
(1994) 07 P&H CK 0043
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 8916 of 1994

Tara Singh

APPELLANT

Vs

State of Punjab and another

RESPONDENT

Date of Decision : 22-07-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Punjab Election Rules, 1952 — Rule 29(2A), 37, 37A, 39, 39(2)
Punjab Municipal Act, 1911 — Section 240

Citation : AIR 1995 P&H 171 : (1995) 1 ILR (P&H) 447

Hon'ble Judges : N.K. Kapoor, J; A.L. Bahri, J

Bench : Division Bench

Advocate : S.P. Jain and Rajesh Kumar, for the Appellant; S.S. Shergill, D.A.G., for the Respondent

Judgement

A.L. Bahri, J.—In this petition filed under Articles 226 and 227 of the Constitution of India, Tara Singh petitioner prays for a writ of certiorari quashing notification dated June 20, 1994, Annexure P 3 by which petitioner's election was set aside and Suresh Kumar respondent-2 was declared elected as member of Municipal Committee, Banur, District Patiala. Election was held on Sept. 6, 1992. Tara Singh petitioner and Suresh Kumar respondent-2 contested the same. Tara Singh was declared elected securing 219 votes whereas Suresh Kumar got 215 votes. Suresh Kumar filed an election petition challenging the same. Copy of the election petition is Annexure P 1. Deputy Director, Local Bodies was entrusted with the inquiry under the Punjab Municipal Act and Election Rules, Annexure P 2 is the reply furnished to the Election Petition. The Inquiry Commission after recording evidence submitted report to the Government of Punjab. The Secretary to the Government summoned the parties for May 9, 1994. On that day, petitioner and his counsel waited for sufficient time. However, Private Secretary to the Secretary to Local Bodies, Punjab res-pondent-1 was requested to fix another date. An application was filed in this respect. It was mentioned therein that copy of the report of the Inquiry Commission be supplied. Thereafter, case

was adjourned for two dates. The order was reserved and ultimately published in the Official Gazette on June 20, 1994 copy Annexure P 3. On notice of motion, written statement has been filed by Suresh Kumar, the contesting respondent. Along with the written statement, copy of the order passed by the Secretary to Government Punjab dated June 14, 1994 has been produced as Annexure R 3. The stand taken up in the written statement is that in fact Suresh Kumar respondent was declared elected as he had secured 215 votes whereas Tara Singh petitioner secured 210 votes. There was a third candidate namely Punjab Singh, who secured 30 votes and invalid votes were 38. In this manner, total number of votes polled was 493. Petitioner was illegally and wrongly declared elected as put of 38 rejected votes 9 were taken out and put in the lot of the petitioner by the Presiding Officer under the pressure of the Returning Officer Parveen Kumar. Otherwise Forms-V and VII indicated that there were 38 rejected votes. Alterations were made in these forms illegally. Findings recorded in the order Annexure R3 are supported. Taking up preliminary objections, it is submitted that Secretary to Government Punjab had allowed an opportunity of inspection of records to Tara Singh petitioner who could inspect the same and know the report of the Inquiry Commission. He also referred to the evidence produced before the Inquiry Commission with respect to preparation of Forms V and VII and alterations made therein. The election of the petitioner according to him was rightly set aside as there were material irregularities committed by the Returning Officer by changing the votes.

2. We have heard learned counsel for the parties. Election records were obtained and vide order dated July 21, 1994 as agreed by counsel for both the parties out of 219 votes alleged to have been cast in favour of Tara Singh petitioner, 9 such votes were taken out, numbers of which were mentioned in Form VII in order to find out as to whether they were valid or invalid votes. Out of those 9 votes, no dispute was being raised by learned counsel for Suresh Kumar respondent with respect to 5 votes which were valid and had to be counted in the lot of Tara Singh petitioner. The dispute was being raised with respect to 4 votes only. Thus, they were kept in the sealed envelope and the case was posted for today for arguments.

3. Before any reference is made to the 4 ballot papers sorted out, the other contentions raised by counsel for the parties be noticed. Learned counsel for Suresh Kumar respondent has argued that as per findings recorded in the order Annexure R 3 that there were inter-polations made in the Forms V & VII, the election of the petitioner Tara Singh was required to be set aside. Such irregularities were material in nature. He has referred to Rules 37(3) and 39(6) of the Punjab Municipal Elections Rules, 1952. Referring to the procedure to be followed at the time of counting of votes, it is stated that the Presiding Officer is required to prepare an account of ballot papers in Form V indicating total number of ballot papers received, the issued and un-issued including tendered and also the number of ballot papers found in the ballot boxes. Such form is required to be forwarded to the Deputy Commissioner along with packets as stated in Rule

42. After the votes are counted, Form VII is required to be filled and it is thereafter that the result is declared. Case of the petitioner is that when such forms were filled, a request in writing was made for recounting of votes. It was asserted that valid votes had been wrongly treated as rejected. The Presiding Officer re-checked the rejected votes and found that there were 9 such votes which were valid votes and put the same in the lot of the petitioner and declared him as elected. Consequently, necessary corrections were made in the Forms V & VII. Since Suresh Kumar respondent had filed the Election Petition, it is taken that Tara Singh was duly declared elected and his election could only be set aside on proof of the grounds given under law. Rule 37(3) on which reliance has been placed provides for preparation of Form V. As stated above, it is required to be sent to the Deputy Commissioner subsequently. Rule 39 provides procedure of counting of votes and sub-rule (vi) is reproduced as under:--

(vi) The Presiding Officer shall allow the candidates and their agents who may be present reasonable opportunity to inspect all ballot papers, which in the opinion of the Presiding Officer are liable to be rejected but shall not allow them to handle those or any other ballot paper. The Presiding Officer shall on every ballot paper which is rejected, endorse the word "rejected". If any candidate or his agent questions the correctness of the rejection of any ballot paper the Presiding Officer shall also record briefly on such ballot paper the grounds for the rejection. A brief record shall be kept in Form VII of the serial numbers of all ballot papers rejected and of such particulars as will identify the ballot box used at a polling station other than a polling station of a notified committee in which each such ballot papers was found."

A bare perusal of the aforesaid Rule would indicate that the Presiding Officer is required to make an endorsement on the ballot paper which is rejected and if objection is raised, the same is also required to be noticed and Form VIII is prepared of the serial numbers of all the ballot papers rejected. It is also required to mention, particulars which would identify ballot box used from where such ballot papers were found. While referring to Annexure R 3, the order of the Secretary to Government, it is stated on behalf of Suresh Kumar respondent 3 that Form V was altered by the Presiding Officer and that per se would be material irregularity vitiating the election. The conclusion arrived at by the Secretary to the Government in order Annexure R 3 in this respect is to the following effect:--

"..... In view of the foregoing discussion, I reach the inescapable conclusion that tampering with Form V by the Presiding Officer is without any rhyme and reason and the alleged application for recounting of rejected ballot papers and the orders passed thereon by the Returning Officer, is a mere afterthought. There is a grave irregularity and illegality, which constitute a material irregularity under Rule 51(xic) of Punjab Municipal Election Rules, 1952, resulting in vitiation of the election result."

After recording the aforesaid finding, election of Tara Singh was declared as void.

The contention of the learned counsel for the respondent in this respect cannot be accepted.

"Material irregularity" has been defined under Rule 51(xi)(c) as under:--

"(c) "material irregularity" in the procedure of an election includes any such improper acceptance or refusal of any nomination or improper reception or refusal of a vote or reception of any vote which is void or non-compliance with the provision of the Act or of the rules made thereunder, or mistake in the use of any form annexed thereto as materially affects the result of an election."

As would be clear from the definition of "material irregularity" as reproduced above, the mere improper acceptance or refusal of any nomination or improper reception or refusal of a vote or reception of a vote which is void or non-compliance with the provisions of the Act or the Rules or mistake in the use of any form annexed will not amount to material irregularity unless it further materially affects the result of election. At the out-set, it may be stated that the Secretary to the Government in the order Annexure R3 did not give a finding that on account of acceptance or non-acceptance of any valid vote or irregularity in the forms it materially affected the result of the election of the petitioner.

4. Rule 63(1) of the Rules provides the grounds on proof of which election could be held to be void. Sub-clause (c) which is relevant for the purposes of deciding the case in hand, provides the grounds as under:--

"(c) There has been any material irregularity."

5. It is not disputed that neither the Inquiry Commission, nor the Secretary to the State, while passing order Annexure R 3 examined 9 votes, validity of which were being disputed. In the absence of that exercise, no finding could be recorded that result of the election of the petitioner was materially affected. That being the position, election of the petitioner could not be set aside. The Full Bench in Parkash Chand Vs. State of Punjab and Others, held as under:--

"..... that there has been reception of any void or non-compliance with the provisions of the Act or the rules made thereunder would not be itself be sufficient to declare an election void until it is further proved that the result of the election has been materially affected as is evident from the words "as materially affects the result of an election" occurring in the definition of "material irregularity". In other words, before any relief can be granted it has to be proved that by the reception of the void votes the result of the election has been materially affected."

The impugned order setting aside the election of the petitioner is, thus, liable to be quashed on this ground alone.

6. Learned counsel for the respondent argued that finding recorded in the order/ Annexure R3 was finding of fact not open to challenge under exercise of jurisdiction under Art. 226 of the Constitution.

7. In support of this contention, reliance has been placed on the decision of the Supreme Court in *State of Orissa v. Murli Dhar Jena* AIR 1963 SC 404 and *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, .

8. In *Murlidhar's* case it was observed that the findings recorded in the departmental inquiry could not be changed by the High Court by re-appreciating the evidence. On the same lines, decision was recorded in *Syed Yakoob's* case. The ratio of the decisions of these two cases cannot be applied to the case in hand. As already stated above, neither the Inquiry Commission, nor the Secretary to the State refer to the 9 ballot papers as to whether they were wrongly polled in favour of the petitioner. The decision of the authorities aforesaid being not based on any evidence was required to be quashed. In other words, without recording any finding in this respect, the election of the petitioner could not be declared to be void. The writ petition could be allowed on this short ground.

9. Since with the consent of the parties as stated above, the 9 ballot papers were separated from the total number of 219 votes polled in favour of the petitioner, they have been examined in Court. As stated, no objection was being raised with respect to 5 such ballot papers which were validly cast in favour of the petitioner and could not be rejected. With respect to remaining 4 ballot papers, again arguments were heard and we are of the opinion that at least with respect to 2 more ballot papers, the finding can be in favour of the petitioner that they were rightly included to have been cast in favour of the petitioner. With respect to remaining 2 ballot papers, again it cannot be said that identity of the voter could be established. Though, it has been strongly argued by counsel for the petitioner that it is not so. On all these four ballot papers, the cross-mark put by the official-stamp is on the election symbol of Tara Singh petitioner. On two of the ballot papers, in addition to the mark aforesaid, some ink-mark apparently like thumb-impression exists on the symbol-mark of Punjab Singh. On the other two ballot papers undescribable and smuggled impression exists on the blank space meant for the candidate Suresh Kumar. Out of them, on one of the ballot papers, similar mark exists on the election-symbol allotted to Suresh Kumar.

10. Rule 29(2-A) of the Rules as amended in 1990, reads as under:--

"(2-A) At the time of issuing a ballot paper to an elector, the polling officer shall,--

(a) record on its counter-foil the electoral roll number of the elector as entered in the marked copy of the electoral roll;

(b) obtain the signature or thumb-impression of that elector on the said counterfoil; and

(c) mark the name of the elector in the marked copy of the electoral roll to indicate that a ballot paper has been issued to him without, however, recording therein the serial number of the ballot paper issued to the elector."

The above rule would show that on receipt of ballot paper, a voter is required to

sign or thumb-mark counter-foil of the ballot paper. If in this process, some thumb-print comes on any part of the ballot paper, it will not make the ballot paper as invalid, liable to be rejected. From such small portions of the thumb-prints as such, identity of the voter cannot be established. On this subject are several judicial pronouncements, which may be noticed.

11. The Supreme Court in *Anup Singh Vs. Shri Abdul Ghani and Another*, , in para 11 of the judgment observed as under:--

"What R. 73(2) (d) requires is (i) that there should be a mark or writing on the ballot paper other than what it permitted under R. 37-A and (ii) that this mark or writing should be such that the elector can be identified because of it. The words "by which the elector can be identified" cannot bear the construction that any mark or writing other than the permitted by R. 37A which might possibly lead to the identification of the elector would be covered thereby. If a mere possibility of identification had been enough to invalidate the ballot paper, Cl. (d) of R. 73(2) would have read something like this: "that there is any mark or writing other than that permitted by R. 37-A". But the words used by the legislature are "any mark or writing by which the elector can be identified," and this implies that there should be something more than a mere possibility of identification, before a vote can be invalidated. This may happen when some pre-arrangement is either proved or the marks are so many and of such a nature that an inference of pre-arrangement may be safely drawn without further evidence."

12. The aforesaid decisions were referred to and relied in *Des Raj v. Gurnam Singh* (1966) 68 PLR 224 and it was held that mere possibility of identification will not invalidated the vote under Rule 9 of the Punjab Panchayat Samitis and Zilla Parishad Chairman and Vice-Chairman Election Rules. The aforesaid Rule also provide that any other mark on the ballot paper should be such that the elector could be identified because of it.

13. The matter was again considered by the Supreme Court in *Km. Shradha Devi Vs. Krishna Chandra Pant and Others*, . While referring to the 9 disputed votes in that case, in para 14 of the Judgment, it was observed as under:--

"..... if there is any mark or writing on the ballot paper which enables the elector to be identified the ballot paper would be rejected as invalid. But the mark or writing must be such as would unerringly lead to the identity of the voter. Any mark of writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter."

It was further observed, as under:--

"It would imply that there must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a Writing itself must reasonably give indication of the

voter's identity".

14. In *S. Sivaswami Vs. V. Malaikannan and Others*, , in para 7 of the judgment, it was observed while referring to Rule 39(2) of the Conduct of Election Rules, 1969, as under:--

"..... The essence of the principle incorporated in the rule is that so long as the ballot paper bears a mark made with the instrument supplied for the purposes, the ballot paper shall not be rejected as invalid, if it is reasonably possible to gather a definite indication from the marking as to the identity of the candidate in favour of whom the vote had been given. In this context it is necessary to remember that nearly 90% of the electorate in this country consists of illiterate and uneducated rural folk totally unacquainted with the intricacies of the rules and technicalities of procedure pertaining to elections. Even if the best of endeavour is made to explain to them such complicated rules and procedures they may not be capable of grasping and fully understanding all the implications and actually carrying them into effect while exercising their franchise."

15. Keeping in view the ratio of the decisions aforesaid and after examining the four ballot papers as referred to above, with respect to two ballot papers, it can safely be said that the marks other than the cross-marks existing on such ballot papers being smuggled and undecipherable, the identity of the voter cannot be established. If that is so, obviously election of the petitioner could not be set aside as he would be getting more votes than Suresh Kumar.

16. There is another aspect of the matter that this Court need not have to examine the ballot papers in detail. Suffice it to say that on none of the nine ballot papers taken out, the endorsement of the Presiding Officer existed about rejecting the same. It is immaterial whether such an endorsement was not made by the Presiding Officer on all the 39 rejected votes as is suggested, though we have not opened the packet containing rejected votes. Suffice it to say that these nine votes do not bear any endorsement of rejection which was contemplated as required under Rule. It was for the election-petitioner to produce evidence that such of the electors with a predesigned had put additional marks on the ballot papers so that their identity could be established. Even on that ground, all the nine ballot papers were rightly included to have been cast in favour of the petitioner.

17. Much importance is not being given to the plea of the respondent-Suresh Kumar that in fact he was declared elected and subsequently nine ballot papers were taken out of the lot of rejected votes and put in the lot of Tara Singh petitioner. It was argued that though it was the case of the petitioner that he had moved an application for recount. However, such application was not on the record and as per the statement of the Presiding Officer, on his transfer he had taken the aforesaid application with him. These irregularities if any, would not materially affect the result of the election of the petitioner as already discussed above.

18. Hand-book for candidates published by the Election Commission of India at page 82 prescribes instructions for re-counting as under:--

"Recount -- When the counting is fixed at one place and is completed, the Returning Officer will record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same. He will then pause for a minute or two. If during this period, any candidate or in his absence his election agent or any of the counting agents asks for a recount, the Returning Officer will ascertain from him as how much time he would require for making an application for recount in writing. If he (the Returning Officer) consider that the time applied for is reasonable and allows it, he will announce the exact hour and minute up to which he will wait for receiving the writing application for recount. The Returning Officer will not complete and sign the result-sheet in Form 20 until after the expiry of time so announced. When an application or recount is made, he will consider the ground urged and decide the matter. He may allow the application in whole or in part, if it is reasonable or he may reject it in toto, if it appears to him to be frivolous or unreasonable. His decision will be final. But in every case he will record a brief statement of his reasons for each decision. If in any case, he allows an application/applications for recount/ recounts either wholly or in part, he will have the ballot papers counted over again in accordance with his decisions. After each recount has been completed, he will amend the result sheet to the extent necessary and announce the amendment so made by him. After the total number of votes polled by each candidate has been announced by him, he will complete and sign the result sheet.

XX XX XX XXXX XX XX XX No candidate has a right to demand a recount after the Returning Officer has completed and signed the result sheet."

19. Even the instructions aforesaid lend support to the view that mere preparation of Form V and VII does not mean declaration of result. Such forms could be corrected and rectified after recount. It is signing of the result sheet that completes the declaration of result. State Government in the impugned order Annexure R3 illegally came to the conclusion that the election of the petitioner was void on account of alterations made in Forms V and VII.

20. A reading of the provisions aforesaid would make it clear that merely by finding any other mark on the ballot paper than the requisite mark put with the mark instrument will not make the ballot paper as invalid unless from such a mark, identity of the voter could be established.

21. For the reasons recorded above, this writ petition is allowed. Order of respondents Annexure P.3 which is based Annexure R.3, declaraing the election of the petitioner as void is quashed. There will be no order as to costs. The four ballot papers which were separated are ordered to be delivered to Shri S. S. Shergill, Deputy Advocate General, Punjab, at an early date.

Dasti on payment.

22. Petition allowed.