
(1969) 09 GAU CK 0009
In the Gauhati High Court
Case No : Civil Rule No. 530 of 1969

Harendra Nath Medhi

APPELLANT

Vs

Bichitraram Medhi and Others

RESPONDENT

Date of Decision : 02-09-1969

Acts Referred:

Assam Panchayat (Constitution) Rules, 1960 — Rule 30, 39, 62(1), 62(5), 62(6)
Parliamentary Elections Rules — Rule 38, 48, 48(2)

Citation : (1969) 09 GAU CK 0009

Hon'ble Judges : M.C. Pathak, J;D.M. Sen, J

Bench : Division Bench

Advocate : N.M. Lahiri and B.M. Mahanta, for the Appellant; S.N. Bhuyan and D.P. Chaliha, for the Respondent

Judgement

Pathak, J.—By this writ petition, the Petitioner has challenged the order passed by the District Judge, L.A.D., Gauhati, by which he affirmed the order of the Munsiff in a petition under Rule 72 of the Assam Panchayat (Constitution) Rules, 1960, as amended by the Assam Panchayat (Constitution) (Amendment) Rules, 1964, under Notification No. PDA. 678/63/Pt. I/dated 11th June, 1964.

2. The Petitioner and the first Respondent were elected as additional members of the Pub Nalbari Anchalik Panchayat. In accordance with the provisions of the Assam Panchayat (Constitution) Rules, as amended, (hereinafter called the Constitution Rules), the Presiding Officer (Magistrate) fixed 10-9-68 for election of the Vice-President of the Pub Nalbari Anchalik Panchayat, inter alia. The Petitioner and the first Respondent were candidates for the office of the Vice-President. In the election, both the Petitioner as well as the first Respondent secured 23 votes each and the matter was decided by tossing a coin as prescribed by the Constitution Rules and the Petitioner was declared duly elected as Vice-President of the Anchalik Panchayat Thereafter the first Respondent filed a petition before the learned Munsiff under Rule 68 of the Rules. The contention of the Respondent No. 1 was that one of the ballot papers counted in favour of

the Petitioner contained a mark other than a cross mark and that in spite of objection, the said ballot paper was counted in favour of the Petitioner in violation of the provisions of Rule 62(6) of the Rules. The Respondent No. 1's further contention was that if the said ballot paper wrongly counted in favour of the Petitioner, would not have been done so, there would have been no occasion for resorting to the procedure laid down in Rule 39 and the Respondent No. 1 would have been validly declared elected as Vice-President inasmuch as he would have secured more votes than the Petitioner. The Petitioner filed objection to the petition and his contention was that there was no illegality or irregularity in his being elected as Vice-President and there was no violation of any provisions of the Assam Panchayat Act or the Rules framed there under.

3. During the trial, the learned Munsiff opened the sealed boxes of the ballot papers and found that two of the ballot papers which were counted in favour of the Petitioner did not bear cross mark."; but had flat marks against the Name of the Petitioner. The learned JUDGE held that probably those marks happened to exist on the ballot papers as reverse of the mark-stick was used while marking the same. The learned Munsiff therefore found that the said two ballot papers, Exts. 3 and 4, were illegally counted in favour of the Petitioner and when those two ballot papers were excluded, the Respondent No. 1 would get 23 votes as against 21 votes received by the Petitioner and as such he set aside the election of the Petitioner as Vice-President of the Anchalik Panchayat and declared the Respondent No. 1 to have been elected to the said office. The Petitioner therefore filed a petition under Rule 72 of the Constitution Rules before the District Judge, Gauhati who, however, by his judgment and order dated 20-5-69 dismissed the Petitioner's application. By the present writ petition, the Petitioner has challenged the order of the learned District Judge.

4. Mr. N.M. Lahiri, the learned Counsel appearing for the Petitioner, submitted that Sub-rule (6)(d) of Rule 62 of the Constitution Rules was directory and not mandatory. His submission was that if no cross mark was placed on the ballot paper but if the intention of the voter as to in whose favour he exercised his vote could be gathered from the surrounding circumstances, the ballot paper should be taken into consideration and it should not be declared invalid. He further submitted that the Returning Officer in the instant case found that though there was no cross-mark on the ballot papers, the votes were exercised in favour of the Petitioner and as such he took them into consideration. The learned Counsel further submitted that the learned Munsiff also held that probably the marks that appeared on the ballot papers were put by using the reverse of the marking stick and therefore it clearly indicated the intention of the voters that these votes were cast in favour of the Petitioner. As such it was contended that the orders of both the learned Munsiff and the learned District Judge were bad in law.

5. Mr. S.N. Bhuyan, the learned Counsel for the Respondent No. 1. submitted that Sub-rule (6)(d) of Rule 62 was mandatory and if there was no cross-mark on the ballot paper, it must be held to be invalid and as such, he submitted, that

the impugned order was quite in accordance with law.

6. Sub-rule (6) of Rule 62 of the Constitution Rules runs as follows:

Immediately after the voting is over, the- President shall open in the presence of the members present the ballot box, take out the voting papers there from, count them and record the number thereof in a statement.

A ballot paper shall be invalid:

- (a) If it bears the signature of the voter or contains any word, sign or visible representation by which he can be identified; or
- (b) If cross marks are placed against more than one name;
- (c) If the cross mark is so placed thereon as to make it doubtful for which one of the two or more candidates, the vote was intended to be given; or
- (d) If no cross mark is placed thereon; or
- (e) If it does not bear the signature prescribed in sub-rule (5).

Mr. Lahiri submitted that so far as Clause (d) is concerned, the word "shall" in the clause "A ballot paper shall be invalid" should be construed as "may". In an election, the most important thing to be considered is the intention of the voter. If from the ballot paper, the intention of the voter as to in whose favour the vote was exercised could be gathered, the ballot paper should not be rejected as invalid. In this connection, he drew our attention to paragraph 240 at page 139 of Halsbury's Laws of England, Third Edition, wherein the following passage occurs:

Ballot papers rejected for uncertainty: A ballot paper which is unmarked or void for uncertainty is void and must not be counted; but a ballot paper on which a vote is marked elsewhere than in the proper place, or otherwise than by means of a cross or by more than one mark is not by reason thereof to be deemed to be void (either wholly or as respects that vote (m)) if an intention that the vote shall be for one or other of the candidates, or, at a poll consequent on a parish meeting, for or against any question, clearly appears, and the way the paper is marked does not of itself identify the voter and it is not shown that he can be identified thereby.

The presumption is that every voter who applies for a ballot paper intends to vote for some candidate. A ballot paper marked on the back only should not be counted, even though the mark shows through the paper on to the front. A ballot paper marked both on the back and on the front may, however, be counted.

In this connection, Mr. Lahiri placed before us the book "Parliamentary Elections", by A. Norman Schofield. At page 1014 of the said Book. Rule 38 of the Parliamentary Election Rules runs as follows:

- (1) A ballot paper shall be delivered to a voter who applies therefore, and

immediately before delivery-

(a) the ballot paper shall be stamped with the official mark, either embossed or perforated;

(b) the number, name and description of the elector as stated in the copy of the register of electors shall be called out;

(c) the number of the elector shall be marked on the counterfoil;

(d) a mark shall be placed in the register of electors against the number of the elector to denote that a ballot paper has been received but without showing the particular ballot paper which has been received; and

(e) in the case of a person applying for a ballot paper as proxy, a mark shall also be placed against his name in the list of proxies.

(2) The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper so as to disclose the official mark and put the ballot paper so folded into the ballot box in the presence of the presiding officer.

(3) The voter shall vote without undue delay, and shall leave the polling station as soon as he has put his ballot paper into the ballot box.

Rule 48 of the said Rules provides as follows: Cat page 1020):

(1) Any ballot paper:

(a) which does not bear the official mark; or

(b) on which votes are given for more than one candidate; or

(c) on which anything is written or marked by which the voter can be identified except the printed number on the back; or - -.

(d) which is unmarked or void for uncertainty;

shall, subject to the provisions of the next following paragraph be void and not counted.

(2) A ballot paper on which the vote is marked.

(a) elsewhere than in the proper place; or

(b) otherwise than by means of a cross; or

(c) by more than one mark; shall not by reason thereof be deemed to be void if an intention that the vote shall be for one or other of "the candidates clearly appears, and the way the paper is marked does not of itself identify the voter and it is not shown that he can be identified thereby.

(3) The returning officer shall endorse the word "rejected" on any ballot paper

which under this rule is not to be counted, and shall add to the endorsement the words "rejection objected to" if an objection is made by a counting agent to his decision.

(4) The returning officer shall draw up a statement showing the number of ballot papers rejected under the several heads of-

(a) want of official mark;

(b) voting for more than one candidate;

(c) writing or mark by which voter could be identified;

(d) unmarked or void for uncertainty? and any counting agent may copy the statement.

7. On a consideration of the above Rules, it is found that Rule 48(2)(b) itself anticipates the possibility of a ballot paper being marked otherwise than by means of a cross and such a ballot paper shall not by reason thereof be deemed to be void if an intention that the vote shall be for one or other of the candidates clearly appears and the way the paper is marked does not of itself identify the voter and it is not shown that he can be identified thereby.

8. The corresponding provisions of the Rules framed under the Assam Panchayat Act are as follows;

Rule 62 (5): If more than one candidate have been proposed and seconded and have agreed to stand for election, the President shall cause to prepare as many ballot papers as there are number of members present containing the names of candidates in Form III in the language of the region and in such other language or languages as may be directed by the Magistrate and hand over one such ballot paper to each of the members present after putting his signature on each of such ballot paper. Then he shall instruct the members present to put a cross mark against the name of the candidate of their respective choice in the ballot paper fold it up and insert it into the ballot box kept for the purpose according to the provisions of Sub-rule (2):

Provided that if a member is unable to write, or physically incapacitated from voting, the President shall at the request of the member, take him to the place set apart for marking, ascertain his choice and shall, accordingly mark the ballot paper, fold it up so as to maintain secrecy and insert it into the ballot box. The President shall cause such arrangements to be made as will ensure the secrecy of the ballot.

The language of Clause (d) of Sub-rule (6) of Rule 62, already quoted above, is quite categorical that if no cross mark is placed on the ballot paper, it shall be invalid, Mr. Lahiri contended that under Sub-rule (5), a duty was cast upon the Magistrate to explain and instruct the members present to put a cross mark against the name of the candidate of their respective choice in the ballot paper and no duty was cast upon the voter to put the cross mark on the ballot paper

and therefore if no cross mark was put on the ballot paper but at the same time some other mark was put, from which the intention of the voter could be clearly gathered,, the ballot paper should not be rejected. This submission of the learned Counsel might have been a sound one provided Clause (d) of Sub-rule (6) of Rule 62 was not there or its language would have been as in Rule 48 of the Parliamentary Election Rules quoted hereinabove. Clause (d) of Sub-rule (6) of Rule 62 casts a duty on the Returning Officer to reject the ballot paper on which there is no cross mark and no scope for inferring the intention of the voter in this case has been left. The language of Rule 48 (2)(b) of the Parliamentary Election Rules materially differs from the language of Rule 62(6)(d) of the Constitution Rules. That being the position, it is quite clear that Sub-rule (6)(d) of Rule 62 is mandatory and not merely directory.

9. Mr. Lahiri's contention was that though some of the clauses of Sub-rule (6) might be mandatory, Clause (d) must be held to be directory. On a consideration of the language of the different clauses of Sub-rule (6), we find that Clauses (a), (b), and (e) can under no circumstances be held to be directory; otherwise the secrecy of the voting will not be maintained and the intention of the voter may be substituted by somebody else's intention. For the same reason and also from the unequivocal nature of its language, clause cannot be said to be directory. On a consideration of the language of Sub-rules (5) and (6) of Rule 62 of the Constitution Rules, we are clearly of opinion that Sub-rule (6) is mandatory and not directory.

10. Mr. Lahiri referred to Dhan- pat Dhanpat Lal Vs. Harisingh and Others, wherein the following passage occurs:

The dominant consideration in deciding the validity of a vote is to ascertain the intention of the voter. It makes no difference whether the mark is put outside the compartment in the paper,, opposite the name of the candidate or is put on the reverse so*long as it is clear that the voter intended to vote for a particular candidate. But if the marking is against the provisions of the statute then the vote will be invalid even though the intention of the voter may be clear from the marking on the ballot paper. While construing Rule 30 it cannot be forgotten that the conditions of our country are different from those in western countries and a vast majority of voters in our country are illiterate.

11. In paragraph 7 of that decision, the Rules concerning the manner of casting votes and the rejection of ballot papers are .quoted. Rule 39 deals with the rejection of ballot papers which runs as follows:

(1) A ballot paper shall be liable to rejection.

(i) if it bears any mark by which the elector can be identified.

(ii) if the number of votes recorded thereon exceeds the number of Panchas to be elected.

(iii) if no vote is recorded thereon.

(iv) if the ballot paper or the vote recorded thereon is void for uncertainty, or
(v) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established.

(2) No ballot paper shall be rejected otherwise than on any of the grounds enumerated in Sub-rule (1).

(3) The Returning Officer shall record on every ballot paper which he rejected a brief statement of the reasons for such rejection.

(4) The decision of the Returning, Officer as to the validity or otherwise of the ballot paper shall be final." On an examination of the above provisions, it is found that the Rules considered by the Rajasthan High Court in Dhanpat Lal Vs. Harisingh and Others, do not contain any, provision like Sub-rule (6) (d) of the Constitution Rules framed under the Assam Panchayat Act and as such the Rajasthan case does not come to any assistance of the Petitioner. From the passage quoted above from the decision of the Rajasthan High Court, it appears that if the marking is against the provisions of the Statute, then the vote will be invalid even though the intention of the voter may be clear from the marking on the ballot paper. Here the statutory provision is that a ballot paper having no cross mark shall be invalid. Hence this case rather goes to support the Respondent's case that these two ballot papers which bear no cross marks thereon cannot be taken into consideration at all and should be rejected as Invalid.

12. The clear finding of the Courts below is that there were no cross marks on the two ballot papers. That being the position, these two ballot papers were rightly held to be invalid and if those two ballot papers were excluded from the votes received by the Petitioner, the Respondent No. 1 would get clearly more votes than the Petitioner. In the circumstances-, we hold that the Respondent No. 1 has been rightly declared elected by the Courts below and there is no substance in this petition which is rejected. The Rule is discharged. In the facts and circumstances of the case, we make no order as to costs.

D.M. Sen, J.

13. I agree.