SURENDRA NATH KHOSLA

v.

DALIP SINGH

1956

November 29.

(S. R. DAS C. J., BHAGWATI, VENKATARAMA AYYAR, B. P. SINHA and S. K. DAS JJ.)

Election—Improper rejection of nomination paper—Whether result of the election materially affected—Presumption—Double member constituency—Whether election wholly void—Attestation—Thumb impression of proposer and seconder—Whether properly attested—The Representation of the People Act, 1951 (XLIII of 1951), s. 100(1) *(c)—The Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, r.* 2(2).

Twelve candidates filed nomination papers for election from a double member constituency for the State Assembly, one of the seats being reserved for the Schedule Castes. The thumb impressions of the proposer and seconder of a candidate were attested by a magistrate specified in this behalf by the Election Commission. But there had been a mistake of omission of the name of the magistrate in the communication sent by the Election Commission to the local authorities. The returning officer rejected the nomination paper on the ground that there was no proper attestation of the thumb impressions of the proposer and seconder. An election petition was filed to set aside the election on the ground that the nomination paper had been rejected improperly and that this had materially affected the result of the election. The Election Tribunal set aside the entire election :

Held, (i) that the magistrate having in fact been specified by the Election Commission, the attestation by him was good attestation, and the rejection of the nomination paper was improper, (2) that in the case of an improper rejection of a nomination paper there was a presumption that the result of the election had been materially affected, and (3) that the whole election, including that of the Schedule Caste candidate, was void.

Vasisht Narain Sharma v. *Dev Chandra,* (1955) 1 S.C.R. 509, *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque,* (1955) 1 S.C.R. 1104, distinguished.

Chatturbhuj Vithaldas Jasani v. *Moreshwar Parashram,* (1954) S.C.R. 817, and *Karnail Singh* v. *Election Tribunal, Hissar,* 10 Elec. Law Reports, 189, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 23 of 1956.

Appeal against the judgment and order dated August 26, 1955, of the Election Tribunal, Patiala, in Election Petition No. 12 of 1954.

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Gopal Singh, for the appellants.

Jagan Nath Kaushal and *Naunit Lal,* for respondent No. 6.

1956. November 29. The Judgment of the Court was delivered by

SINHA J.—This appeal by special leave is directed against the majority judgment and order of the Election Tribunal of Patiala, dated August 26, 1955, declaring the two appellants' election to be void on account of the improper rejection of the nomination paper of Buta Singh, respondent 18.

In order to appreciate the arguments raised on behalf of the appellants it is necessary to state the following facts: The appellants and respondents 2 to 18 filed their nomination papers on January 9, 1954, for election from a double member constituency of Samana to the Pepsu Legislative Assembly. Of the two seats, one was reserved for the Schedule Caste and the other was a general constituency. Scrutiny of the nomination papers by the Returning Officer took place on January 13, 1954. The Returning Officer accepted all the nomination papers except that of Buta Singh aforesaid on the ground that the thumb impressions of the proposer and the seconder had not been attested by an officer in accordance with the Election Rules. Polling took place on February 24, 1954, and the results announced in the Pepsu Gazette on March 4, 1954. The results thus announced showed that the first appellant, Surendra Nath Khosla, had obtained 13,853 votes in the general constituency and the second appellant, Pritam Singh, had polled 13,663 votes for the reserved seat. They having secured the largest number of votes from their respective constituencies were declared to have been duly elected. The other candidates got smaller number of votes which it is not necessary to set out here. Buta Singh aforesaid, whose nomination paper had been rejected by the Returning Officer, did not take any further steps. But Dalip Singh, the first respondent, filed an election petition with the Election Commission, respondent 19. The election petition was enquired into by the Election Tribunal

consisting of three persons, one of them being the Chairman. A number of issues were joined between the parties. The Chairman and another member of the Tribunal decided the material issues 1 and 4 in favour of the first respondent to the effect that the 18th respondent had been duly proposed and seconded, that the Returning Officer had wrongly rejected his nomination paper and that as a result of that rejection the result of the election as a whole had been materially affected. On those findings they declared the election void as a whole and set aside the election of the appellants. The third member of the Tribunal, while agreeing with the majority in their judgment on the other issues, disagreed with them on the most material issue in the case, namely, issue 4, and held that the first respondent had failed to prove that the wrong rejection of the nomination paper of the 18th respondent had materially affected the result of the election. The appellants moved this Court and obtained special leave to appeal from the majority judgment declaring the election to be void as a whole.

The appeal was first placed for hearing before a Division Bench of three Judges on March 23, 1956. That Bench directed that the papers be laid before the Hon'ble the Chief Justice for having the case heard by a larger Bench because in their view the case raised a difficult and important point about election law. They made reference to the full Court decision in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*(1), which upheld the earlier decision of this Court in *Vasisht Narain Sharma* v. *Dev Chandra*(2), as authorities for the proposition that the burden of proof is on the person who seeks to challenge the election and that he must prove that the result of the election has been materially affected by the improper rejection of the nomination paper. They indicated the difficulty of discharging such a burden unless some sort of presumption was called in aid of the petitioner who sought to have the election set aside.

In this Court learned counsel for the appellants has raised three questions for our determination: (1) That

(1) [1955] 1 S.C.R. 1104. (2) [1955] 1 S.C.R. 509.

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the first issue had been wrongly determined by the Election Tribunal and that it should have been held that the thumb impressions of the proposer and seconder of the 18th respondent had not been properly verified according to the Election Rules and that therefore the rejection of the nomination paper by the Returning Officer was justified by law. (2) Assuming that the nomination paper had been wrongly rejected, the fourth issue had been wrongly decided by the majority in so far as it held that there was a presumption that the wrong rejection of the nomination had the necessary result of materially affecting the election and that the evidence led on behalf of the appellants had not rebutted that presumption. It was further contended that the minority judgment on issue No. 4 to the effect that it was for the first respondent, who sought to have the election set aside, to prove that the result of the election had been materially affected on account of the wrong rejection of the nomination paper of the 18th respondent was correct, and that he had failed to establish that by evidence. (3) That in any case, the election of the second appellant in respect of the reserved seat should not have been set aside.

The first issue is in these terms :

"Whether respondent No. 19 (respondent No. 18 in this Court) was duly proposed and seconded and thumb impressions of the proposer and the seconder on his nomination paper were attested in accordance with law ?"

The Tribunal took the view that as a matter of fact the respondent Buta Singh had been duly proposed and seconded. The learned counsel for the appellants did not challenge that finding of fact. But he contended that the further finding of the Tribunal that the thumb impressions of the proposer and the seconder on the nomination paper had been attested in accordance with law is erroneous. As to the regularity of the attestation, the matter depends upon the rules framed under the provisions of the Representation of the People Act, XLIII of 1951 (hereinafter referred

to as the Act), particularly r. 2(2), which is in these terms :

"For the purposes of the Act or these rules, a person who is unable to write his name shall, unless otherwise expressly provided in these rules, be deemed to have signed an instrument or other paper if he has placed a mark on such instrument or other paper in the presence of the Returning Officer or the presiding officer or such other officer as may be specified in this behalf by the Election Commission and such officer on being satisfied as to his identity has attested the mark as being the mark of such person."

In this case the nomination had been attested by a local magistrate and the Tribunal after referring to the relevant evidence has recorded the finding that that magistrate had been specified by the Election Commission in that behalf. The question, therefore, is essentially one of fact But the learned counsel for the appellants contended that, as found by the Tribunal, there had been a mistake of omission in the communication from the Election Commission to the local election officer and that such a mistake, clerical or accidental though it may have been, has the effect of rendering the attestation unacceptable. We are not prepared to acceded to that contention as sound in principle. The Tribunal having found as a fact that the persons whose thumb impressions the nomination paper purported to bear had really proposed and seconded the candidate and that those thumb impressions had been attested by a magistrate who had in fact been authorised in that behalf, there is no room for the contention that the Returning Officer was justified in rejecting the nomination paper in question. The first ground of attack therefore fails.

The second ground of attack is based on issue No. 4, which is in these terms :

"Whether the rejection of the nomination paper of respondent No. 19 (respondent No. 18 in this Court) had materially affected the result of the election."

On this issue the majority of the Tribunal took the view that in a case where a nomination paper had

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been improperly rejected there is a strong presumption that the result of the election has been materially affected. It referred to a large number of decisions of different Election Tribunals both before and after the enactment of the Act to show that the view taken in most of the decisions was that in a case like this there was a presumption in favour of holding that the result of the election had been materially affected and that the burden lay on the person seeking to uphold the election to prove the contrary. They gave effect to that presumption and held that the evidence adduced by the appellants (then respondents) did not rebut that presumption. The learned counsel for the appellants invited our attention to the words of the statute. Section 100(1)(c) is in these terms :

"If the Tribunal is of opinion—

.....

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination,

the Tribunal shall declare the election to be wholly void."

He argued that the legislature has placed "improper acceptance" and "improper rejection" of a nomination paper on the same footing, and the condition precedent to the declaration of an election to be void is that the Tribunal should be satisfied not only that there has been an improper rejection of a nomination paper but also that that improper rejection has materially affected the result of the election, (confining the provisions of the statute to the facts of the present case). Reliance was also placed by him on the two decisions of this Court, namely, *Vashisht Narain Sharma* v. *Dev Chandra* (supra) and *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque* (supra) in support of the proposition that the two conditions are cumulative and must both be established and that the burden of establishing them is on the person who seeks to have the election set aside. He also relied upon the terms of s. 90(3) of the Act to the effect that the provisions of the Evidence Act shall subject to the provisions of

the Act, be deemed to apply in all respects to the trial of an election petition. The contention further is that ss. 101 and 102 of the Evidence Act must therefore apply and the burden must be cast on the petitioner before the Tribunal to establish both the conditions before any relief could be granted to him. In our opinion, that argument does not advance the case of the appellants any more than what has been laid down by this Court in the cases referred to above. The other provisions of the Evidence Act including the rules of presumption must also be equally applicable. But neither of the two cases referred to above directly applies to the facts of the present case which is one of improper rejection of a nomination paper. A Division Bench of this Court has laid down in the case of *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*(1) at p. 842 that the improper rejection of a nomination paper "affects the whole election". A similar view was taken in the case of *Karnail Singh* v. *Election Tribunal, Hissar*(2), by a Bench of five Judges of this Court. But, as pointed out on behalf of the appellants, in neither of those two cases the relevant provisions of the Act have been discussed. It appears that though the words of the section are in general terms with equal application to the case of improper acceptance, as also of improper rejection of a nomination paper, case law has made a distinction between the two classes of cases. So far as the latter class of cases is concerned, it may be pointed out that almost all the Election Tribunals in the country have consistently taken the view that there is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an elecion had been kept out of the arena is by itself a very material

(1) [1954] S.C.R. 817. (2) 10 Elec. Law Reports 189.

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consideration. Cases can easily be imagined where the most desirable candidates from the point of view of electors and the most formidable candidate from the point of view of the other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field. The conjecture therefore is permissible that the legislature realising the difference between the two classes of cases has given legislative sanction to the view by amending s. 100 by the Representation of the People (Second Amendment) Act, XXVII of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void. For the reasons aforesaid, in our opinion, the majority decision on the fourth issue is also correct.

Alternatively, it was argued by the learned counsel for the appellants that if there was such a presumption, it was a rebuttable one and the Tribunal should have held that the evidence adduced by the appellants had rebutted that presumption. He proposed to take us through the oral evidence adduced by them. But we refused to go into that evidence for the simple reason that this Court in an appeal by special leave does not ordinarily reopen findings of fact recorded by a competent Tribunal. It must, therefore, be held that the Tribunal was justified in coming to the conclusion that the result of the election had been materially affected by the improper rejection of the nomination in question.

Lastly it was urged that assuming that the Tribunal was justified in declaring the election to be void so far as the general seat was concerned, there was no reason to set aside the election as a whole and that, therefore, the election of the second appellant should not have

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been set aside. But s. 100 in terms provides that if the Tribunal was of the opinion, as it was in this case, that the result of the election had been materially affected by the improper rejection of the nomination paper, "the Tribunal shall declare the election to be wholly void". The election in this case was in respect of a double seat constituency and was one integral whole. If it had to be declared void, the Tribunal was justified in setting aside the election as a whole.

As all the contentions raised in support of the appeal fail, it must be dismissed with costs to the contesting respondents.

Appeal dismissed.

KALUA

v.

THE STATE OF UTTAR PRADESH

1956

November, 21

(JAGANNADHADAS, JAFER IMMAM and GOVINDA MENON JJ.)

Criminal Trial—Murder—Cricumstantial evidence—Opinion of fire-arms expert—Whether conclusive.

One Daya Ram had been murdered by shooting with a country made pistol. The circumstantial evidence established against the appellant was (1) that he had a motive for the murder, (2) that three days before the murder the appellant had held out a threat to murder the deceased, (3) that a cartridge Ex. I was found near the cot of the deceased, and (4) that the appellant produced a country made pistol Ex. III from his house in circumstances which clearly showed that he alone could have known of its existence there. The fire-arms expert examined the recovered pistol and the cartridge and after making scientific tests was of the definite opinion that the cartridge Ex. I had been fired from the pistol Ex. III.

Held, that the opinion of the fire-arms expert conclusively proved that the cartridge Ex. I had been fired from the pistol Ex. III.

The circumstantial evidence was sufficient to establish the guilt of the appellant.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 135 of 1956.