

(2009) 02 MAD CK 0099

In the Madras High Court

Case No : Election Petition No. 6 of 2006 and Original Application No. 1272 of 2008

M. Boominathan

APPELLANT

Vs

The Returning Officer for the 144 Madurai East Assembly
Constituency/Assistant Commissioner and Others

RESPONDENT

Date of Decision : 05-02-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 1, Order 6 Rule 15(2), Order 6 Rule 7
Conduct of Elections Rules, 1961 — Rule 27, 54A, 54A(1), 54A(4), 93(1)
Original Side Rules — Rule 12
Representation of the People Act, 1951 — Section 169, 83, 87

Citation : (2009) 02 MAD CK 0099

Hon'ble Judges : D. Murugesan, J

Bench : Single Bench

Advocate : S. Thiruvankadasamy, for the Appellant; R. Vaigai, for R2 and S. Manimaran, for R3, for the Respondent

Final Decision : Dismissed

Judgement

D. Murugesan, J.—The petitioner, Thiru M. Boominathan, belongs to Marumalarchi Dravida Munnetra Kazhagam, a recognised State party in the State of Tamil Nadu. He was chosen as a candidate from the said party to contest the election for No. 144, Madurai East Assembly Constituency held during May, 2006. He filed his nomination and the same was accepted. Thiru N. Nanmaran, the second respondent in the election petition, belongs to Communist Party of India (Marxist) and he was set up by the said party to contest the very same election. Apart from the above two candidates, there were other eight candidates who had contested the election. The polling took place on 8.5.2006 and the voting was through the Electronic Voting Machines.

2. According to the petitioner, even before the counting of votes polled through postal ballots, the votes polled through the Electronic Voting Machines were counted and an announcement was made as to the number of votes secured by

each of the candidates. The petitioner had secured 36,308 votes as against the next candidate Thiru Nanmaran, who had secured 36,227 votes. According to the petitioner, the counting of votes polled through the Electronic Voting Machines was completed by 9.00 a.m. Thereafter, the votes polled through the postal ballots were counted. It was objected by the election agent of the petitioner, as the votes polled through the postal ballots should have been counted even before the counting of votes polled through the Electronic Voting Machine. In spite of the objection, the Returning Officer proceeded to count those votes. Even then it was pointed out that out of 208 votes polled through the postal ballots, 58 votes did not even contain the declaration forms and number of forms did not contain authenticity. But the objections were not accepted and after the counting, it was announced that the petitioner had secured 24 votes and the returned candidate had secured 156 votes through postal ballots. After adding 156 postal ballot votes in favour of Thiru N. Nanmaran, he was declared elected. Hence the petitioner preferred the election petition praying for a direction to order the re-counting of postal ballots received; to declare that the election of Thiru N. Nanmaran is null and void and consequently to declare the petitioner Thiru M.Boominathan as the returned candidate as well as to pay the cost of the petition.

3. In support of the election petition, it is averred that the Returning Officer had failed to comply with the mandatory provisions of Rule 54-A of the Conduct of Election Rules, 1961 (hereinafter referred to as "the Rules"), which provides that the Returning Officer shall first count the postal ballot votes by following the procedure prescribed therein. It is further averred that as per Rule 27 of the Rules, after recording the votes, the postal ballots should reach the Returning Officer before the hour fixed for counting. It is also averred that the Returning Officer not only violated Sub-rule (1) of Rule 54-A of the Rules, but also failed to follow the procedure prescribed in issuing, receiving and counting the postal ballot votes, particularly the procedure contemplated to open the covers in Forms 13-A to 13-C. For non-compliance of the mandatory provisions, the election of the said Nanmaran is liable to be set aside.

4. The above averments were denied and disputed by the returned candidate in his written submission. According to the returned candidate, the postal ballot box was placed on the table of the Returning Officer by 8.00 a.m., itself and only after the counting was over, the counting of votes polled through the Electronic Voting Machines was done and the said exercise was completed by 9.00 a.m. The averment as to the non-compliance of the mandatory provisions of Rule 54-A of the Rules was specifically denied by the returned candidate.

5. By the orders of this Court, the name of the first respondent viz., The Returning Officer for No. 144 Madurai East Assembly Constituency was struck off from the election petition and the respondents 4 to 9 were called absent and set ex parte. No counter affidavit is filed by the third respondent.

6. On 5.4.2006, this Court had framed the following issue for consideration:

Whether the Returning Officer has failed to comply with the mandatory provisions of Rule 54-A of the Conduct of Election Rules, 1961?

7. On behalf of the petitioner, two witnesses were examined. The petitioner examined himself as P.W.1. P.W.2 is one of the counting agents of the petitioner. On behalf of the returned candidate, three witnesses were examined. The returned candidate examined himself as R.W.1. R.W.2 is the election agent of the returned candidate. R.W.3 is the election agent of R. Rajagopal, one of the candidates who contested the election.

8. Mr. S. Thiruvankadasamy, learned Counsel appearing for the election petitioner has submitted that the evidence of P.Ws.1 & 2 would show that the votes polled through the Electronic Voting Machines were first counted at 8.00 a.m., even before the votes polled through the postal ballots were counted. The above witnesses have also spoken that the petitioner had secured 36,308 votes compared to the returned candidate who had only 36,227 votes i.e., he secured 81 votes less. Only after the announcement of the above votes polled by both the petitioner and the returned candidate, strangely, the Returning Officer started counting the votes polled through postal ballots, which was vehemently opposed. He would submit that the two mandatory provisions have been violated by the Returning Officer. Firstly, the Returning Officer has violated Sub-rule (1) of Rule 54-A of the Rules. Secondly, there was a violation of even opening the postal covers. According to the learned Counsel, the Returning Officer directed two of his Assistant Officers to open the postal covers simultaneously. According to him, the covers under Form 13-C were not opened one after another and 70 covers in Form 13-C did not contain the postal ballots separately in covers in Form 13-B and there was no proper declaration in Form 13-A. In the absence of even the declaration forms, the 70 votes are substantially defective votes as per Sub-rule (4) of Rule 54-A of the Rules. The Returning Officer has strangely accepted those 70 defective votes and out of 70 defective votes, 63 votes were counted in favour of the returned candidate. He would also submit that the 58 postal ballots found in Form 13-C, where the declaration forms were enclosed, were not certified by the Certifying Officers and the acceptance of those 58 postal ballots is also contrary to the Rules. All the 58 votes were counted in favour of the returned candidate in violation of Sub-rule (4) of Rule 54-A of the Rules. By the above counting of 121 invalid votes in favour of the returned candidate, he was declared elected and therefore in view of such reception of 121 postal ballot votes in favour of the returned candidate, the results of the election have materially affected the petitioner.

9. So far as the objection as regards the failure in the certification of the declaration forms is concerned, he would extensively rely upon the provisions of Section 83(c), Section 87 of the Representation of the People Act, 1951 and Rule 12 of the Original Side Rules as well Order VI Rules 1, 7, 15(2) of the Civil Procedure Code. He would submit that the verification is not in conformity with the Rules and therefore, without there being a proper verification, the votes

polled through the postal ballots should not have been counted. He would also submit that in view of the judgment of the Apex Court in Rakesh Kumar Vs. Sunil Kumar, , this Court would be competent to call for the declaration forms and verify the same.

10. Ms. R. Vaigai, learned Counsel appearing for the second respondent would submit that the provisions of the CPC are only guidelines to the proceedings in an election petition. Even if certain procedures are not followed in the counting of votes, the same cannot be a ground to interfere with the election. Equally, even if there is any defect in the counting, it will not affect the results of the election. Factually, the election petitioner was not in the place of counting and he is not competent to make any allegation as to the failure on the part of the Returning Officer to follow Rule 54-A of the Rules. She would submit that in order to succeed in the election, a high standard of proof is required and the evidence of P.W.1 is highly lacking on this aspect. The evidence of P.W.1 goes to show that all the averments were made only on presumptions. All the more, the petitioner had not proved the prejudice that his caused to him in the counting of votes. The evidence let in on behalf of the petitioner has not made out a case for interference in the election held in a democratic way solely on the ground that there was a lapse on the part of the Returning Officer in the counting of votes. Hence the learned Counsel would submit that the election petition deserves a dismissal.

11. I have given my anxious consideration to the submissions made by the learned Counsel for the petitioner and the learned Counsel for the second respondent and also perused the records.

12. As the challenge is to the non-compliance of Rule 54-A of the Rules, it would be proper to extract the said Rule, which reads as follows:

54-A. Counting of votes received by post.--(1) The Returning Officer shall first deal with the postal ballot papers in the manner hereinafter provided.

(2) No cover in Form 13-C received by the Returning Officer after the expiry of the time fixed in that behalf shall be opened and no vote contained in such cover shall be counted.

(3) The other covers shall be opened one after another and as each cover is opened, the Returning Officer shall first scrutinize the declaration in Form 13-A contained therein.

(4) If the said declaration is not found, or has not been duly signed and attested, or is otherwise substantially defective, or if the serial number of the ballot paper as entered in it differs from the serial number endorsed on the cover in Form 13-B, that cover shall not be opened, and after making an appropriate endorsement thereon, the Returning Officer shall reject the ballot paper therein contained.

(5) Each cover so endorsed and the declaration received with it shall be replaced in the cover in Form 13-C and all such covers in Form 13-C shall be kept in a

separate packet which shall be sealed and on which shall be recorded the name of the constituency, the date of counting and a brief description of its content.

(6) The Returning Officer shall then place all the declarations in Form 13-A which he has found to be in order in a separate packet which shall be sealed before any cover in Form 13-B is opened and on which shall be recorded the particulars referred to in Sub-rule (5).

(7) The covers in Form 13-B not already dealt with under the foregoing provisions of this rule shall then be opened one after another and the Returning Officer shall scrutinize each ballot paper and decide the validity of the vote recorded thereon.

(8) A postal ballot paper shall be rejected:

(a) if it bears any mark (other than the mark to record the vote) or writing by which the elector can be identified; or

(aa) if no vote is recorded thereon; or

(b) if votes are given on it in favour of more candidates than one; or

(c) if it is a spurious ballot paper; or

(d) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(e) if it is not returned in the cover sent along with it to the elector by the Returning Officer.

(9) A vote recorded on a postal ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.

(10) A vote recorded on a postal ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(11) The Returning Officer shall count all the valid votes given by postal ballot in favour of each candidates, record the total thereof in the result sheet in Form 20 and announce the same.

(12) Thereafter, all the valid ballot papers and all the rejected ballot papers shall be separately bundled and kept together in a packet which shall be sealed with the seals of the Returning Officer and of such of the candidates, their election agents or counting agents as may desire to affix their seals thereon and on the packet so sealed shall be recorded the name of the constituency, the date of counting and a brief description of its contents.

13. In terms of Section 169 of the Representation of the People Act, 1951

(hereinafter referred to as "the Act"), the Central Government, after consulting the Election Commission, by notification in the Official Gazette, make rules for carrying out the purposes of the Act including the procedures to be followed by the Returning Officers in counting the votes. Rule 54-A relates to the counting of votes received by post. Sub-rule (1) of Rule 54-A contemplates that the Returning Officer shall first deal with the postal ballot papers in the manner provided under the said rule. Sub-rule (2) contemplates that no cover in Form 13-C received by the Returning Officer after the time fixed in that behalf shall be opened and no vote contained in such cover shall be counted. Sub-rule (4) contemplates that if the declaration is not found or has not been duly signed and attested or is otherwise substantially defective, the said cover shall not be opened and the Returning Officer shall reject the ballot paper therein contained.

14. The challenge in the petition is mainly on the ground of non-compliance of Sub-rules (1) & (4) of Rule 54-A of the Rules. Our Constitution ensures universal adult franchise to all citizens. The concept of election is the ultimate democratic device and it is a deep-seated one. Democracy is a system of living on the basis of social values. It is not just a form of Government, but also a way of life. Our election law being statutory in character, it must be strictly complied with and being statutory in character, it is essential that it must conform to the requirements of our election law. Equally, purity of election process must be maintained at all costs and those who violate such statutory norm must suffer for such violation. (See F.A. Sapa Etc., Etc., Vs. Singora and others,)

15. So far as Sub-rule (1) of Rule 54-A of the Rules is concerned, it is mandatory inasmuch as the Returning Officer is mandated to first count the votes polled through postal ballots and thereafter only to proceed the counting of votes polled through the Electronic Voting Machines. So far as the postal ballots to contain the declaration with due attestation in terms of Sub-rule (4) of Rule 54-A of the Rules is concerned, the said rule as to the procedure to be followed while counting postal ballots, there cannot be any dispute over the above. Much was argued that there was no declaration in respect of the 70 votes and there was no proper certification in respect of the 58 votes. Whether there was a declaration and proper certification or not is a question of fact to be decided in each case. Hence I proceed to consider the evidence in this regard.

16. The question is whether the Returning Officer has followed both the Sub-rules (1) & (4) of Rule 54-A of the Rules at the time of counting of votes. As we have held that the counting of votes polled through postal ballots must be dealt with before the counting of votes polled through the Electronic Voting Machines is mandatory and equally we have held that the procedures in the opening of the postal ballots in Forms 13-A to 13-C are also to be scrupulously followed, whether the election petitioner has established the non-compliance of the above rules is a matter of evidence. Law is well settled that the burden to prove each and every averment contained in the election petition must be proved by the petitioner and especially in election matters, a high degree of proof is required to

sustain an election petition. This leaves the question as to whether the election petitioner has discharged such a burden.

17. The election petition has been verified and signed by the petitioner by name M. Boominathan. From his evidence, it is seen that he was not present at the time of counting of votes. He has nominated one election agent and two counting agents. He has not examined the election agent in support of the allegations. From his evidence in the cross-examination, it is seen that he was only under the impression that there were no votes polled through postal ballots and he was also under the impression that he was the successful candidate in the election after the votes polled through the Electronic Voting Machines were counted. Though he has stated that he was not present at the time the votes polled through the Electronic Voting Machines were counted, since it was announced that he had secured more number of votes than the returned candidate, he was being congratulated by his party-men and thereafter, on coming to know that the votes polled through postal ballots were being counted, he went and protested. It is not clear from his evidence as to at what point of time he went inside the place of counting and the evidence of P.W.2 is also silent in this regard. In the absence of such proof, a mere allegation that the Returning Officer counted the votes polled through postal ballots after the counting of votes polled through the Electronic Voting Machines cannot be held to be substantiated by concrete evidence. That apart, though he has deposed that he as well as his election agent objected to the counting of votes polled through postal ballots, there is no written complaint or objection to the said effect made either to the Returning Officer or to the Election Commission.

18. The election petitioner in his deposition has stated that he has been in politics since 1989 and he became a member of Marumalarchi Dravida Munnetra Kazhagam party in the year 1993. He also contested the election from the Madurai East Constituency. He has admitted that he knows the procedure and rules with regard to the conduct of election. In the circumstances, it can be reasonably presumed that when the Returning Officer had adopted a procedure for counting in contravention of Sub-rule (1) of Rule 54-A of the Rules, such procedure could have been opposed by a written objection as, in election matters, a written objection would be of prime evidence to prove the violation of the mandatory rules. Equally when irregularities were found in opening the postal ballot covers and forms not containing declaration and some of the forms, though contained declaration, not authenticated by certification, certainly, objection would be made as a first response. Further, on the facts of this case, the election petitioner had secured more votes than the returned candidate after the counting of votes polled through the Electronic Voting Machines and only because the returned candidate secured maximum number of votes polled through postal ballots, which was a turning point, had resulted in the defeat of the election petitioner. In a democratic process, election plays an important role and the Courts are not expected to interfere with the election unless strong case is made out. It would not be proper for this Court to interfere with the election

merely on the basis of the averments made by the petitioner, especially when he has not made any written objection to the authorities concerned. P.W.2 has also deposed on the same lines. In my considered view, in the absence of any written objections, a mere statement in the election petition though supported by the evidence to some extent, cannot be considered to be a strong ground made out for interfering with the election of a returned candidate. It is to be noted that when the petitioner had approached this Court that Sub-rule (4) of Rule 54-A is violated, it is specifically denied by the returned candidate. The Court also can infer that the Returning Officer did follow Sub-rule (1) of Rule 54-A of the Rules on the ground that none of the other contested candidates had filed any written objections.

19. One more argument of the learned Counsel for the petitioner is that as many as 70 postal ballot papers did not contain the declaration and out of which, 60 ballot papers did not contain the certification. For the same reason that there was no objection as to the procedure said to have been adopted by the Returning Officer, I have no hesitation to reject such a claim of non-compliance of the procedure under Sub-rule (4) of Rule 54-A of the Rules as well. In fact the Apex Court in the judgment in Mahender Pratap Vs. Krishan Pal and Others, has held that "for the election tribunal to interfere in the election, high standard of proof is required." In fact in the judgment in Sri Uma Ballav Rath Vs. Sri Maheshwar Mohanty and Others, , the Apex Court has observed that "even if certain procedural violations are noted, the election cannot be interfered." In Thakur Sen Negi Vs. Dev Raj Negi and another, , the Apex Court has observed that "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." In Rahim Khan Vs. Khurshid Ahmed and Others, , the Apex Court has also emphasised the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. In Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, , the Apex Court has observed that a Judge can be satisfied only on the basis of proof and not on the basis of mere allegations.

20. As the burden of proof lies on the election petitioner, without there being any substantial evidence in the form of written objection either to the Returning Officer or to the Election Commission, I am not inclined to interfere with the election solely on the ground of averments made in the election petition as well as in the oral evidence.

21. So far as the submission of the learned Counsel for the petitioner that this Court would be competent to call for the postal ballots to find out the declaration is concerned, here again, as observed by the Apex Court in F.A. Sapa and others

etc. case (supra), the defective verification cannot be fatal in all cases. Mr. S. Thiruvankadasamy, learned Counsel for the petitioner had submitted that Rule 93(1)(e) of the Rules empowers this Court to call for and see the invalid declaration received by the Returning Officer without calling for the ballots at the stage of trial. He also relied upon a judgment of the Apex Court in Rakesh Kumar Vs. Sunil Kumar, in support of his contention. On the facts and circumstances of this case, we are not inclined to accede to the said contention, as we have held that in the absence of any concrete evidence to the allegation of violation of Rule 54-A of the Rules, the ballot papers cannot be summoned. Moreover, in election matters, the Court cannot lightly call for the ballot papers unless strong grounds are made out.

22. For all the above reasons, I am not inclined to accept any of the challenge to the election of the returned candidate. Accordingly, the election petition is dismissed as devoid of merits. There shall be no order as to costs. In view of the order in the election petition, Original Application No. 1272 of 2008 is closed.