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BRIJ MOHAN SINGH

v.

B

PRIYA BRAT NARAIN SINHA AND ORS.

February 5, 1964

[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, K. C. DAS GUPTA,
J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.]

C

Evidence Act (1 of 1872)—S. 35—Entry in official Record maintained by illiterate person by some one else at his request—Admissibility.

D

The appellant and respondent were rival candidates for election to the Bihar Legislative Assembly. The appellant obtained a majority of votes and was declared elected. This election was challenged by the respondent on the ground that the appellant had not attained the age of 25 years on the date of filing the nomination papers and was on that account disqualified under Art. 173 of the Constitution from being a member of the Assembly; that he held subsisting contracts under the Bihar Government in his individual and personal capacity and was thus disqualified under s. 7(d) of the Representation of the People Act and that he and his party-men were directly responsible for publication and distribution of copies of leaflets entitled "*Bagula Neta Se Hoshiar*" containing direct insinuations and aspersions against the personal character of the respondent, those being false to the knowledge of the appellant.

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The Election Petition was dismissed by the Election Tribunal. The respondent appealed to the High Court. The High Court came to the conclusion that the allegation that the appellant held Government papers and that the appellant was guilty of a corrupt practice in the appeal and set aside the election of the appellant on the ground that he was below the age of 25 on the date of filing the nomination papers and that the appellant was guilty of a corrupt practice in that he had published the offending leaflets. With certificate of fitness granted by the High Court the appellant appealed to this Court. Allowing the appeal:

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HELD: (i) The burden of proving that appellant had not attained the age of 25 years on the date of his nomination was on the respondent and he had failed to prove that and hence the election of the appellant could not be set aside on that ground.

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The entry made in an official record maintained by an illiterate Chowkidar, by somebody else at his request, does not come within Section 35 of the Evidence Act.

(ii) The respondent had not been able to prove the publication of the leaflets by the appellant or his agent or by any other person with the consent of the appellant or of his election agent, and hence the Election Tribunal was right in coming to the conclusion that the commission of any corrupt practice by appellant under s. 123(4) had not been proved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9 of 1964. **A**

Appeal from the judgment and order dated September 9, 1964 of the Patna High Court in Election Appeal No. 2 of 1963.

C. B. Agarwala, L.M. Sarma and D. N. Mukherjee, for the appellant. **B**

Sarjoo Prasad and K. K. Sinha, for the respondent No. 1.

The Judgment of the Court was delivered by

Dass Gupta, J. The appellant Brij Mohan Singh and the respondent Priya Brat Narain Sinha were among the candidates who contested the Aurangabad Constituency seat for the Bihar Legislative Assembly at the General Election held in 1962. The polling took place on February 21, 1962. The appellant received a majority of votes and was declared elected. The respondent Priya Brat Babu who was the sitting member was defeated on April 9, 1962, he filed a petition challenging the validity of the appellant's election. He prayed for a declaration that the election of the appellant Brij Mohan Singh be declared void and that he (Priya, Brat Narain Sinha) be declared to have been duly elected to the Bihar Legislative Assembly from the Aurangabad Constituency. Among the grounds on which the appellant's election was challenged were these three:— **C**

- (1) That the appellant was born on October 15, 1937 and was thus under 25 years of age on the date of filing the nomination papers and therefore disqualified under Art. 137 of the Constitution from being a member of the Bihar Legislative Assembly; **D**
- (2) That he held subsisting contracts under the Bihar Government in his individual and personal capacity and was thus disqualified under s. 7(d) of the Representation of the People Act; **E**
- (3) That the appellant, and with his consent, his party-men Rameshwar Prasad Singh and others (whose names are mentioned) were directly responsible for publication and distribution of copies of leaflets containing direct insinuations and aspersions against the respondent's personal character, these being false to the knowledge of the appellant. **F**

The Election Tribunal held on a consideration of the oral and documentary evidence produced before it that none of these or the other grounds on which the validity of the election was challenged had been established. Accordingly, the Tribunal dismissed the petition. **G**

A On appeal, the High Court of Judicature at Patna set aside the judgment and order of the Election Tribunal and made an order setting aside the election of the appellant Brij Mohan Singh to the Bihar Legislative Assembly. The High Court however refused the respondent's prayer to be declared duly elected.

B Against this order of the High Court the present appeal has been preferred on a certificate granted by the High Court under Art. 133(1)(b) of the Constitution.

C The only grounds that appear to have been pressed before the High Court were the three which we have mentioned above. The High Court agreed with the Election Tribunal that the allegation that the appellant held a contract under the Government in his personal capacity had not been established. As regards the other two grounds the High Court disagreed with the Election Tribunal. The High Court held that the appellant was below the age of 25 years on the date of filing the nomination and was therefore not qualified to be a candidate for the Bihar Legislative Assembly. The High Court also held that the appellant had published a leaflet Ex. 10 containing attacks upon the personal character of the respondent and was thus guilty of a corrupt practice within the meaning of s. 123(4) of the Representation of the People Act. As already stated, the High Court set aside the election of the appellant.

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E The findings of the High Court on the question of age and also on the question of publication of the document Ex. 10 have been challenged before us. It was also urged that in any case the pamphlet Ex. 10 did not amount to an attack on the personal character of the respondent.

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[After considering the evidence his Lordship concluded that it was not proved that the appellant had committed any corrupt practice or that he was below twenty-five years on the date of filing of nomination papers. On the question whether an entry made in an official record maintained by an illiterate public servant, by some one else at his request is relevant under s. 35 of the Evidence Act his Lordship held:]

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H On an examination of the physical appearance on the *hath-chitha* and the entries made therein, the evidence of the Chowkidar and the circumstances under which this document was ultimately produced before the Tribunal we are inclined to agree with the view of the Election Tribunal that this is a genuine document which was maintained by the Chowkidar in the discharge of his official duty. If the document had been manufactured to assist the appellant we do not think it likely that the Chowkidar would have refused to produce it readily when summoned to do so. The fact

that a warrant of arrest had to be executed against him is a convincing circumstance that the Chowkidar was unwilling to produce it. We are not impressed by the argument of Mr. Sarjoo Prasad that the omission of the Chowkidar to produce the document in obedience to the summons and the issue of warrant of arrest to secure its production were all pre-arranged to create an atmosphere for the acceptance of the document as genuine. The appellant's lawyers before the Election Tribunal could not possibly have been sure that the Tribunal would in the last resort issue a warrant of arrest. It is not likely that they would take such risk so that the document might not come at all.

In our opinion, this document is genuine and is the book that was maintained by the Chowkidar for noting the births in his Ilaka during the years 1934 to 1936. The entry therein showing the birth of a son to Sarjoo Singh on October 15, 1935 can however be of no assistance to the appellant unless this entry is admissible in evidence under the Evidence Act. If this entry had been made by the Chowkidar himself this entry would have been relevant under s. 35 of the Evidence Act. Admittedly, however, the Chowkidar himself did not make it. Mr. Agarwal tried to convince us that when an illiterate public servant is unable to make an entry himself and he gets the entry made by somebody else this should be treated as an entry made by the public servant. This argument must be rejected. The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate Chowkidar, by somebody else at his request does not come within s. 35 of the Evidence Act. It is not suggested that the entry is admissible in evidence under any other provision of the Evidence Act. The entry in the *hath-chitha* has therefore to be left out of consideration in coming to a conclusion about the appellant's age.

Appeal allowed.