JITENDRA BAHADUR SINGH

v.

KRISHNA BEHARI & ORS.

August 13, 1969

[K. S. HEGDE AND A. N. RAY, JJ.]

Election—Petition for setting aside election—Application for scrutiny of ballot papers—When can be ordered.

The first respondent, an elector, challenged the election of the appellant to the Lok Sabha. He alleged *inter alia*, in the election-petition that: (1) only one counting agent of the defeated candidate was permitted at each table where three persons were counting simultaneously, and hence, it was impossible for the counting agent to detect the wrong acts of the counting staff who had adopted an attitude hostile to the defeated candidate; and (2) several votes of the defeated candidate were improperly rejected ignoring the protests of the election agent of that candidate, while invalid votes and votes of the defeated candidate were counted in favour of the appellant. The Schedule to the petition gave some figures of such improper rejection and improper acceptance. In the verification to the petition it was stated that the allegations were made on the basis of information received from the workers and the counting agents of the defeated candidate and that the election-petitioner believed the information to be correct. It was however not stated in the petition who the workers were and what was the basis of their information. No written objection was filed during the counting, either to the acceptance or the rejection of any vote, nor was any such application made for a recount.

Before the trial of the election-petition the election-petitioner filed an application for permission to inspect the packets of ballot papers containing the accepted as well as rejected votes of the candidates. In the affidavit in support of the petition he averred that on one of the days of counting, he was the counting agent of the defeated candidate and had personal knowledge of such improper rejection and acceptance. No other affidavit of persons who could have had personal knowledge of the matter was filed. The High Court allowed the application and permitted scrutiny solely on the basis of the allegations in the election petition and the affidavit in support of the application seeking scrutiny.

In appeal to this Court,

HELD : In view of the importance of maintaining the secrecy of the ballot papers, scrutiny can only be ordered if the election-petition contains an adequate statement of the material facts on which the petitioner relies, that is, *the material facts disclosed must afford an adequate basis for the allegations:* and, the election tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary. [855 G-H; 856 A]

In the present case, the High Court stated that it was so satisfied on the mere statement of some figures in the petition and affidavit. It also did not give any reason in support of its satisfaction as to the need for inspection. [857 G-H]

(1) The petitioner had not stated that any of the counting agents appointed by the defeated candidate or his election agent, in accordance

A with the rules, had been refused admission to the place of counting. Therefore, the allegation that enough number of counting agents were not permitted was not supported by any statement of material facts. [857 B-C]

(2) Similarly, with regard to the rejection of the votes polled in favour of the defeated candidate, under the rules, before a vote is rejected the agents of the candidates must be permitted to examine the concerned ballot paper, and therefore, the serial numbers of the concerned B ballot papers could have been noted. The election petition, however, is silent as to the inspection and notes of the ballot papers and other material facts such as raising objections and asking for a recount. [857 C-E]

Therefore, the scrutiny of the ballot papers was sought on the basis of mere assertions and allegations which were neither accompanied by a statement of material facts nor were they supported by any evidence; and C hence, the High Court should have rejected the application for scrutiny. [857 F]

Ram Sewak Yadav v. *Hussain Kamil Kidwai,* [1964] 6 S.C.R. 238 and *Dr. Jagjit Singh* v. *Giani Kartar Singh,* A.I.R. 1966 S.C. 773, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1483 of 1968.

D Appeal by special leave from the judgment and order dated May 21, 1968 of the Allahabad High Court, Lucknow Bench in Civil Misc. Applications Nos. 41(E) and 42(E) of 1968 in Election Petition No. 7 of 1967.

C. B. Agarwala, V. P. Joshi and *S. S. Khanduja,* for the appel- E lant.

G. N. Dikshit, R. N. Dikshit and *O. P. Saini,* for respondents Nos. 1 and 9.

The Judgment of the Court was delivered by

Hegde, J. This appeal by special leave is directed against the F order made by Sahgal, J. on May 21, 1968, permitting the 1st respondent, an elector challenging the validity of the election of the appellant to Lok Sabha from 15, Shahabad Parliamentary Constituency in the general election held in 1967, to inspect the packets of ballot papers containing the accepted as well as the rejected votes of the candidates.

G In the election in question as many as 10 persons contested. The appellant, the Jan Sangh nominee was the successful candidate. The 9th respondent, Shri Nevatia Rameshwar Prasad, the Congress nominee was his nearest rival. In the election petition, the petitioner not only wants the appellant's election to be held void, he also wants that the 9th respondent should be declared H elected. The election of the appellant has been challenged on various grounds, with most of which we are not at present concerned. We are only concerned with the allegations relating to the irregularity in the scrutinising and counting of votes. The

averments relating thereto are found in paragraphs 13 and 14 of the election petition. They are as follows : A

(1) only one counting agent was permitted at each table whereas three persons were doing the counting work simultaneously and it was impossible for one man to look into and detect the wrong acts of three persons at the same time. B

Under this head it was further mentioned that the counting staff was from amongst the government servants who had gone on two months strike before the election and during the elections they had adopted hostile attitude towards the congress candidates and had made efforts to bring about their defeat;

C

(2) the bundles of votes of either candidates were neither properly made nor properly scrutinised;

(3) about 5,000 votes of the congress candidates were improperly rejected ignoring the protests of Mr. Malhotra, the election agent of the congress nominee;

D

(4) invalid votes were counted in favour of the returned candidate. The votes of the congress candidates were counted for the returned candidate.

In Sch. 'E' certain figures showing the alleged improperly rejected as well as accepted votes pertaining to certain booths are mentioned. It also shows the number of votes of the congress E nominee counted as the votes of the returned candidate. Neither the petition nor the Schedule discloses the basis for arriving at those figures.

The election petitioner is neither the candidate nor his election agent. In the election petition, it was not stated that he was even the counting agent. In the verification appended to the election petition, it was averred that the allegations contained in paragraphs 12 to 15 of the election petition were believed by the petitioner to be true on the basis of the information received from the workers of the congress nominee and others which means that the allegations made by him in paragraphs 13 and 14 of the election petition were based on hearsay information. He does not G and he could not vouchsafe their accuracy though he claims to have believed the information given to him to be correct. Similarly in the verification appended to Sch. 'E', the election petitioner stated that he has given the information contained in that Schedule on the basis of the information received from the counting agents of the congress nominee. Neither in the election petition nor in H the Schedule he mentioned that the counting agents had given him the information in question on the basis of any record made by them.

F

A In the affidavit filed by the petitioner in support of his application seeking permission to inspect the ballot papers, he went one step further. Therein he averred that on one of the days when the counting was going on, he acted as one of the counting agents for the congress nominee. Hence he claims to have personal knowledge of the rejection of some valid votes and the acceptance B of some invalid votes. No affidavit of either the congress nominee or his election agent or any of the persons who could have had personal knowledge of the matter was filed in support of that application. No oral evidence has been taken in the case till now. The returned candidate has denied the allegations referred to earlier. It is true that some of the defeated candidates in their written statements have lent support to the allegations made by the C election petitioner. The reason for the same is obvious. But even they have not filed any affidavit in support of the concerned allegations. Solely on the basis of the averments made in the election petition and the facts sworn to in the affidavit filed by the election petitioner in support of his application seeking scrutiny of the ballot papers, the trial court had issued the impugned direction.

D Before proceeding to consider the material in support of the impugned order, it is necessary to mention that it is not the case of the election petitioner that any written objection had been filed during the counting either to the acceptance or to the rejection of any vote. In the petition, it is averred that "the Returning Officer on being pointed out by the election agent of respondent No. 9, E Shri P. C. Malhotra, said his decision was final and can be questioned through Election Petition". Evidently this averment relates to the objections said to have been taken by Shri Malhotra in respect of the orders made by the returning officer as to the validity of some of the votes. Apart from the fact that the allegation in question is very vague and lacking in details, not even an affidavit F of Shri Malhotra has been filed in support of that allegation. Admittedly no application was made to the returning officer for recounting the votes. We have to examine the facts of this case bearing in mind these circumstances.

The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated G has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and ors.*(1) and *Dr. Jagjit Singh* v. *Giani Kartar Singh*(2). These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are :

H (1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the peti-

(1) [1964] 6 S.C.R. 238. (2) A.I.R. 1966 S.C. 773.

tioner relies in support of his case and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. A

The trial court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information? It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition. The facts stated in paragraphs 13 and 14 of the election petition and in Schedule 'E' are mere allegations and are not material facts supporting those allegations. This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. Unfortunately the trial court has mistaken the form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made. B C D E

The learned trial judge while deciding the point in issue overlooked certain important circumstances. The election petition is silent as regards certain important aspects. This omission has bearing on the point to be decided. The allegation that the returning officer did not permit the appellant more than one counting agent for each counting table is an extremely vague allegation. It is not the election petitioner's case that the congress nominee had appointed more than one counting agent for any counting table but the returning officer did not accept their appointment. Under s. 47 of the Representation of People Act, 1951, a contesting candidate or his election agent may appoint in the prescribed manner one or more persons but not exceeding such number as may be prescribed by the rules, to be present as his counting agent or agents at the counting of votes and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer. Rules framed under that Act prescribe the number of counting agents that a candidate may appoint. The form of the notice required to be given under s. 47 of the Act is given in the rules. The appointment of the counting agents F G H

A is to be made in the prescribed forms in duplicate, one copy of which is to be forwarded to the returning officer while the other copy should be made over to the counting agent. Rules also provide that no counting agent shall be admitted into the place fixed for counting unless he has delivered to the returning officer the second copy of the instrument of his appointment after duly completing and signing the declaration contained therein. The petitioner did not state in the election petition that any of the counting agents appointed by the congress candidate or his election agent in accordance with the rules had been refused admission to the place of counting. Hence the allegation that the returning officer did not permit enough number of counting agents to be appointed is not supported by any statement of facts necessary to be stated. In other words the material facts relating to the allegations made have not been stated.

Now coming to the rejection of the votes polled in favour of the congress nominee, under the rules before a vote is rejected the agents of the candidates must be permitted to examine the concerned ballot paper. Therefore it was quite easy for them to note down the serial number of the concerned ballot papers. The election petition is silent as to the inspection of the ballot papers or whether the counting agents had noted down the serial numbers of those ballot papers or whether those agents raised any objection relating to the validity of those ballot papers; if so who those agents are and what are the serial numbers of the ballot papers to which each one of them advanced their objections. These again are the material facts required to be stated.

As seen earlier the allegations made in the election petition are purported to have been founded on the informations given by others. No one takes direct responsibility for those allegations. No oral evidence was given in support of them, not even affidavits were filed in support of the allegations. The scrutiny of ballot papers was sought on the basis of assertions which were neither accompanied by a statement of material facts nor supported by any evidence.

The trial court correctly came to the conclusion that before an order of inspection of the ballot papers can be made it must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. It did say that it was so satisfied but it gave no reasons whatsoever as to how it came to be satisfied. A judge can be satisfied only on the basis of proof and not on the basis of mere allegations. There is absolutely no proof in this case to support the allegations on the basis of which the scrutiny of the ballot papers was prayed for. The trial court did not mention in its order even a single reason in support of its satisfaction as to the need for

inspecting the ballot papers. Every judicial order must be based on reasons and those reasons must be disclosed in the order itself. Unfortunately the learned trial judge had overlooked the importance to be attached to the secrecy of the ballot papers.

We have earlier referred to the principles enunciated by this Court to be followed before ordering the scrutiny of ballot papers. The legal position in England is the same as in this country. In fact our election law is patterned on the basis of the English Election Law. In *Halsbury's Laws of England* (Vol.14 at page 310, paragraph 559), it is observed :

> "The usual practice is for an application for a recount to be made by summons to a judge on the rota for the trial of parliamentary election petitions before the trial on an affidavit showing the grounds on which the application is based. A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer."

In Rogers on Elections (Vol. II at p. 199) it is observed that an application for recount should be made by summons supported by affiidavits showing grounds. Fraser in his Law of Parliamentary Elections and Election Petitions observes at p. 222 :

> "A strong case must be made on affidavit before an order can be obtained for inspection of ballot papers or counterfoils".

Even before the Representation of the People Act, 1951 was enacted the law in this country relating to inspection of ballot papers was as stated earlier. The election tribunals in this country have refused to permit the scrutiny of ballot papers unless there was *prima facie* evidence in support of the allegations made in the election petition—see *Tanjore, N.M.R.* (*Hammond's Election Cases* 673); *Punjab North Case* (*Hammond's Election Cases* 569), *Karnal Mohammadan Constituency Case* (2 *Doabia* 235); *Karnal* (*South*) *General Constituency Case* (2,*Doabia* 80); *Chingleput Case* (*Hammond's Election Cases* 307); see also *R. Swaminath's Case* (2, *E.L.R.* 51); *Seshaiah* v. *Koti Reddi* (3, *E.L.R.* 39) and *Lakshumanayya* v. *Rajam Aiyar* (58 *M.L.J.* 118).

For the reasons mentioned above we allow this appeal and set aside the order made by the learned trial judge. He will now proceed with the trial of the case in accordance with law. The 1st respondent, the election petitioner shall pay the costs of the appellant in this appeal.

V.P.S. *Appeal allowed.*