
(1969) 01 SC CK 0041

In the Supreme Court Of India

Case No : Civil Appeal No. 729 Of 1968

Kamta Prasad Upadhyaya

APPELLANT

Vs

Sarjoo Prasad Tiwari and Others

RESPONDENT

Date of Decision : 15-01-1969

Acts Referred:

Citation : (1969) 3 SCC 622

Hon'ble Judges : V. Ramaswami, J;J. C. Shah, J;A. N. Grover, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

J.C. SHAH, J.-At the last general elections held on 20/02/1967, the appellant and ten others contested for a seat in the Madhya Pradesh Legislative Assembly from the Lahar Constituency No. 13. The first respondent secured 8, 904 votes; the appellant secured 6,109 votes, and respondent No. 2 Heeralal Bahadur secured 4, 227 votes. (No argument was advanced before us which necessitate reference to the votes secured by the other candidates). Respondent No. 1, Sarjoo Prasad Tiwari who secured the highest number of votes was declared elected. The appellant Karnta Prasad Upadhyaya who secured the next largest number of votes) applied to the High Court of Madhya Pradesh under the Representation of the People Act 43 of 1951, for setting aside the election of respondent No. 1 on diverse grounds. It is necessary to refer to only one ground on which the appeal is argued before us.

2. Respondent No. 2, Heeralal Bahadur was, it was the case of the appellant, disqualified to stand as a candidate for election under Article 19 (1) (a) of the Constitution in that he held an office of profit under the Government of Madhya Pradesh other than an office described by the Legislature of the State by law as not disqualifying its holder, and since his nomination was erroneously accepted by the Returning Officer, the election of the returned candidate was liable to be set aside. Five issues were raised in respect of this contention. They were-

"2(A) Whether respondent No. 2 was in the service of the Government as a teacher in Primary School at Magroda, District Guna either on the date of the filing of the nomination papers or on the date of the scrutiny as alleged by the petitioner?

(B) Whether respondent No. 2 already submitted his resignation from government service and was accepted on 7/1/1967 as alleged by respondent No. 1 ?

(C) Whether respondent No. 2 held an office of profit under the Government of Madhya Pradesh and, therefore, was not qualified to contest the election to fill seat in question ?

(D) Whether there has been improper acceptance of nomination paper of respondent No. 1 on this account as alleged?

(E) Whether the result of the election in so far as it concerns the returned candidate respondent No. 1 has been materially affected by such improper acceptance as alleged by the petitioner?"

The High court on a consideration of the evidence bearing on the issues recorded answers in the affirmative on Issues No. 2(a), (c) and (d), and on issue No. 2(b) the High court recorded an answer "Accepted on 1/04/1967". The High court recorded on Issue No. 2(e) the answer "Not proved", and rejected the petition filed by the appellant.

3. Counsel for the appellant contends that after deciding Issue Nos. 2(a), (b), (c) and (d) in favour of the appellant; the High court erred in deciding Issue No. 2(e) against the appellant. The first respondent polled 2, 795 votes more than the appellant. Respondent No. 2 Heeralal Bahadur had polled 4, 227 votes and since Heeralal Bahadur was disqualified from standing as a candidate those votes were "thrown away". Counsel for the appellant contends that if the Returning Officer had rejected the nomination of Heeralal Bahadur, a large majority of the voters who voted for Heeralal Bahadur would have voted for the appellant. Counsel says that there were 6,000.00 votes belonging to the Kachhi community in the constituency and the sympathy of the Kachhi community had always voted for the candidate sponsored by the political party which had supported his candidature, but since the members of the community of Kachhi had resolved to vote solidly in favour of Heeralal Bahadur respondent No. 2 who was a Kachhi, they did not vote for him. Counsel submits that if, Heeralal Bahadur's nomination had not been accepted those votes would have gone to the appellant, and in that event the total votes polled by the appellant would have exceeded the votes polled by Respondent No. 1. Counsel contends that by reason of the improper acceptance of the nomination paper of Heeralal Bahadur the election of the returned candidate had been materially affected, and on that ground it is liable to be set aside under Section 100(l)(d) of the Representation of the People Act, 1951.

4. A similar question arose for decision before this court in *Vashist Narain Sharma v. Dev Chandra and Others*. It was contended in that case that if the nomination of one of the candidates Dudh Nath had not been accepted the result of the election would have been different and on that account it must be held that by reason of the improper acceptance of the nomination paper of Dudh Nath the result of the election was materially affected. This Court rejected the contention observing (at p. 514) :

"Before an election can be declared to be wholly void under Section 100(1)(c), the tribunal must find that "the result of the election has been materially affected". These words have been the subject of much controversy before the Election tribunals and it is agreed that the opinions expressed have not always been uniform or consistent. These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

The court further observed :

"The language of Section 100(1) (c), however, clearly places a burden upon the objector to substantiate the objection that the result of the election has been materially affected."

The onus, according to the court, of proving that improper acceptance of the nomination had materially affected the result of the election, lies upon the petitioner who seeks to set aside the election, and that the question can arise in one of the following three ways-

(1) where the candidate whose nomination was improperly accepted had secured a smaller number of votes than the difference between the returned candidate and the candidate securing the next highest number of votes ;

2. where the candidate securing the next highest number of votes secured more votes than the difference ;

3. where the person whose nomination has been improperly accepted is the returned candidate himself. In the first class of cases the result of the election is not materially affected, because even if all the "wasted votes" were added to the votes of the candidate securing the next highest votes, it will make no difference to the result. In the third class of cases unquestionably the nomination of the returned candidate being improperly accepted, the election must be set aside.

Dealing with the second class of cases, the court observed :

"..... we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary

inference that that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate."

5. Counsel for the appellant, however, utges that since Vashist Narain Sharma's case (supra) was decided. Section 100 of the Representation of the People Act, 1951 has been extensively amended and the intention disclosed by the amendment was to supersede the law declared by that case, and in any event to lighten the onus of proof which lies upon the election petitioner in a petition for setting aside the election on the ground of improper acceptance of the nomination of a candidate. The relative provisions of the Act may be set out in juxtaposition. : Before amendment After amendment

"100 (1) If the Tribunal is of opinion- "100. Subject to the provisions of sub-section

(a) x x x (2) if (the High

(b) x x x Court) is of opinion-

(c) that the result of the election has

been materially affected by the improper (a) x x x

acceptance or rejection of any nomination, (b) x x x

the Tribunal shall declare the election (c) that any nomination

to be wholly void. has been improperly

Explanation.- . rejected ; or

2. Subject to the provisions of sub-section (d) that the result of the

3. If the tribunal is of opinion- election, in so far as

(a) X X it concerns a returned

candidate, has

(b) x x been materially

(c) that the result of election has affected-

been materially affected by improper

reception or refusal of a vote or by the (i) by the improper

reception of any vote which is void, or acceptance of any

by any non-compliance with the provisions nomination, or

of the Constitution or of this Act (ii) XXX

or of any rules or orders made under this (iii) by the improper
Act or rules relating to the election, or reception, refusal or
by any mistake in the use of any rejection of any vote
prescribed form. or the reception of

The Tribunal shall declare the election any vote which is
of the returned candidate to be void, or
void. (iv) by any non-compliance

3. X x x." with the
provisions of the
Constitution or of this
Act or of any rules
or orders made
under this Act, (the
High Courts) shall
declare the election
of the returned
candidate to be
void."

TD> (2) if (the High (b) x x x Court) is of opinion- (c) that the result of the
election has been materially affected by the improper (a) x x x acceptance or
rejection of any nomination, (b) x x x the Tribunal shall declare the election (c)
that any nomination to be wholly void. has been improperly Explanation.- .
rejected ; or (2) Subject to the provisions of sub-section (d) that the result of
the (3) if the tribunal is of opinion- election, in so far as (a) X X it concerns a
returned candidate, has (b) x x been materially (c) that the result of election has
affected- been materially affected by improper reception or refusal of a vote or
by the (i) by the improper reception of any vote which is void, or acceptance of
any by any non-compliance with the provisions nomination, or of the Constitution
or of this Act (ii) XXX or of any rules or orders made under this (iii) by the
improper Act or rules relating to the election, or reception, refusal or by any
mistake in the use of any rejection of any vote prescribed form. or the reception
of The Tribunal shall declare the election any vote which is of the returned
candidate to be void, or void. (iv) by any non-compliance (3) x x x." with the
provisions of the Constitution or of this Act or of any rules or orders made under
this Act, (the High Courts) shall6. Counsel then contended that in this case there

was evidence to show that if Heeralal Bahadur's nomination had not been accepted, the appellant would have been declared elected because all the votes which were cast in favour of Heeralal Bahadur who was a Kachhi would have been cast in favour of the appellant. But the following observations in Vashist Narain Shama's case (supra) at p. 516 clearly negative that plea :

"The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1) (c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the court to find in his favour on this point, the inevitable result would be that the tribunal would not interfere in his favour and would allow the election to stand."

It may be accepted that in the constituency there were 6,000.00 Kachhi voters. But there is nothing to show that all Kachhi voters did vote at the election or that only Heeralal Bahadur obtained the votes of Kachhi or that if Heeralal Bahadur had not stood for the election, all those voters would have voted for the appellant.

7. It was said that the Kachhi voters would have voted for the appellant who stood as a candidate of the Congress party, but for the fact that a member of their own community-Heeralal Bahadur-was standing as a candidate, and in a caste meeting held on 5/02/1967, at the village Amaha it was resolved that all the Kachhi numbering about 6,000.00 should vote for Heeralal. We have read the evidence of the witnesses Dine Kachhi, P. W. 4 Mukundi Kachhi P. W. 5, Garibe Kachhi P. W. 7, Hiralal Kachhi P. W. 8, Gangadhar Kachhi P. W. 12, and Karnta Prasad P. W. 14 and we hold that there is no reliable evidence which supports the case that if the nomination of Heeralal Bahadur had not been accepted, 6,000.00 voters belonging to the Kachhi community or a majority of those voters would have voted for the appellant. How the members of the community reacted to the resolution and how far they regarded the resolution as binding upon them is a matter of speculation, and it would be impossible to predicate that the votes cast in favour of Heeralal Bahadur or a majority of those votes would have gone to the appellant and to no other candidate. How voters at an election will vote in a given situation cannot be determined with any degree of certainty. It is, therefore impossible to accept the assertion made by the candidate and his supporters that on some supposed or imaginary ground of affinity-political or communal-all or some of the votes would have gone to him) but for the irregularity committed by the Returning Officer in accepting the nomination of Heeralal. We agree with the High court that the evidence on the record on the point that the "wasted votes" would have been distributed in such a manner that it would have brought about the defeat of the returned candidate is scanty and unreliable, and even that scanty evidence is only of a speculative or conjectural

nature.

8. The appeal therefore fails and is dismissed with costs.