

CASE NO.:
Appeal (civil) 5657 of 2001

PETITIONER:
RAJANKUMAR SHANKARRAO TAWARE AND ANR.

Vs.

RESPONDENT:
AJIT ANANTRAO PAWAR

DATE OF JUDGMENT: 20/03/2002

BENCH:
G.B. Pattanaik & S.N. Phukan

JUDGMENT:

Phukan, J.

This appeal under Section 116A of the Representation of the People Act, 1951 (for short 'the Act') arises from the judgement dated June 29, 2001 of the High Court of Judicature at Bombay. By the impugned judgment, the High Court dismissed the election petition.

The election petition was filed challenging the election of the respondent from 255 Baramati Assembly Constituency, which was held on 11th September, 1999. The petition was filed by two persons, one was a voter of the constituency and the other was the counting agent of the defeated candidate viz. Shri Chandrakant K. Teware. In the said election the respondent Shri Ajit Anantrao Pawar defeated his immediate rival candidate, Shri Teware by a margin of 50,366 votes. The petition was filed alleging that certain mal practices were committed at the time of counting of the votes, under Section 100(1)(d)(iii) of the Act.

The allegations, which are relevant for the present purpose, are stated below: -

After the polling, the ballot boxes were to be kept in the MES High School, Baramati as per programme and when the ballot boxes arrived at the said school and was in the process of unloading, all the boxes were shifted to the Recreation Hall, MIDC area at Baramati. According to the appellants this change was made by the Returning Officer without informing the contesting candidates. As the said MIDC area is adjacent to the premises of the Vidya Pratisthan Shikshan Sansthan, which was fully controlled by the family of the respondent and in fact the respondent was one of the office bearers of the said Pratisthan, this sudden change caused an apprehension in the mind of the appellants that it was so done with the oblique motive for replacing genuine ballot papers by fake ones. We find from the counter that there was heavy rain at Baramati on 9th September, 1999 and rainwater was also collected around the said High School. Apprehending that there might be rain on subsequent days and the said High School area might be flooded, the Returning Officer changed the venue of keeping the ballot boxes for safe custody of the boxes as in the event of rain the school area might be flooded. It was also alleged that during counting of votes it was noticed that in the majority of ballot papers there were signatures on the back side of the ballot papers which were similar in nature with the same ink and character. It was, therefore, suspected that genuine ballot papers were substituted by fake ones. In the polling booth No.235, 455 ballot papers were used and there was no signature of the Presiding Officer on the reverse side of the ballot papers as required under the rules, whereas according to the Presiding Officer of the said Booth he signed on all the ballot papers on the previous day of polling, suggesting that ballot papers might have been substituted. In this polling booth one ballot

paper of Khed Legislative Constituency was found inside the ballot boxes which was brought to the notice of Returning Officer by filing a written complaint (Annexure P-21A) and according to the appellants the complaint was filed at 2.30 p.m. on 6th of October, 1999 i.e. while the counting process was going on but the Returning Officer refused to receive the same. It was alleged that subsequently the Returning Officer recorded a note at 3.30 a.m. on 7th October, 1999 and, thereafter, passed necessary orders. On these facts it was also alleged that the Returning Officer was influenced by the respondent in the conduct of election and counting of the votes.

Before we proceed to examine the facts of the present appeal, we may refer to the position of law. In *Ram Sewak Yadav versus Hussain Kamil Kidwai & Ors.* [(1964) 6 SCR 238] a Constitution Bench of this Court held that power to order inspection of ballot papers is clearly implicit in Sections 100(1)(d)(iii), 101 and 102 of the Act and Rule 93 of the Conduct of Election Rules, 1961 and an order for inspection under the Act may not be granted as a matter of course, having regard to the insistence upon the secrecy of the ballot papers. It was further held that the Court would be justified in granting an order for inspection provided two conditions are fulfilled: -

- (i) the petition for setting aside an election contains adequate statement of the material facts on which the petitioner relies in support of his case; and
- (ii) the Election Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of ballot papers is necessary.

The Constitution Bench also held that an order for inspection of ballot papers could not be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas.

In *Smt. Sumitra Devi versus Shri Sheo Shanker Prasad Yadav & Ors.* [(1973) 3 SCC 330] a three Judge Bench of this Court held in an appeal under Section 116A of the Act that it has been the consistent practice of the Supreme Court not to interfere with findings on questions of fact unless there is some grave or palpable error in appreciation of the evidence on the basis of which the findings were arrived at.

While interpreting clause (d) of sub-section (1) of Section 100 of the Act, this Court has consistently held that in view of clear language of the provision even if the allegations in the election petition are found to be proved, the election petitioner should also establish that the result of the election was materially affected.

Drawing our attention to paragraph 30 of the impugned judgment, Mr. Lalit, learned counsel for the appellant has submitted that the High Court proceeded on a wrong legal proposition. In the said paragraph the learned Judge took the view that in order to succeed in the election petition, the appellants have at least to create a genuine doubt in the mind of the Court by establishing circumstances alleged in the election petition beyond all reasonable doubt. This approach was wrong in view of the settled position of law but we find from the impugned judgment that subsequently, the learned Judge after discussing various decisions of this Court recorded the finding that after going through the records it could not be said that even a genuine suspicion about alleged mal practice of substituting the valid votes with spurious votes could be established. We have also perused the impugned judgment and we find after discussing law and evidence on record, the election petition was dismissed holding that the appellants failed to make out a *prima facie* case and could not be allowed to embark upon a fishing inquiry.

At the outset we may state here that all the allegations were made against the Returning Officer and though initially he was impleaded as a respondent, subsequently, his name was deleted by the order of the court. The High Court has noted that during the trial the Returning Officer was present in court and he was also shown as a witness in the list of witnesses submitted by the appellants. Subsequently, his name was struck off from the said list and was not examined. The defeated candidate, Shri Teware did not appear as a witness to support the allegations made in the election petition.

The first contention of Mr. Lalit, learned counsel for the appellants is that the ballot boxes were to be collected at the MES High School and instead boxes were collected at the Recreation Hall, MIDC without information to the candidates/agents

about such shifting of ballot boxes and this was done in order to replace ballot papers in the ballot boxes.

The High Court has recorded in the impugned judgment that it has come out from oral evidence of PW-4 that 'there was rain and there was water log in the MES High School.....'. Mr. Lalit has rightly pointed out that no such statement was made by PW-4. On the contrary, Mr. Ashok Desai has submitted that it was a genuine mistake on the part of the learned Judge and he has drawn our attention to the evidence of PW-5, the Presiding Officer of the booth. PW-5 in cross-examination has stated that when they went to the MES High School on 9th September, rainwater had collected there. We agree with Mr. Desai that it was a genuine mistake.

We have already noted that shifting of the collection centre was for safe custody of the ballot boxes. In the evidence it has come out that on 9th September, 1999 there was heavy rain at Baramati. PW-2, the Principal of the school has stated that when it rains in Baramati, rainwater gets collected at some area of the school. It is the responsibility of the Returning Officer to keep the ballot boxes in the safe custody, therefore, the Returning Officer rightly shifted the collection centre for ballot boxes for safe custody and we reject the contention of the appellants that it was so done with an ulterior motive.

From the evidence of PW-1, the polling agent of Shri Teware who is appellant No.2 herein, it has come out that at the MES High School he waited for 15 minutes and saw that the boxes were reloaded in the vehicle. He has stated that the Assistant Returning Officer who was present at the MES High School informed him that boxes were being shifted as per the orders of the Returning Officer. PW-3, the Presiding Officer of Booth No.234 who arrived at the MES High School has deposed that he and other Presiding Officers were informed about the shifting of collection centre for the ballot boxes. Therefore, the submission that no notice was given is contrary to evidence on record. In absence of evidence of defeated candidate, Shri Teware we cannot accept the submission that no notice was given to the candidates about such shifting.

The Recreation Hall, MIDC, which was under the control of the State Government, was adjacent to Vidya Pratishthan Shikshan Sansthan, which was under the control of the family of the respondent. The appellants have not adduced any evidence to support the allegation that any attempt was made by the respondent or any member of his family to substitute the ballot papers in the ballot boxes.

Mr. Ashok Desai, learned senior counsel for the respondent has rightly pointed out that party on whose ticket the respondent contested the election was not in power at the relevant time and the BJP and the Shiv Sena were in power. This was in reply to the contention made in the election petition that the respondent was a nephew of Shri Sharad Pawar, Ex-Chief Minister of Maharashtra who also contested the election for the parliamentary constituency and got elected.

The ballot boxes were received at the Recreation Hall, MIDC, Baramati on September 11, 1999 and were dispatched on next day i.e. September 12, 1999 to the Storage Centre, Pune. All ballot boxes were dispatched by 7.30 a.m. except the ballot boxes of Baramati constituency, which were dispatched at 9.30 a.m. The High Court has recorded that there were 251 ballot boxes for this Assembly Constituency and on the basis of evidence of PW-10 it came to the conclusion that it would require 30 to 35 minutes for sorting of ballot papers in each ballot box. On these premises, the High Court rightly was of the opinion that it would require 125 hours for opening 251 ballot boxes, sorting out ballot papers of the Lok Sabha and the Assembly constituency and substituting ballot papers by different set of ballot papers. Therefore, it would not possible to substitute ballot papers during the period the boxes were kept at Recreation Hall, MIDC and rejected the plea holding that it was a 'fertile imagination of the witnesses'. We agree with the above finding of the learned Single Judge.

We have perused the written complaint filed before the Returning Officer in which two allegations were made viz. absence of signature of the Presiding Officer on the ballot papers and one used ballot paper for Khed Lok Sabha Constituency was found in the ballot boxes. A prayer was made before the Returning Officer that the ballot papers of the entire legislative constituency be scrutinised and verified. The said complaint was filed by Shri Arun Chandrrao Teware, PW-7 and time was noted at 2 p.m. The Returning

Officer in his order stated that he found in polling booth No.234 there were no signatures of the Presiding Officer on the back side of the ballot papers and he checked numbers of the ballot papers, thereafter he informed the counting representative that the said ballot papers were from the said polling centre and the counting agents did not make any objection and gave consent for counting of votes. After going through the report we do not accept the contention that the Returning Officer refused to accept the complaint as alleged. We may state here that no prayer was made either by the defeated candidate or any counting agent for recount.

The second contention of Mr. Lalit is that in the absence of signature of the Presiding Officer in Booth No.234 on the back of 455 ballot papers would so that they were substituted.

According to the High Court since only 455 ballot papers were found without the signature of the Presiding Officer and assuming that the ballot papers ought to have been rejected, it would not affect materially the result of the election as respondent won by huge margin of about 50,000 votes. We agree with the above finding of the High Court. PW-5 was the Presiding Officer at Booth No.234 and according to him he put his signature on all ballot papers of Lok Sabha Constituency and in 500 ballot papers of Assembly Constituency on 10th September, 1999 and the Polling Officers checked each and every ballot papers. PW-6, the Polling Officer of the said booth has supported PW-3 on this point. According to Rule 38 of the Conduct of Election Rules every ballot paper before it is issued to the electorate, the counter foil attested thereto shall be signed by the Presiding Officer on its back. PW-5 could not explain why he signed the ballot papers on the previous day. A criminal proceeding has been initiated against him under Section 134 of the Act for his omission to sign the ballot papers and is pending and, therefore, according to the High Court he could not have deposed otherwise. Therefore, on this ground, the High Court disbelieved PW-5, as it was his endeavour to justify his action to absolve himself of the criminal charge. This finding of the High Court cannot be faulted.

The respondent defeated Shri Teware by a huge margin of more than fifty thousand votes. Only 455 ballot papers without signature of the Presiding Officer were found in Booth No.234. These ballot papers were counted and as the Returning Officer has recorded in his order there was no objection by the counting agents. Had these ballot papers been rejected, it would not have also materially affected the result of the election in view of the above huge margin. Regarding finding of one ballot paper of another constituency in the ballot box, we are also of the view that this would also not materially affect the result of the election.

Regarding the allegation that the signature of the Presiding Officers in various polling booths on the ballot papers appeared to be of similar in character, the High Court took note of the fact that not a single counting agent in the hall or any other counting agent raised any objection in writing to the Returning Officer. In the report of the Returning Officer, it was recorded that he verified the signatures and was satisfied that the objection raised was unfounded. In the absence of evidence of Returning Officer, the High Court rightly drew adverse inference.

Mr. Lalit, learned counsel for the appellant has submitted that as ballot papers without the signature of the Presiding Officers were found in booth No.234, the appellants may be allowed to inspect ballot boxes in other polling booth to find out whether there was such omission by the Presiding Officers in other booths. This submission has to be rejected, as it will amount to allowing the appellants to fish out evidence to support the contention of the appellants.

After perusing the evidence which are available on record and also the impugned judgment, we are of the opinion that the High Court has not committed any grave or palpable error in appreciation of the evidence. We are also of the opinion that the appellants have failed to establish a prima facie case for inspection of ballot papers.

In the result appeal is dismissed. Registry shall take follow up action in terms of sub-section (2) of Section 116C of the Act. Cost on the parties.

..J.
[G.B. Pattanaik]

March 20, 2002.

J.
[S.N. Phukan]

JUDIS