

(1963) 06 BOM CK 0002
In the Bombay High Court
Case No : Appeal No. 98 of 1963

Sakharam Vithoba Salunkhe

APPELLANT

Vs

Shankar Babaji Sawant and Others

RESPONDENT

Date of Decision : 26-06-1963

Acts Referred:

Registration of Electors Rules, 1960 — Rule 26, 27
Representation of the People Act, 1950 — Section 14, 15, 16, 17, 18
Representation of the People Act, 1951 — Section 100, 100(1), 100(2), 119, 119A

Citation : AIR 1964 Bom 228 : (1963) 65 BOMLR 780 : (1964) ILR (Bom) 229

Hon'ble Judges : Shah, J;Patel, J

Bench : Division Bench

Advocate : S.S. Kavalekar, for the Appellant; K.K. Singhvi, C.J. Sawant and M.A. Rane, Asst. Govt. Pleader, for the Respondent

Judgement

Two candidates out of five who secured maximum number of votes secured equal number of votes and the returning officer drew lots and declared the respondent No. 1 elected . At one of the polling stations out of total number of ballot papers issued was 470. The votes secured by several candidates were 426.25. Ballot papers were rejected. 19 other ballot papers were issued but were not put in the ballot box. Presiding Officer put each of the 19 ballot papers in separate envelopes and sealed them and also put all those sealed envelopes in one single envelope and sealed it and took it to the Returning Officer.

1-5. * * * * Patel, J.

6. Mr. Singhvi on behalf of respondent No. 1 has raised a preliminary objection to the filing of the appeal. He says that Section 119A of the Act requires that every person who prefers an appeal shall enclose with the memorandum of appeal a Government Treasury receipt showing that a deposit of Rs. 500 has been made by him either in a Government treasury or in the Reserve Bank of India in favour of the Election Commission as security for the costs of the appeal. In the present case on behalf of the appellant one G D. Bhadkamkar deposited the amount in

the name of the appellant giving his address on the challan. In the column of particulars of remittance and the authority it is stated "paid u/s 119 of the Representation of the People Act, 1951, in respect of appeal from order in Election Petition No. 1 of 1962" and in the column "Head of account" "R. D." is mentioned. Apparently this I after column appears originally to have been blank, since the ink in which the entire form is filled up including the particulars on the reverse appears to be different from the ink in which letters "R. D." in the column regarding "head of account" are written. It is true that Section 119 is mentioned instead of Section 119-A. In pur" view, however, this is not sufficient to invite a rejection of the appeal on the ground that the section has not been complied with. The purpose of enclosing a Treasury receipt in favour of the Election Commission is that if the appeal fails the amount should be available ss costs to the other side and also to the Election Commission in the event of its being a party. The payment of the costs must however depend upon the order of the Court. Even though In the column "Head of account" it is blank or "R. D." is mentioned, the Challan indicates "that the payment is made towards the appeal which is filed in a particular election petition. There is therefore more than reasonable certainty of the amount having been deposited towards the costs of this appeal. In our view this is substantial compliance with the provisions of Section 119-A. The mere mention of Section 119 is merely an oversight and cannot be allowed to affect the validity of the appeal. We are supported in the view that we have taken by the latest decision of the Supreme Court in Budhi Nath Jha v. Manilal Jadav. 22 EL R (SC) 86 where the Constitution Bench of the Supreme Court says :

"The fact that the receipt does not in terms specify that the deposit is made for the costs of that particular election petition is also not a ground for dismissing the petition u/s 90 (3), for the deposit must evidently be taken to be security for the costs of the election petition to which the receipt is attached."

They also say :

"The mere fact that the deposit receipt does not expressly show on the face of it that the deposit is made in favour of the Secretary, Election Commission is not a ground for summarily dismissing the petition u/s 90(3) of the Representation of the People Act, on the ground of non-compliance with Section 117 of the Act."

7. In our view on the application of that principle, it must be held that the appellant has substantially complied with the requirement of Section 119A and the appeal therefore cannot be dismissed in limine.

8. At the trial of this petition originally by Ex 18 preliminary issues were raised by the Election Tribunal. They were as follows :

1. Whether the 17 persons in question were electors as contemplated in R, 39 of the Conduct of Election Rules, 1981, so as to be entitled to proceed to vote?
2. Whether this Tribunal has jurisdiction to enquire into the above question in the

present petition?

3. Whether this Tribunal has Jurisdiction to consider whether the Returning Officer has illegally rejected two ballot papers, as stated in para. 17 of the written statement of Opponent No. 1?

4. Whether this Tribunal has jurisdiction to consider whether any postal ballot papers were wrongly rejected by the Returning Officer?

* * * *

9. At the end of the arguments Mr. Singhvi contended that the Tribunal was in error in shutting out this part of respondent No. 1's case on the ground that there was no recrimination and he requested for a remand for trial of the issues. We will assume for the purpose of this case that the Tribunal erred on so holding; even so it is not necessary to remand the case. All the issues can be answered on the materials on the record without prejudice to either party.

10. Mr. Kavalekar firstly contends that it was an error on the part of the Returning Officer not to have rejected one postal ballot paper in respect of which the appellant had raised the objection. Mr. Kavlekar contended that there appeared at the back of this ballot paper the name "Sawant Shankar "Babaji." According to him this was sufficient to identify the voter and since the principle under the Representation of the People Act, 1951, is that of election by ballot, his objection should have been upheld. He relied for this purpose on the case of Woodward v. Sarsons (1875) 10 L C P 733, where it was said:

"The ballot paper must not be marked.....so as to make it possible, by seeing the paper itself, or by refer once to other available facts, to identify the way in which he has voted.

If these requirements are not substantially fulfilled, the ballot paper is void and should not be counted; and, if it is counted, it should be struck out on a scrutiny.

Ballot papers with the name of the voter or of the candidate voted for, written opposite to the name of the voter and not marked with a cross, or with the addition of "cu" to the cross were held to be void."

It is pertinent to note that it has not been shown either by refer once to the electoral roll or by refer, once to the evidence on record that there was any voter by the name of Sawant Shankar Babaji except respondent No. 1. It is undoubtedly true that respondent No. 1 said that he might recognise some handwritings but the question was not pursued further and he was asked whether he could recognise the writing of that particular party concerned. There is also nothing to show that respondent No. 1 had any understanding with the voter in order to be able to identify the voter and be assured that the voter had voted on his behalf. At p. 747 of the above report after referring to the enactment concerned it is said :

"It is not every writing or every mark besides the number on the back which is to

make the paper void, but only such a writing or mark as is done by which the voter can be identified."

In our view having regard to the evid once on record: it is impossible to say that merely because the voter wrote the name of the candidate at the back of the voting paper he could have been identified. As we said, the only thing taken out from respondent No. 1 was, ""Generally I would be able to "recognize" from handwriting with which I am acquainted, the person who wrote it." He has not been asked whether ha was able to recognise the particular writing on the particular voting paper. In view of the paucity of evid once we are not prepared to hold that the conclusion of the Returning Officer about the validity of this voting paper was erroneous.

11. In these premises it is not necessary to refer to the argument advanced by Mr. Singhvi that the theory ol ballot cannot apply to postal ballot papers; prim a facie the argument does not appear to be sound. He attempted to show from the rules that some persons must at least know how the voter has voted. It seems that great care has been taken in framing the rules to see that when the outside envelopes are opened the Returning Officer does not see the actual vote given by the voter. The outer envelope has first to be all destroyed and it is only thereafter, after all the inner envelopes are taken out and the outer envelopes are beyond the reach of inspection of anyone, that those.other envelopes have to be examined. Under these circumstances it is doubtful if it can be said that rule of vote by ballot would not apply to postal ballot papers. The argument of the learned counsel carried to its extreme must mean that even if a ballot paper is actually signed by the voter it cannot be declared to be invalid--a contention which cannot possibly be ac-cepted. However nothing further need be said on this point as we are not prepared to hold that the conclusion of Returning Officer in connection with this ballot paper was erroneous.

12. This brings us to the first ground of attack Section 100 so far as is relevant reads as follows :

"(1) Subject to the provisions of Sub-section (2) if the Tribunal is of opinion-

(d) that the result of the election, in so far as it concerns a return candidate, has been materially affected-- (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void,

the Tribunal shall declare the election of the returned candidate to be void."

Under this section, therefore, if there is an improper refusal of any voting paper by the officer whose duty it is to receive the same and thereby the election of a returned candidate is materially affected the election of such candidate would be void.

13-20. * * * * * 21. The next question is whether the nineteen voters were rightly issued the voting papers. In this connection it has been contended by Mr, Singhvi that the issue as to whether or not these persons were electors ought to

have been tried and the Court was in error in saying that unless there was a proper recrimination u/s 97 that issue was not open to be canvassed. This argument was practically made at the fag end of the entire case. Apart from this, it appears to us that there is not much substance in the point at all. The evidence of Isane, that of Gayakwad and the Police Patil clearly shows that the objection was not as to the identity of the persons but was based only on the fact that the surnames given by them were different from the surnames that appeared in the Electoral Roll. Isane at Ex. 66 in paragraph 1 stated that Gayakwad, the agent for respondent No. 1, raised the objection that there was a mistake in the surname. This clearly shows that the objection was not as to the identity of the voter. Gayakwad says in the fourth line of his deposition "I raised an objection that the surnames stated in the Electoral roll did not tally with their surnames". To the same effect is the evidence of the Police Patil who identified each of the voters. In this view of the matter after the question was not one of identity but the question was whether the Returning Officer was justified in issuing the ballot papers or not in view of the fact that the surname did not tally with the surname given by the voter.

22. By Section 2, Sub-clause (e), "elector" in relation to a constituency is defined to mean a person whose name is entered in the electoral roll of that constituency. The rest of the clause is not material for our present purposes. Section 62 of the Act says that "no person who is not for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. Emphasis was laid on Sub-section (7) of Section 36 which renders the entry in the electoral roll final for that particular constituency. It was contended that unless the name in the electoral roll completely tallied with the name given by the voter, he could not be issued a voting paper. Section 36 however, relates to scrutiny of nominations and Sub-section (7) clearly states that for the purpose of this section an entry in the electoral-roll for that constituency shall be conclusive evidence of the fact that the person stated therein is an elector for that constituency. It is therefore clear that this section is not applicable to other matters connected with the poll.

23. Now Electoral Rules are prepared under the Representation of the People Act, 1950, and the relevant sections are sections 14 to 25. Section 14 is a definition section, Section 15 indicated that for every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of the Representation of the People Act, 1950, under the superintendence, direction and control of the Election Commission. Sections 16 to 20 are not material to the present discussion. Section 21 says that the electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under the Act. Section 22 provides the machinery for correction of entries in electoral rolls. The jurisdiction is given to the Electoral Registration Officer for a constituency to correct the roll either suo motu or on an application made to him if he is satisfied (1) that it is erroneous or defective in

any particular or (2) that the entry should be trans-posed from one place to another place or (3) that it should be deleted. Section 23 enables a person whose name ought to be included in the roll to apply if his name is not included. Section 24 provides for appeals and Section 25 provides for fee for applications and appeals.

24. Rules 26 and 27 of the Registration of Electors Rules, provide the manner in which applications have to be made for the purposes of correction referred to in those sections. Rule 35 of the Conduct of Elections Rules, 1981, relates to the identification of electors at the time of conduct of election. Sub-rule (1) permits the Presiding Officer to employ at the polling station such person as he thinks fit to help in the identification of electors or to assist him otherwise in taking the poll. Sub-rule (2) requires him to check the elector's name and other particulars with the relevant entry in the electoral roll. Sub-rule (3) requires that an elector shall produce his identity card before the Presiding Officer or the Polling Officer authorised by him in that behalf. Sub-rule (4), which is the most important rule, is thus :

"In deciding the right of a person to obtain a ballot paper the presiding officer or the polling officer, as the case may be, shall overlook merely clerical or printing errors in an entry in the electoral roll, if he is satisfied that such person is identified with the elector to whom such entry relates."

The whole objection was, at least as we have pointed out, in the case of 18 voters, that their surnames differed from those stated in the electoral rolls and in view of this particular rule the question that now has to be answered is whether this should be regarded as clerical error or not. If it can be regarded as clerical error then undoubtedly the voter was entitled to vote in spite of that fact that the surname was different from the one given by him. If it was not a clerical error but was a substantial error then he would not be entitled to vote.

25. Since the Rule-framing authority has used the words "clerical or printing errors", it would seem that "clerical error" cannot mean the same thing as "printing error": it must be something more than that. It must obviously mean such errors that may be committed by inexperienced or inefficient clerks through oversight. The whole idea of Sub-rule (4) of rule 35 would appear to be that if the electoral roll contains other materials sufficient to identify the particular voter then merely because some portion of the particular is erroneously stated, he should not be deprived of his right to vote which is a very valuable right. It is undoubtedly true that if the name of a person were not the same as given in the electoral roll or his father's name was not the same as given in the electoral roll it can be said that this could never be regarded as a clerical error and then a serious question of identification comes in and he would not be entitled to vote. But where the voter's name and that of his father tally, and the particulars regarding age, the place where he resides and the house number where he resides also tally, it would be impossible to hold that merely because instead of his proper surname another surname is written through

oversight or for any other reason he should be deprived this voting right by holding that this was not a clerical error. If the rule making authority wanted that clerical error meant nothing more than printing error, then certainly it would have used the words "printing errors" and not "clerical errors". In our view, in view of the fact that the other particulars tallied and the only objection raised in respect of the 18 voters was regarding their surname, it must be held that under this rule there being merely a clerical error in writing the surnames, respondent No. 6 was justified in issuing the voting papers and wrong in not allowing them to put those voting papers in the ballot box. On the same principle it must be said that, in the case of the first voter where his father's name as given by him is Ganpati while in the electoral roll it is Daulat, it must be held that it is a serious question of identity which might be a matter of some evidence once and of doubt and cannot be regarded as mere clerical error.

26. Mr. Singhvi called our attention to the case of Champa Devi v. Jamuna Prasad, 15 Ele L R 443 where it was said that if there is a difference in the father's name, that particular voter, would not be entitled to vote. We agree that that would be so but the ratio cannot possibly apply to the case of the 18 voters whom we have held were entitled to vote.

27. It is true that from the judgment of the Tribunal it does not seem that its attention was focussed on the terms of Section 100(1)(d)(iii), it has gone more on the breach of rule 39 of Conduct of Election Rules, it is, however, clear from the petition of the appellant that his main and substantial ground was the improper conduct of the respondent No. 6 i. e., the presiding officer, in not permitting the voters to insert the ballot papers in the ballot box and receiving them himself. But the effect of this contention is that the Presiding Officer improperly and illegally refused to receive those votes. We hold that respondent No. 6 had improperly refused to receive those votes.

28. However, mere improper reception, refusal or rejection of any vote would not itself be sufficient to have the election set aside. Sub-clause (d) (i) requires that the result of the election, in so far as it concerns a returned candidate, must be materially affected. It seems that this clause has been slightly recast. Originally clause 1c) of Section 100(1) related to an improper acceptance or rejection of nomination and in connection with that, it provided that if in the opinion of the Tribunal the result of the election has been materially affected by the improper acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void. This clause was the subject matter of interpretation by several High Courts and also by the Supreme Court. The Supreme Court held in *Visit Narain Sharma v. Dev Chandra* 1954 S C J 717 : *AW 1954 S C 513*, that the two conditions were cumulative and the burden lay on the objector to substantiate the objection that the result of the election has been materially affected by the improper acceptance or rejection of the nomination paper. This view has been reaffirmed in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, .

29. The question, therefore, is whether in the present case it can be held that

the result of the election has been materially affected. The inspection of the voting papers shows that 18 voters had voted for the appellant and one had voted for some of the Other respondents but certainly not for respondent No. 1. Since we have held that one person was not entitled to vote, it must be taken that out of the 18 voters, 17 were in favour of the appellant. Mr. Singhvi has, however, very strenuously argued that in view of the decisions of the Supreme Court and some of the other High Courts it is impossible on the basis of these voting papers to determine whether the result of the election has been materially affected. If these papers can be referred to in view of the fact that 17 votes have been cast in favour of the appellant, the election of respondent No. 1 must be declared invalid. On the other hand, if these papers cannot be looked into and evid once aliunde must be brought forward, then there being no such evid once the appellant must fail.

30. Reliance is particularly placed on the decision in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, to which we have already referred. The case arose because of some mistake on the part of the officers entrusted with the election. In polling stations Nos. 316 and 317 in Sobhapur the ballot papers for the House of People were marked with green bar while those for the State Assembly were marked with brown bar. Due to some mistake these ballot papers got exchanged and those who voted at the polling stations 318 and 317 of Sobhapur were given voting papers marked with the green bar meant for the State Assembly for the purpose of voting for the House of People. The total number of such votes was 443. Out of these 62 were in favour of the appellant, and 301 were in favour of the 1st respondent and the remaining in favour of the other candidates. Rule 47 (I) (c) enacts that a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station. The Tribunal held that the ballot papers were not marked as required by rule 47 (II) (c) but it took into account the votes and said that the election was not materially affected. Before the Supreme Court, in support of the judgment of the Tribunal it was contended on behalf of the respondent that rule 23 was also broken by the Election Officer concerned and if that rule had not been broken the wasted votes would have gone to him and therefore it should be held by relying on those votes that the result of the election was not materially affected. The Court repelled that argument and held that since by the mandatory provisions of rule 47 these votes could not be regarded as validly cast, they must be rejected and consequently the Tribunal had no jurisdiction to rely on those very votes and hold that the result of the election was not materially affected. It was also argued before the Supreme Court that the object of the election was to discover the intention of the majority of the voters in the choice of a representative and if the electors had shown a clear intention to vote for a particular candidate then these votes must be taken into account u/s 100(2)(c) even though the votes might have to be reflected for non-compliance with the formalities. This contention was rejected by their Lordships since it would mean in effect doing the very thing prohibited by

the election rules. In our view, this cannot be read to mean that irrespective of the fact whether the votes were affected by a particular rule, the Court must disregard them. The distinction is that in that case though in fact those votes could not be counted for supporting the election of the respondent therein, it was argued that they could yet be relied upon to say that if those voters had voted on correct papers the result of the election would not have been affected and thereby do something prohibited by the rules. In the present case the question is entirely different. In the present case, in fact the votes are not being considered at all but they are only looked at to know how the voters had voted in order to see whether the improper rejection of the voting papers by the Presiding Officer, had affected the result of the election. In our view, from the judgment in that case it is apparent that since those votes could not be accepted as good votes, they had to be rejected. The case in *Damodar, v. Narnarayan* AIR 1955 Ass 163. is on a par with the one in the Supreme Court and cannot apply. In that case also the Returning Officer accepted a vote on a ballot paper which was wrong and it was held that it is impossible to take such voting paper into account u/s 100(2) (c) in the face of mandatory provisions of rule 47 (1) (c).

31. In *Krishna Murthy v. Subbanna* A I R 1957 Mys 76 , voting papers were invalid under rule 92 (2) and it was held that these votes cannot be used indirectly u/s 100(2) for giving effect to the election of a particular candidate based on these voting papers. This case is also similar to the one decided by the Supreme Court and can have no application to the facts of the present case. The case of *Inayatullah Khan Vs. Diwanchand Mahajan and Others*, , arose out of the acceptance of the nomination paper of a disqualified candidate. It was argued that since the disqualified candidate whose nomination paper was accepted had 8000 and odd votes and the margin between the contesting candidate and the successful candidate was very narrow it must be held that the result of the election was materially affected. The contesting candidate had led general evidence to show that he would have secured those votes. It was held that such general evidence cannot be decisive of the matter in view of the test laid down by the Supreme Court in *Vashit Narain Sharma Vs. Dev Chandra and Others*, . This case has no application. Mr. Singhvi contends that rules 58 and 57 permit only those ballot papers as are found in the ballot box to be counted and if we consider the 18 ballot papers and hold that the result of the election is affected, we will in effect act contrary to the rule. There is a fallacy underlying the argument. Relying on those papers we are not holding that the appellant is elected in place of respondent No-1 in which case alone it could be said that the rules are disregarded. The rules only prohibit such papers being regarded as valid votes. In *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, , it was attempted to bring about this result which the Supreme Court resisted, and the observations in that case were directed against bringing about that result.

32. Mr. Singhvi next contend that it was an error on the part of the Returning Officer to reject 29 ballot papers without even Opening them on the ground that they were received beyond time. In our view, rule 27 is mandatory and requires

that the ballot papers should be so posted as to reach before 10 A. M. on the date of the election. Since they were admittedly received beyond that time, they were rightly rejected. It is true that respondent No. 1 was not allowed to argue this point on the ground that he had not filed recrimination u/s 97 of the Act. Whether he is entitled to do so or not is not necessary for us to determine since the point is concluded against respondent No. 1 by the rule in question.

33. In the view that we take, we declare that the election of respondent No. 1 is void. The other prayers of the appellant are rejected. The order of the trial Court regarding costs is set aside. In view of the circumstances of the case we direct that the parties shall bear their own costs throughout. We further direct that the appellant may withdraw the deposit which he made in the Reserve Bank u/s 119A and/or Section 119 of the Representation of the People Act, 1950 and 1951.

34. Appeal allowed.