

CASE NO.:
Appeal (civil) 4621 of 2002

PETITIONER:
Hari Shankar Prasad

RESPONDENT:
Shahid Ali Khan & Ors.

DATE OF JUDGMENT: 13/03/2003

BENCH:
R.C.Lahoti & Brijesh Kumar.

JUDGMENT:

JUDGMENT

Brijesh Kumar, J.

This is an appeal under Section 16(A) of the Representation of People Act, 1951 (for short 'the Act') against the judgment of the Patna High Court dismissing the election petition filed by the appellant and upholding the election of respondent no.1 to the State Assembly.

The appellant Hari Shankar Prasad contested the election held in February, 2000 as a candidate for Sitamarhi Assembly Constituency No.67 in the State of Bihar. He was a B.J.P. candidate whereas the respondent no.1 Shahid Ali Khan, who has been declared elected has been a candidate of Rashtriya Janta Dal. A number of other candidates were also in the fray. The polling was held on 22.2.2000, the counting was done on 25.2.2000 and the result was declared on 27.2.2000. Respondent No.1 Shahid Ali Khan was declared elected defeating his nearest rival, namely, the appellant Hari Shankar Prasad by a margin of 35 votes.

The appellant filed an election petition inter alia on two grounds which seem to have been pressed before the High Court one in respect of rejection of 90 votes casted in his favour and the other about loss of a bundle of another 50 ballot papers in his favour. The High Court has not accepted either of the grounds which have now been raised in this appeal but the learned counsel for the appellant has confined his submissions in regard to rejection of 90 ballot papers which were casted in his favour. In the fourth round of the counting of the votes of Booth No.49 at Table No.7, it was found that 90 ballot papers in favour of the appellant were marked by the stamp of "distinguishing mark" used by the polling officer while issuing the ballot paper and not by the stamp meant for voting. These ballot papers were separated and not counted for the appellant. The polling agent of the appellant raised objection and lodged a protest in writing to the Returning Officer but of no avail. A fax message was flashed to the Election Commission, on behalf of the appellant. A reference also seems to have been made to the Election Commission of India by the Returning Officer of No.67 Sitamarhi Assembly Constituency. The Election Commission in response thereof issued the directions on 26.2.2000, a copy of which has been placed on the record as Annexure P-7. It reads as follows :
"..If the Presiding Officer or the polling staff has, by mistake, supplied the distinguishing mark

stamp to voters for making ballot papers, the ballot papers so marked should not be rejected"

The Returning Officer, after considering the matter, rejected 90 ballot papers which were in favour of the appellant and declared the respondent no.1 Shahid Ali Khan as elected by a margin of 35 votes. The order declaring the result and containing the reasoning rejecting the objections of the appellant is Annexure P-8, relevant portion of which is extracted as below :

"Vide letter no.459/BR-LA/2000 (67) an order was received from the commission that those 90 ballot papers which had distinguishing mark stamps may be counted by considering them to be correct. It is relevant to mention that those ballot papers were counted during counting. As they have been counted once, there is no need to recount them and they are in favour of one party. Information with respect to same was given to all election agents/candidates, who signed the result sheet of that round in this constituency in other booths and in 68, Bathnaha Assembly Constituency, decision had been taken to reject such ballot papers at the time of counting. I am fully satisfied that it was not due to fault of the presiding officer or polling officer that by mistake distinguishing mark stamp had been given to voters, as other ballot papers of the same booth had mark made by arrow cross instrument"

According to the appellant the wrong rubber seal meant for putting "distinguishing mark" was provided by the polling staff to the voters and the same continued to be used while casting their votes during the first one and a half hours. Later on on detection of the fault in providing the wrong seal it was changed and thereafter the ballot papers were marked by the voters by the rubber stamp of cross mark meant for the use by a voter to cast his vote for any particular candidate. The case of the appellant is that since the mistake is that of the polling staff such votes bearing the marking of distinguishing mark could not be rejected and have to be counted in favour of the appellant.

Respondent no.1 refuted the allegations made by the appellant challenging his election and a Recriminatory Petition was also filed setting up a case of booth capturing by the appellant along with his son and other anti-social elements and during that period it is alleged that the appellant committed corrupt practice as defined under Section 83 of the Act. The 90 votes, therefore, were rightly rejected by the Returning Officer.

Both parties have led evidence, documentary as well as oral, in support of their respective case. As indicated earlier, the High Court did not accept the case of the appellant and dismissed the petition. It may, however, have to be examined whether there was any mistake or not on the part of the polling staff in providing a wrong rubber stamp by reason of which the mark other than prescribed for marking the ballot paper by a voter has been used making the ballot paper liable to be rejected. It may also have to be seen whether there has been any booth capturing as alleged by respondent no.1 to explain the marking of 90 ballot papers by rubber stamp meant for putting

distinguishing mark by the polling staff.

In connection with the above controversy, relevant provisions of The Conduct of Election Rules, 1961 (for short 'the Rules') may be perused. Rule 39 deals with Maintenance of secrecy of voting by electors within polling station and voting procedure. Rule 39(2)(b) provides as under :

"39(1) xxx xxx xxx
(2) The elector on receiving the ballot paper shall forthwith
(a) xxx xxx xxx
(b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote;
(emphasis supplied)
(c) xxx xxx xxx"

Rule 56 deals with Counting of Votes. Rules 56(2)(b) reads as under :

"56(1) xxxx xxx xxx
(2) The returning officer shall reject a ballot paper
(a) xxx xxx xxx
(b) if it bears no mark at all or, to indicate the vote, it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or
(emphasis supplied)
(c) xxx xxx xxx"

From the perusal of the above provisions, it is clear that the ballot paper is liable to be rejected in case it bears a mark made otherwise than by the instrument supplied for the purpose i.e. to say if the mark has been made by an instrument supplied by the polling staff, the ballot paper would not be liable to be rejected. As indicated earlier, both parties have adduced oral and documentary evidence in support of their case. The High Court has rejected the case of the appellant on the ground that besides the polling officer PW 5 Awadhesh Kumar no other witness was produced in support of the case that wrong seal was supplied to the voters. It has also been found that the diary of the presiding officer does not mention about the supply of the wrong seal. Therefore, the case of the petitioner was not accepted. It is also observed that it was for the first time in the Court that PW 5 Awadhesh Kumar had made a statement that wrong seal was given by him by mistake to the voters which was later on taken back and correct seal was supplied. The High Court has also observed that in the election petition and other protest applications it was not indicated that wrong seal was provided by PW 5 Awadhesh Kumar. The High Court has also heavily relied upon the fact that after getting instructions from the Election Commission of India the returning officer had considered the matter and had rejected the objection raised by the petitioner.

So far the case of the respondent no.1 regarding booth capturing is concerned the Court has held that such allegations have not been proved nor any such allegation was made ever before at any point of time. Therefore, the case of booth capturing as set up by respondent no.1 was also

rejected.

In the above background we may examine the reasons assigned by the High Court in not accepting the case of the petitioner and further as to how far such reasons are sustainable on the material available on record.

Learned counsel for the appellant has firstly drawn our attention to the averments made in the election petition, more particularly, to paragraph 12 of the petition wherein it is averred that in round no.4 at table no.7, booth no.49, 93 ballot papers found polled and marked in favour of the petitioner, were deliberately put in the column of the doubtful votes and were wrongly rejected by the returning officer in violation of Rule 56 of the Conduct of Rules, 1961. In para 13 it is averred that election agent of the petitioner had lodged a protest then and there on 25.2.2000 itself during the course of the counting. It is further averred that counting was stopped for sometime telling the agent that the matter was being referred to the election commission for seeking its instructions. In para 17 it has been averred that despite the instructions of the Election Commission of India the returning officer had wrongly rejected 90 ballot papers marked in his favour. It is also averred that the polling staff by mistake had supplied the seal of the "distinguishing mark" to the voters. We also find that the fax message sent by the returning officer to the Election Commission of India, a copy of which has been placed on record as Annexure P-6, mentions in column 5 under the heading "any other unusual feature" as follows : "90 polled ballot papers were found which were not polled with the prescribed stamp but were stamped with distinguishing mark which was considered as doubtful while counting and were rejected after hearing vote is only 35, therefore the matter is being referred to Election Commission for permitting the Returning Officer to declare the result."

The reply of the election commission dated 26.2.2000 has already been quoted in the earlier part of this judgment. These facts leave no room to doubt that right from the very beginning a protest has been made on behalf of the appellant regarding non-counting of 90 votes in his favour.

The Election Commission has very clearly instructed to the Returning Officer that if the Presiding Officer or the polling staff had by mistake supplied the distinguishing mark stamp to voters, the ballot papers so marked should not be rejected. It was further directed "you should therefore review the matter and scrutinize those 90 ballot papers on merits and count them in favour of the candidate for whom they are validly marked". The Returning Officer passed the order on 27.2.2000 rejecting 90 ballot papers and declared the result. The Returning Officer in his order dated 27.2.2000 while rejecting the ballot papers observes "I am fully satisfied that it was not due to fault of the Presiding Officer or polling officer that by mistake distinguishing mark stamp had been given to voters, as other ballot papers of the same booth had mark made by arrow and cross instrument". The order does not indicate at all if the Returning Officer had made any enquiry whatsoever from anyone regarding the fact of supply of distinguishing mark stamp by mistake of the Presiding Officer or any of the polling officer. It is nobody's case that all the votes of the polling booth were stamped by wrong stamp. The petitioner's case is that it

was only for one and half hours in the beginning that the ballot papers were marked by wrong stamp where after correct stamp was supplied. It is not at all indicated as to on what basis the Returning Officer "felt satisfied" that it was not due to fault of Presiding Officer or any of the polling officer that wrong stamp was supplied. The case of booth capturing has been discarded by the High Court. There has been no such allegation or objection earlier by respondent no.1. The Returning Officer has not indicated nor shown to have made any effort to find out as to in what circumstances wrong stamp was put on only 90 ballot papers out of the 440 votes polled at booth no.49. The petitioner, to substantiate his case examined PW 5 Awadhesh Kumar one of the Polling Officers who was assigned the duty of providing stamp for putting the mark on the ballot papers. He has very clearly stated that he was entrusted with the duty of making over rubber stamp to the voters and to see that the ballot papers are properly folded and put into the box. He further stated that after about one and half hours the rubber stamp which was provided by the Presiding Officer was taken back saying that it was not the proper stamp and another stamp was given for the purpose. In cross-examination he denied the suggestion that he was making a false statement at the instance of the petitioner. He further told that he is employee of a Bank and did not remember the name of the Presiding Officer but only remembered that he was an employee of Silk Industry department. The reason assigned by the High Court for not accepting the statement of PW 5 is that no other person was examined to support his statement, does not seem to be a cogent reason. Non-mention of the fact of providing a wrong stamp in the diary of the Polling Officer too, cannot be taken to be a valid reason for not accepting the statement of PW 5. The Polling Officer may or may not have attached any special importance to the fact that initially for some time wrong stamp was used or may have avoided to mention this fact in the diary. The diary and the filling up of the same, was under his own control. In case wrong stamp was provided by him to the Polling Officer no.3 who passed it on to the voters, non-mention of this fact by him in the diary would not lead to any inference that no such mistake was committed. Non-mention of such a fact would obviously suit the polling officer. There is a positive statement of the person himself who had provided the stamp to the voters. It was not necessary at all for the petitioner to have examined other polling officers once the statement came from the horse's mouth. The statement of PW 5 is in consonance with circumstances and the plea of the petitioner. The respondent no.1 could produce the Presiding Officer as his witness to indicate that he had given the correct stamp alone to the Polling Officer no.3, Awadhesh Kumar to be supplied to the voters. The Returning Officer himself has come to the conclusion that only 90 ballot papers were marked by a wrong stamp and since all other ballot papers were not wrongly stamped would not lead to inference that it was not due to mistake of the polling staff, which inference has been wrongly drawn by the Returning Officer. It rather goes to show that as soon as the mistake was detected the wrong stamp was withdrawn as a result of which after the withdrawal of the wrong stamp rest of the ballot papers were stamped by a correct stamp. At the risk of repetition we may again mention that the theory of booth capturing which could perhaps explain this kind of wrong seal on the ballot papers, has been discarded by the High Court. The

circumstances indicated by PW 5 in his evidence provides a plausible reason, as to how only 90 ballot papers were stamped by distinguishing mark and not the rest of them. It is also incorrect on the part of the High Court to say that in the petition, no such case was pleaded. We have referred to the averments made in para 17 of the election petition that by mistake polling staff had supplied a wrong stamp. The case of supply of wrong stamp was very much pleaded right from the initial stage.

The Returning Officer has been examined as DW 5. In his cross-examination he has stated that he had reinvestigated the matter regarding wrongly stamped 90 votes in the presence of the Central Observer and he was quite satisfied that no mistake was committed either by the Presiding Officer or by the polling officer. In reply to the another question he stated as follows :

"If the Central Observer had written anything to the Election Commission of India in the following manner :

"Speaking order passed by Returning Officer on the decision/order of ECI which I could get from him after lot of persuasions. The complaint given to me by BJP candidate after declaration of result is also enclosed as Annexure-C. From the perusal of my report, it is quite clear that the R.O. has not complied with the orders of ECI and the instructions of the Observer. His action smacks of favouritism in favour of winning candidate, perhaps under political pressure."

then the same is totally false and biased"

In the later part of his statement he further states as follows :

"Regarding the distinguishing marks and the seals in those ballots had not been enquired and verified specifically from the polling staff."

It is not understandable what enquiry then the Returning Officer actually made in regard to supply of the wrong stamp to the voters, on the basis of which he "felt satisfied" that no wrong stamp was supplied by the polling staff. It is just a bald observation in his order without any enquiry worth the name. The order rejecting the 90 ballot papers is against the instructions and orders of the Election Commission of India dated 26.2.2000 which required the Returning Officer to enquire into the fact if the Presiding Officer or the polling staff had by mistake supplied the distinguishing mark stamp to voters marking the ballot paper and, in case that was so, the ballot papers should not be rejected. Only the Presiding Officer and the polling staff would have been the proper persons from whom the Returning Officer was supposed to have made enquiries but admittedly he failed to do so. The High Court clearly erred in placing much reliance upon the order of the Returning Officer, on reconsideration of the complaint of the petitioner about rejection of 90 votes. Such a report/order which is admittedly based on no enquiry, much less from the concerned persons, who could throw light on the fact, is an order or report based on no material, it is vitiated and liable to be ignored. In this background we find that there was no reason, not to accept the statement of PW-5 one of the polling officers who as per his duty as assigned, had supplied the stamp to the voters and has further stated that the stamp was withdrawn about one and a half hours after the

voting started, where after correct stamp was supplied by the Presiding Officer. His statement is fully supported by the circumstances.

On behalf of respondent no.1, a reference has been made to a decision reported in (1970) 2 SCC p.462, Shri Manni Lal Vs. Shri Parmai Lal & Ors., holding that it is the duty of the petitioner to prove the fact that the ballot papers were marked by the stamp issued by the polling staff. In absence thereof, the ballot papers were held to be rightly rejected. There is no dispute about the proposition of law and in this case, in our view, the petitioner has proved the fact that stamp was supplied by the polling staff by examining PW 5, one of the polling officers whose duty it was to provide the rubber stamp to the voters. On behalf of the appellant reliance has been placed upon the decision of this Court reported in (1999) 8 SCC p.692, T.H.Musthaffa Vs. M.P.Varghese and Ors., where it has been held that where supply of wrong instrument is due to mistake of the polling officer to the voters and the ballot papers having been marked by such stamp as supplied wrongly, they are not liable to be rejected.

On consideration of all the material available on the record, we find that the wrong stamp was made available to the voters by the polling officer. That being the position, such of the ballot papers marked by the stamp supplied have been wrongly rejected by the Returning Officer and they are to be counted in favour of the petitioner-appellant also as per the directions of the Election Commission. The margin of vote between two contenders is only 35 votes, counting 90 votes in favour of the appellant would provide a lead of 55 votes to the petitioner-appellant who would be entitled for being declared elected.

For the discussion held above, the election petition is allowed with costs. The declaration of respondent no.1 as elected is set aside and the petitioner appellant is declared elected from Sitamarhi Assembly Constituency No.67, State of Bihar.