who claims to be a voter of polling station No. 116 in his deposition has stated that on the date of poll between 1-1.20 p.m. he had come to the polling station to cast his vote but as polling station was overcrowded he returned home. According to PW-8 he had again come to the polling station at about 3 p.m. But, once inside, he was told that the vote against his name had already been cast. This witness has further deposed that he raised objections before the Presiding Officer and on coming out of the polling station he was told by some boys wearing "Lotus" symbol badges that as the vote against his name had been cast, nothing can be done.

18. Issue No. 5 as framed for trial in the case has been sought to be established by the election Petitioner in his favour by examining PW-1, PW-4, P W-10 and PW-13.

PW-1 in his deposition has stated that on the date when the results were declared a crowd of about 400 persons had gathered in his residence. In the presence of several persons who were there in the residence of the election Petitioner, one Abdul Hye, election agent of the Respondent No. 8, Sultan Ahmed Choudhury, informed the election Petitioner (PW-1) that though the Respondent No. 8 wanted to withdraw from the election, the returned candidate had persuaded him not to do so and in return promised to pay him a sum of Rs. 50,000/-. According to the election Petitioner, as both the election Petitioner and the Respondent No. 8 belonged to the same locality, if the Respondent No. 8 had withdrawn, his supporters would have voted for the election Petitioner. However, because of the inducement offered by the returned candidate, the Respondent No. 8 not only remained in the fray but also had asked his supporters to vote for the returned candidate. In cross-examination, the election Petitioner has denied the fact that his return of election expenses were submitted by Abdul Hye, election agent of the Respondent No. 8. He has also stated it is not correct that two vehicles bearing registration No. TRL 2884 and AS-10-2770 were jointly used by the election Petitioner and the Respondent No. 8.

PW-4 is one of the persons named in the election petition who was allegedly present at the time when the incident in question was narrated by Abdul Hye. In his deposition, PW-4 has stated that in the evening following the declaration of the result about 15-20 persons were sitting in the drawing room of the election

Petitioner. The aforesaid persons were exchanging their views as to why the election Petitioner has lost the election. One Abdul Hye, a retired school teacher came to the drawing room about one hour later and looked like Respondent. On being asked, Abdul Hye informed the gathering that one evening prior to the election date, the Respondent No. 1 had visited the house of Sultan Ahmed Choudhury and persuaded him to remain in the election fray and had offered him a sum of Rs. 50,000. Subsequently, he could come to know that the aforesaid Abdul Hye was the election agent of Sultan Ahmed Choudhury.

PW-10 is an Anr. person named in respect of the alleged incident by the election Petitioner. He has stated that the returned candidate visited the house of Sultan Ahmed Choudhury in the evening of 25.4.2001 and persuaded him not to withdraw from the election. According to this witness, the said incident was reported to him by Abdul Hye at the residence of the election Petitioner immediately after declaration of the result. PW-10 has also deposed that there was some talk monetary transaction between the returned candidate and Sultan Ahmed Choudhury though the exact amount was not known to him.

PW-13 is Sultan Ahmed Choudhury himself. According to PW-13, within 4 to 5 days of his filing nomination he perceived his chances of winning the election to be bleak, primarily on account of his inability to meet the expenses involved in the election. He, therefore, wanted to withdraw from the contest. In the evening of 25.4.2001, the returned candidate came to his house and in presence of his election agent requested him not to withdraw from the contest and on being told that he had financial difficulties, the returned candidate assured him that funds would be provided for. PW-13 has deposed that consequently he remained in the electoral fray.

19. The returned candidate examined himself and two other witnesses in support of his case. The returned candidate examined as D.W-1 in his deposition has stated that he had presented the constituency in question twice earlier i.e. in the year 1991 as well as in the year 2000 (by-election). In the election held in the year 2001 he had won from the constituency by a margin of over 17,000 votes. DW-1 has categorically denied the allegations made with regard to the acts attributed to Hemanta Bhattacharjee, Addl. Superintendent of Police as pleaded in paragraph 27 of the election petition and deposed by the witnesses on behalf of the election Petitioner. DW-1 in his evidence has stated that he had no occasion to have any interaction with Hemanta Bhattacharjee, Addl. Superintendent of Police and that the said person was not allotted any duty on the date of the poll in the constituency. The DW has also denied the allegations made by the election Petitioner in paragraph 28 of the election petition and has stated in his deposition that none of the incidents as described in paragraph 28 of the election petition had occurred in any of the polling stations in question. While denying the fact that he had offered any money to Sultan Ahmed Choudhury to remain in the electoral fray, DW-1 has deposed that Abdul Hye was a school teacher against whom there were several public complaints and as the

sitting MLA he had himself taken the said complaints to the authorities in the Education Department for necessary action. DW-1 has also deposed that the aforesaid Abdul Hye had been in jail custody on several occasions,. PW-1 has proved Exhibit-R3 as well as Exhibit-R4 namely, the application filed by Sultan Ahmed Choudhury and the election Petitioner respectively seeking permission of the Deputy Commissioner to use the vehicles mentioned in the said applications for election purposes. DW-1 has deposed that the vehicle bearing registration No. TRL 2883 is common to both the lists. He has also proved Exhibit-R5 i.e. Anr. application filed by Abdul Hye on behalf of Sultan Ahmed Choudluwy for permission to use certain vehicles on the election date. In the said Exhibit-R5, two vehicles bearing registration Nos. AS-10-2770 and AS-01-H-9689 are mentioned and the said vehicles also find mention in Exhibit-R4.

DW-2 Suresh Barman is the election agent of the Respondent No. 1 and an advocate by profession. According to this witness, on the days preceding the election he hardly had any time to come out of the election office and kept himself busy with various office duties. He had denied the allegations made in paragraph 26 and has stated that he does not know either the PW-3 or PW-5. In cross-examination this witness had however, admitted that as the election agent of the returned candidate, he was required to attend meetings in the election office and government offices function during the day from 8.30 a.m. to 5.30 p.m. He has also admitted that during the election days, he had gone to the Court in connection with professional duties though such visits were of short duration. DW-3 is an official witness and was at the relevant point of time working as Senior Assistant in the election branch of the Deputy Commissioner's office at Karimganj. According to this witness, the return of the election expenses of the election Petitioner was submitted by one Abdul Hye who also collected the acknowledgment receipt. According to this witness the election Petitioner had verbally requested him to allow the aforesaid Abdul Hye to complete the formalities. This witness has stated that pursuant to the summons received from the Court he had brought the connected documents which included the return of expenses of the election Petitioner. This witness has also stated that the relevant records have been brought by him with due permission from the higher authority.

20. Mr. AM Mazumdar, learned senior counsel appearing on behalf of the election Petitioner in a very elaborate and lucid argument has contended that under part 17 of the Election Symbols (Reservation & Allotment) Order, 1968 (hereinafter referred to as the "Symbols Order") it was incumbent on the part of the Election Commission to include the symbol of "Boat" in the list of free symbols. According to Mr. Mazumdar, as the recognition granted to the U.M.F. party stood withdrawn, the symbol of "Boat" immediately following such "de-recognition" should not have been kept in the category of reserved symbol, but should have been brought within the category of free symbols for consideration of the claim of the election Petitioner for allotment of the said symbol. As the Election Commission had failed to act in terms of the mandatory requirement of para 17 of the Symbols Order, the actions of the Returning Officer in not allotting the symbol

"Boat" to the election Petitioner on the ground that it was not included in the list of free symbols is patently wrong. Additionally, it has been urged by the learned senior counsel that non-allotment of the said symbol of "Boat" and instead the allotment of the symbol "Cup & Saucer" having materially affected the result of the election, the Petitioner is entitled to the benefit of the reliefs claimed for in the election petition.

21. In so far as the issue Nos. 2, 3 and 4 are concerned, the argument advanced by the learned senior counsel appearing on behalf of the election Petitioner is that the evidence of the witnesses examined by the election Petitioner with respect to the said issues clearly and cogently make out a case of commission of corrupt practices as alleged by the election Petitioner for which reason the ejection of the returned candidate is liable to be declared void. Mr. Mazumdar has urged that the best evidence possible, in the facts of the case, have been brought on record by the election Petitioner and on proper appreciation thereof this Court should hold the commission of corrupt practices as alleged under the aforesaid three issues to have been duly proved by the election Petitioner. Mr. Mazumdar has additionally argued that in the cross-examination of the witnesses examined by the election Petitioner in respect of the facts constituting corrupt practices in question no challenge has been offered. In the cross-examination of the Petitioner's witnesses on behalf of the returned candidate not only the facts constituting the corrupt practices as alleged has not been challenged, even no suggestions to the witnesses putting forward the stand of the returned candidate in respect of the allegations brought have been made to the witnesses in question. On the said basis the learned senior counsel contends that the returned candidate must be deemed to have accepted the correctness of the versions deposed to by the Petitioner's witnesses in question.

22. In so far as the issue No. 5 is concerned, Mr. Mazumdar, learned senior counsel, has argued that though Abdul Hye, election agent of the Respondent No. 8 has not been examined, PW-4 and PW-10 in whose presence the incident was reported have been clear and unambiguous in their depositions/Cross-examination of the said witnesses do not in any manner cast any doubt on the versions as deposed to. Furthermore, PW-13 Sultan Ahmed Choudhury in his evidence has very clearly and categorically stated that money was offered to him by the returned candidate not to withdraw from the election. Consequently, the commission of corrupt practices u/s 123(1)(A)(a) has been clearly made out warranting declaration of the election of the returned candidate as void. Mr. Mazumdar has relied on the ratio laid down by the Apex Court in the case of Maqsoodan and Others Vs. State of Uttar Pradesh, for the proposition that it is not the quantity but the quality of evidence that matters in any given case and that in the instant case, the election Petitioner has fully succeeded in proving his case on the basis of the witnesses examined. Reliance has also been placed on two decisions of this Court namely, Sanjib Kumar Das v. The State of Tripura reported in (1994) 2 GLR 328 and Ganesh Jadav and three Ors. v. State of Assam reported in (1995) 1 GLR 111 in respect of the proposition that lacuna in

the cross-examination of the Petitioner's witnesses are capable of being construed as admission of the facts deposed to by the Petitioner's witnesses in question. The learned Counsel has also relied on the decision of the Apex Court in the case of Punjab Rao Vs. D.P. Meshram and Others, for the proposition that the evidence of the witnesses examined on behalf of the election Petitioner ought not to be rejected merely because they appear to be interested in the election process.

23. Mr. N.M. Lahiri, learned senior counsel appearing on behalf of the Respondent/returned candidate controverting the submissions advanced by Mr. Mazumdar has argued that once a symbol is included in the list of reserved symbols even upon withdrawal of recognition of a political party, the said symbol is not to be included in the list of free symbols. This, the learned Counsel contends, is to avoid confusion in the minds of the electorate. In this regard Mr. Lahiri has drawn my attention to the averments made in the written statement to the effect that the symbol of "Bullocks" and "Cow & Calf" earlier allotted to the Indian National Congress had been frozen by the Election Commission for use by any political party. Mr. Lahiri submitted that there is no provision in the Symbols Order requiring that a particular symbol included in the list of reserved symbols has to be automatically included in the list of free symbols upon withdrawal of recognition of the political party to whom earlier the reserved symbol was allotted. Mr. Lahiri by placing reliance on the decision of the Apex Court in the case in Elvin Sangma Vs. Projengton Momin and Another, has contended that publication of the manifesto under the "Boat" symbol by the election Petitioner when the said symbol was not allotted to the election Petitioner is itself a corrupt practice within the meaning of Section 123(4) of the R.P. Act, 1951. The learned senior counsel has further submitted that even assuming that an interaction of the Symbols order has taken place in the instant case, the material affect of such infraction on the result of the election is a question of fact which has to be established by the evidence on record. In the instant case, apart from the general allegations made to the aforesaid effect, there is no concrete evidence to establish that the allotment of the "Cup & Saucer" symbe" to the election Petitioner, even if assumed to have been wrongly done, had materially affected the result of the election, particularly when the difference of the margin of votes between the election Petitioner and the returned candidate is over 17,000.

24. Mr. Lahiri has further argued that the allegation of corrupt practice of bribery in respect of which issue No. 2 has been framed has not at all been substantiated by the evidence adduced by the election Petitioner. The learned senior counsel has submitted that PW-8 and PW-5 examined in respect of the said allegations are partisan witnesses and in any case their testimony has been demolished by the evidence of DW-2 examined in the case. The learned senior counsel by referring to the judgment of the Apex Court in the case of Patangrao Kadam Vs. Prithviraj Sayajirao Yadav Deshmukh and Others, has contended that even assuming, while denying that the allegations of bribery has been proved, there being no evidence to prove that the said act was committed with the consent of

the returned candidate, no liability can be fastened on the returned candidate for the acts of his election agent.

25. The depositions of the witnesses examined by the Petitioner under issue No. 3 even if accepted in its entirety and taken at face value, do not make out a case u/s 123(2) of the RP Act it is argued by Mr. Lahiri. No case u/s 123(7) of the Act, it is contended, has also been made out as sought to be additionally argued on behalf of the Petitioner. The learned Counsel for the returned candidate has further argued that the knowledge and consent of the returned candidate to the alleged acts attributed to Hemanta Bhattacharjee, Addl. Superintendent of Police on the basis of which commission of corrupt practice has been sought to be established has not been at all proved by the evidence and materials on record. Mr. Lahiri has argued that the charge of corrupt practice is quasi-criminal in nature and such a charge must be established beyond all reasonable doubt. Even assuming the acts alleged to have taken place, the hypothesis that the same were done in the course of official duties connected with the poll has not been excluded by the evidence and materials on record.

26. In so far as the case of both capturing sought to be made out by the election Petitioner is concerned, Mr. Lahiri has submitted that the pleadings in the election petition seek to make out a case of voting by impersonation and not booth capturing. The evidence on record, according to the learned Counsel for the returned candidate does even remotely establish a case of booth capturing within the meaning of Section 123(8) of the Act. Mr. Lahiri has alternatively argued that even if the entire evidence of the witnesses examined by the Petitioner on this score is accepted, what is at best established is a reception of the void votes which would require further proof that such reception of the void votes has materially affected the result of the election. According to Mr. Lahiri, the evidence of the Petitioner's witnesses do not even attempt to establish the said question of fact.

27. In so far as the issue No. 5 is concerned, the argument of Mr. Lahiri is that the witnesses examined by the election Petitioner on this aspect of the case are partisan and interested witnesses who are not worthy of credence. Abdul Hye, election agent of Sultan Ahmed Choudhury has not been examined and, therefore, it is contended that the evidence of PW-4 and PW-10 who are reported to have heard the allegation of attempted bribery of Sultan Ahmed Choudhury, should not be believed. In so far as PW-13 is concerned, Mr. Lahiri has argued that the materials on record amply demonstrates that PW-13 is a highly interested witness and is closely connected to the election Petitioner. Elaborating Mr. Lahiri has argued that the evidence on record would go to show that the return of the election expenses of the Petitioner was filed by Abdul Hye, election agent of Sultan Ahmed Choudhury, PW-13 and that both the election Petitioner and the aforesaid Sultan Ahmed Choudhury had used common vehicles during the election campaign as evident from Exhibit D3 and D4.

28. Continuing his argument Mr. Lahiri has submitted that the witnesses brought

on the dock by either side in an election dispute are normally partisan and interested witnesses and, therefore, the Court should be very careful in evaluating the evidence tendered by such witnesses before deciding to act upon such evidence. According to Mr. Lahiri, unless evidence tendered by such partisan and interested witnesses are sufficiently corroborated, and/or backed by cogent circumstantial and documentary evidence, the Court should always be slow and hesitant to accept the oral testimony of such witnesses examined. Reliance in this regard has been placed on two judgments of the Apex Court. The first case relied upon is reported in *Thakur Sen Negi Vs. Dev Raj Negi and another*, The following passage from the aforesaid judgment may be usefully extracted hereinafter:

3. ...It must be remembered that in an election dispute the evidence is ordinarily of partisan witnesses and rarely of independent witnesses and, therefore, the Court must be slow in accepting oral evidence unless it is corroborated by reliable and dependable material. It must be remembered that the decision of the ballot must not be lightly interfered with at the behest of a defeated candidate unless the challenge is on substantial grounds supported by responsible and dependable evidence. The election result shows that both the contesting candidates were influential persons having a strong hold on large numbers of people of the constituency. Between the two the Appellant was a far more influential person who had been in office since long and had held important positions. He had been in active politics for the last many years and had won many elections. Loss in this contest must have given him a rude shock. How an election Court should evaluate the evidence in such a situation has been stated time and again by this Court.....

29. The other judgment relied on by *Rahim Khan Vs. Khurshid Ahmed and Others*, Para 9 and 21 of the aforesaid judgment may be reproduced here in below:

9. However, we have to remember Anr. factor. An election once held is not be treated in a lighthearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Court naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceeding of quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.

21. We must emphasize the danger of believing at its face value oral evidence in

an election case without the backing of sure circumstances or indubitable documents. It must be remembered that corrupt practices may perhaps be proved by hiring half a dozen witnesses apparently respectable and disinterested, to speak to short and simple episodes such as that a small village meeting took place where the candidate accused his rival of personal vices. There is no X-ray whereby the dishonesty of the story can be established and, if the Court were gullible enough to gulp such oral versions and invalidate election, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of kilkenny cat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The Court must look for serious assurance, unlying circumstances on unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life.

30. The very weighty arguments advanced by the learned Counsel for the parties may now be considered.

31. In so far as issue No. 1 is concerned, this Court has noticed that though a case that the provisions of Symbols Order has been violated by the Election Commission of India as a consequence of which violation the result of the election has been materially affected, has been sought to be made by the election Petitioner, surprisingly the Election Commission of India has not been impleaded as a party to the present election dispute. Even otherwise a perusal of the provisions of the Symbols Order would go to show that there is no specific provision in the order making it mandatory for the Election Commission to include a symbol earlier reserved, in the list of free symbols after a party which had been earlier allotted the said reserved symbol; had ceased to be a recognised political party. In view of the provisions of the Symbols Order, this Court considers it appropriate to hold that the alleged infraction of the said order has not been established by the election Petitioner. Consequently, the question of any such infraction having materially affected the result of the election does not even arise. None the less it cannot be overlooked that the materials on record clearly establish that the Petitioner has not succeeded in proving that any such alleged infraction, even if assumed, has materially affected the result of the election of the returned candidate.

32. Consideration of the evidence on record, particularly, the evidence of PW-1, PW-3, PW-5 and DW-2 would go to show that in so far as the allegation of bribery contained in paragraph 26 of the election petition is concerned, while PW-3 and PW-5 have emphatically stated that the election agent of the returned candidate had offered them money in exchange for their votes, in the evening prior to the date of poll DW-2, election agent of the returned candidate has been equally emphatic in denying the said allegation. If both the versions are probable, proof beyond reasonable doubt cannot be said to exist and the charge

of bribery has to be proved beyond all reasonable doubt. The argument of Mr. Mazumdar, learned senior counsel for the election Petitioner that the best possible evidence has been adduced by the election Petitioner and there is no reason why the same should be disbelieved stands answered by the above conclusion reached by the Court. The defects in the cross-examination, pointed out by Mr. Mazumdar, which he contends should be taken as admission of the allegations by the returned candidate is too wise a proposition for acceptance. While it is correct that in the cross-examination of the Petitioner's witnesses no suggestion that the allegations of bribery are false had been put to the Petitioner's witnesses, the same cannot be conclusive. The evidence of DW-2 denying the allegations cannot be overlooked. That apart, what is required, as already stated, is proof beyond all reasonable doubt and it is for the Petitioner to establish that such proof of the highest degree, leaving no room for doubt whatsoever, has been brought on record. In the facts the present case, I am unable to hold that the election agent of the returned candidate had committed the act of bribery as defined u/s 123(1)(A)(b) of the RP Act. As the allegation of bribery has not been proved by the election Petitioner, it would not be necessary for this Court to consider the effect of the law laid down by the Apex Court in the case of Patangrao Kadam (supra).

33. In so far as the issue No. 3 is concerned, a scrutiny of the evidence on record would go to show that PW-1 in his cross-examination has stated that he was informed that the lathi-charge by the police was not resorted to with the consent of the returned candidate but it was for the benefit of the returned candidate. PW-2 examined in the case had contradicted himself inasmuch as, while in chief he had stated that lathi-charge at Dashgram LP School took place in his presence, in cross-examination he had admitted that he was not an eyewitness to the said lathi-charge. PW-4 has deposed in very general terms and has mentioned that there was trouble on the polling day and that the police had also committed excesses on the date of re-polling. PW-9 in his evidence has stated that on reaching the polling station he saw people running and on enquiry he could come to know that people were being beaten by the police. PW-11 in his deposition has stated that at about 11 a.m. some police personnel dis-embarked from a vehicle and started beating people. PW-12 in his deposition which is to the same effect however, has mentioned the time as 2.30 p.m.

34. The witnesses examined by the Petitioner are not consistent with regard to the time when the alleged incident of illegal police action took place. That apart, there is nothing in the evidence of the Petitioner's witnesses to show that the alleged actions were so done with a view to prevent any person from voting and that too with the knowledge and consent of the returned candidate. On the said facts this Court feels safe to conclude that the election Petitioner has failed to make out any case whatsoever of undue influence within the meaning of Section 123(2) of the Act.

35. Coming to the issue No. 4, this Court has noticed that the deposition of the

election Petitioner on this aspect of the case has not been supported by his own witnesses. The election Petitioner in his evidence has stated that the workers and supporters of the Respondent No. 1 had created a human barricade preventing voters from entering the polling station and inside the polling station there was stamping going on. The allegation of stamping going on inside the polling station is not even pleaded. That apart, in which polling station such alleged actions were committed is not mentioned in the evidence. The pleadings contained in paragraph 28 contain a list of as many as 15 polling stations.

36. PW-6 examined by the election Petitioner on this aspect of the case in his deposition has stated that when he reached his polling station there was commotion and BJP volunteers had asked him to go away and come back later. When this witness came to the polling station for the second time, he found that his vote was already cast. PW-7 and PW-8 in their deposition have stated that when they had gone to the respective polling stations, they found the same to be crowded and when they went to polling station for the second time they found their votes to have already been cast. The evidence of PW-6, PW-7 and PW-8 do not even remotely make out a case of booth capturing within the meaning of Section 123(8) of the Act. The evidence of PW-1, therefore, stands in isolation and the said evidence not been corroborated. In view of the deficiencies in the said evidence, I am inclined to hold that no case of booth capturing has been made out.

37. Coming to the last issue i.e. issue No. 5 this Court has noticed that Abdul Hye, election agent of Sultan Ahmed Choudhury has not been examined by the election Petitioner and no reason is forthcoming for such non-examination. PW-4 and PW-10 who were allegedly present at the residence of the election Petitioner when Abdul Hye is stated to have reported the incident relating to attempt at bribery by the returned candidate, must be held to be sympathisers, if not supporters of the election Petitioner in view of the fact that the said witnesses were in the residence of the election Petitioner immediately after he had lost the election. The best possible evidence in this regard i.e., that of Abdul Hye is not forthcoming. In such a situation this Court feels unsafe to rely on the testimony of PW-4 and PW-10. In so far as PW-13 is concerned, his version must be weighed very carefully in view of certain closeness between the PW-13 and the election Petitioner as demonstrated by the testimony of DW-3 and the documents exhibited through the said witness. That apart, PW-13 had secured only about 250 votes which fact also cannot be lost sight of in judging the probative value of the testimony of PW-13. To decide the instant issue in favour of the election Petitioner, the attempted bribery of Sultan Ahmed Choudhury must be proved beyond reasonable doubt. The evidence and materials on record as discussed above, hardly permits any such conclusion.

38. In view of the above discussion, all the issues framed in the case are decided against the election Petitioner. The election petition, therefore, has to fail and is accordingly dismissed with costs which is quantified at Rs. 5,000/-