

ELECTION PETITIO No.2 OF 2006

In the matter of an application under Sections
80, 80A and 81 of the Representation of the
People Act,1951.

1. SUDHKAR PANDEY and
2. MARKANDEY Petitioners
Versus
AJIT CHOUDHARY Respondent

For the Petitioners : M/S S.N.P. Sharma,Sr.Adv.,
Subhash Chandra Yadav,Adv.,
Sushil Kumar Singh,Adv. And
Om Prakash,Adv.

For the Respondent : M/S. P.K.Verma,Adv. And
U.K. Choudhary,Adv.

P R E S E N T

THE HON'BLE MR. JUSTICE GHANSHYAM PRASAD

Ghanshyam Prasad, J. This application under the provisions of Representation of People Act, 1951 has been filed to declare the election of sole respondent- Ajit Choudhary, member of Bihar Legislative Assembly from Bhrampur Assembly Constituency (2000) as void.

2. The petitioner no. 1- Sudhakar Pandey was one of the contesting candidates in the said election for member of Bihar Legislative Assembly from Bhrampur Constituency which was held in the month of October 2005. As per the programme schedule of election notified by the returning officer of the constituency, petitioner no. 1, respondent and others filed nomination papers before the Returning Officer, Buxar. After scrutiny on 1.10.2005, the Returning Officer accepted the nomination papers of all the candidates as valid. The Returning Officer after expiry of date of withdrawal allotted symbols to the candidates according to their respective party affiliation. Accordingly, as alleged, the petitioner no. 1 being authorized candidate of Samajwadi Janta Party (Rashtriya), was allotted symbol of tree

(Baniyan). Ultimately, election was held on 18.10.2005. After completion of counting on 22.11.2005, the Returning Officer declared the sole respondent as elected by the margin of 6800 votes. Petitioner no. 1 secured only 568 valid polled votes.

3. The petitioners have challenged the election of respondent on the ground of wrong printing of the symbol of petitioner no. 1 on the ballot papers including Electronic Voting Machine. It has been alleged that the petitioner no. 1 was candidate of Samajwadi Janta Party (Rashtriya) of which election symbol was Baniyan tree and accordingly the returning officer allotted him the above symbol. But in ballot papers palm tree was printed instead of Baniyan tree. The petitioner no. 1 during his campaigning prorogated amongst the voters that he had been allotted election symbol of Baniyan tree but on account of wrong printing of election symbol a great confusion amongst the voters was created as such petitioner no. 1 lost his election. According to him, about 20,000 illiterate voters were misled on account of wrong printing of election symbol and thus the result of election in question was materially affected. In support of the aforesaid averments, names of some voters have been given in paragraph 15 of the election petition.

4. The further case of the petitioners is that when the above fact of misprinting was known to him on 18.10.2005, petitioner no. 1 without any loss of time on the same day sent an application through fax to District Election Officer, Buxar as well as Chief Election Officer Bihar, Patna and also Chief Election Commissioner of India. Under the aforesaid ground, according to the petitioners, the election of respondent is void and illegal and fit to be set aside.

5. Written statement has been filed on behalf of respondent no. 1. Apart from other grounds, respondent has raised the point of maintainability of the election petition on the ground of non-compliance of mandatory provision of Sections 81, 82, 83 and 117 of the Representation of People Act, 1951. It has been averred that since the allegations are vague and frivolous, it is hit by mandatory clause of Sections 83 & 87 of the Act read with Order VI, Rule 16 and Order VII, Rule 11 of the C.P.C.

However, the main defence of respondent is that the petitioner no. 1 was never allotted the symbol of Baniyan tree nor there was any misprinting of symbol in ballot papers. The petitioner no. 1 was the candidate of Samajwadi Janta Party (Rashtriya) which was admittedly an unrecognized registered party and as such there is no question of any reserved symbol for that party. The petitioner was entitled for only free symbol available at the time of election.

6. It has further been averred that had the voters in mass been misled they would have filed any written objection before the authority. Such allegation has been alleged only with view of supporting his false cause. It has further been averred that the petitioner no. 1 also did not file any objection during the course of counting. It was filed thereafter and therefore there is no question of result of election being materially affected as a result of alleged irregularities.

7. It has further been averred that respondent had won election from Bhrampur Assembly Constituency on four occasions. In the impugned election, he secured 32,138 votes whereas the petitioner no. 1 secured only 568 votes and his security deposit was also forfeited. The number of voters alleged to be misled is imaginary and wrong. The allegation of result being materially affected as a result of alleged wrong printing of symbol is baseless and imaginary.

8. Both the parties have led oral as well as documentary evidence in support of their case. The petitioners have examined all together 10 witnesses including petitioner no. 1-Sudhakar Pandey as P.W. 2 whereas respondent has also examined 10 witnesses including himself as D.W.10, Ajit Choudhary.

9. Following are the documents exhibited on behalf of the petitioners:-(i) Ext. 1 to 1/2 are three sets of nomination papers of petitioner no. 1 dated 30.9.2005; (ii) Ext. 2 is protest/objection petition dated 18.10.2005 filed by petitioner no. 1 against non-allotment of Baniyan tree as symbol, Ext. 2/1 is the copy of above petition, (iii) Ext. 3 is notice/notification for election, (iv) Ext. 4 is the list of contesting candidates with their respective symbols, (v) Ext. 5 is the proceeding book

of election along with result sheet & (vi) Ext. 6 is the report of District Election Officer dated 22.10.2005.

10. On behalf of respondents following documents have been exhibited:-

(i) Ext. A is the receipt of application filed before Public Information Officer dated 31.7.2007, (ii) Ext. B and B/1 are the information supplied by Election Commission of India dated 6.9.2007, (iii) Ext. C is the result sheet of election held in the month of February 2005 and Ext.C/1 is the final result sheet dated 25.11.2005.

11. In view of the pleadings of the parties as well as the evidence adduced by them following issues are recast for decision of this election petition;-

- i) Is the election petition maintainable in the eye of law?
- ii) Is the election petition bad for non-compliance of mandatory provisions of Sections 81, 82, 83 and 117 of the Representation of People Act?
- iii) Was the petitioner an authorized candidate of Samajwadi Janta Party (Rashtriya) and entitled to get the symbol of Baniyan tree?
- iv) Was there any change/misprinting of election symbol of petitioner as alleged, and if so, whether it materially affected the result of election so far it concerned to respondent?
- v) Is the election of respondent void and illegal and is liable to be set aside as alleged?
- vi) Are the petitioners entitled to get any other relief/reliefs as claimed?

12. Some important facts in this case are admitted. It is admitted that petitioner no. 1 was one of the candidates in the impugned election and was a candidate of Samajwadi Janta Party (Rashtriya). Earlier the party was a recognized party under the Representation of People Act but later on, much before the impugned election, it was derecognized. It is also admitted that prior to derecognition the symbol of aforesaid party was Baniyan tree as per the list of election symbols specified by the Election Commission in part III. It is also admitted that in the

impugned election the symbol of tree (palm) was printed in ballot papers/ EVM against the name of petitioner no. 1.

Issues no. III, IV, V:-

13. All the three issues being interconnected have been taken together for the sake of convenience and brevity.

14. Petitioners have sought declaration of the election of respondent from Bhrampur Assembly Constituency (2000) as void on the sole ground of wrong printing of symbol against the name of petitioner no. 1 in EVM. Details of allegations in this respect have been mentioned in paragraph 13 to the Election Petition which are as follows;

“ 13. That the petitioner no. 1 was the candidate of Samajwadi Janta Party (Rashtriya) (Sudhakar Pandey) and his symbol was tree (Banyan tree) therefore Returning Officer allotted him tree (Banyan tree) but in ballot papers palm tree was printed over ballot papers instead of Banyan tree(Bargad).”

15. Respondent in his written statement vide paragraph 8 and 11 has challenged the above allegations of petitioner that petitioner no. 1 was allotted Banyan tree as symbol and there was any change thereafter. It is averred that Samajwadi Janta Party (Rashtriya) being unrecognized registered party there could not be any reserved symbol for it. Petitioner was only entitled for a free symbol available at the time of election. In paragraph 12 it has been averred that no cogent grounds have been disclosed as to how the result of election of respondent was materially affected.

16. Documents exhibited on behalf of petitioners as well as proceeding book of the impugned election leave no room for doubt that petitioner no. 1 was a candidate of Samajwadi Janta Party (Rashtriya). Exts. 1, 1/1, 1/2 are three sets of nomination papers filed by petitioner no. 1. They go to show that petitioner no. 1 filed his nomination paper for election as candidate of Samajwadi Janta Party (Rashtriya). The

nomination paper is also accompanied with notice in Form B under the provisions of the Election Symbols (Reservation & Allotment) Order, 1968 regarding the name of candidate set up by the party and as also communication by President of the party to intimate the name of candidates set up by the party. Ext.5 is proceeding book of the election. It also goes to show that petitioner no. 1 filed nomination paper before Returning Officer as candidate of Samajwadi Janta Party (Rashtriya) which was accepted as such vide order dated 3.10.2005. Table III of Appendix XVII dated 3rd April 2001 would go to show that Samajwadi Janta Party (Rashtriya) is included in the list of registered unrecognized party (serial no. 492). Part III of the list of symbol specified by the Election Commission contains the names of unrecognized political parties covered under Section 10 A of Election Symbols (Reservation and Allotment) Order, 1968 and the symbol allotted to them when they were recognized parties. Samajwadi Janta Party (Rashtriya) is one of such party. Serial No. 8 which bears symbol of Baniyan tree by figure is against party's name.

17. Rule 10 (A) of the Election Symbols (Reservation and Allotment) Order, 1968, gives concession to such derecognized political party in allotment of symbol. Rule 10(A) runs as follows;

“ 10A. Concession to candidates set up by an unrecognized party which was earlier recognized as a National or State Party- If a political party, which is unrecognized at present but was a recognized National or State Party in any State or Union Territory not earlier than six years from the date of notification of the election, sets up a candidate at an election in a constituency in any State or Union Territory, whether such party was earlier recognized in that State or Union territory or not, then such candidate may, to the exclusion of all other candidates in the constituency, be allotted the symbol reserved earlier for that party when it was a recognized National or State party, notwithstanding

that such symbol is not specified in the list of free symbols for such State or Union territory, on the fulfillment of each of the following conditions, namely:-

- (a) that an application is made to the Commission by the said party for the exclusive allotment of that symbol to the candidate set up by it, not later than the third day after the publication in the Official Gazette of the notification calling the election;
- (b) that the said candidate has made a declaration in his nomination paper that he has been set up by that party at the election and that the party has also fulfilled the requirements of clauses (b), (c), (d) and (e) of paragraph 13 read with paragraph 13A in respect of such candidate; and
- (c) that in the opinion of the Commission there is no reasonable ground for refusing the application for such allotment:

Provided that nothing contained in this paragraph shall apply to a candidate set up by the said party at an election in any constituency in a State or Union Territory where the same symbol is already reserved for some other National or State party in that State or Union Territory.”

18. Thus, from the above discussions, it is quite clear that petitioner no. 1 was an authorized candidate of Samajwadi Janta Party (Rashtriya) and was also

entitled to get Baniyan tree as election symbol provided an application is made to the Commission by the party for exclusive allotment of that symbol to the candidate set by it. There is no document on record to show that any such application was filed by the party for exclusive allotment of its symbol to the petitioner. In nomination paper also, the petitioner, though filed as a candidate of Samajwadi Janta Party (Rashtriya) did not pray for allotment of any specific symbol of Baniyan tree as his election symbol. However, proceeding book of election (Ext. 5) would go to show that though no application was filed by the party for allotment of Baniyan tree as symbol to the petitioner no. 1, Election Commission ordered for allotment of symbol of tree to the candidate of Samajwadi Janta Party (Rashtriya) i.e. petitioner no. 1. Accordingly, Returning Officer Buxar by its order dated 3.10.2005 modified its earlier order of allotment of symbol dated 1.3.2005 and allotted the symbol of tree to the petitioner no. 1 being candidate of Samajwadi Janta Party (Rashtriya). Earlier he had been allotted symbol of Kulhari as free symbol meant for independent candidate. There is not doubt that in view of list of symbols specified by the Election Commission the name of tree as election symbol of Samajwadi Janta Party (Rashtriya) is Baniyan.

19. There is overwhelming oral as well as documentary evidence on the record to show that instead of Baniyan tree, symbol of Palm tree was printed/displayed in the EVM against the name of petitioner no. 1. On this point petitioners have examined almost all 10 witnesses. P. W. 1, Deo Raj Rai, one of the voters in the impugned election, has stated that petitioner no. 1 contested the impugned election as Samajwadi Janta Party (Rashtriya) candidate and his election symbol was Bargad tree. He did not cast vote as there was no such symbol in the EVM. P. W. 2, Sudhakar Pandey is the candidate himself. He has fully supported his case and has stated that in EVM in stead of Bargad tree symbol of Palm tree had been displayed. Similarly, P. W. 3, Markandey Rai, P.W. 4, Raj Narain Kuer, P. W. 5, Suraj Deo Dubey, P. W. 6, Jitendra Rai, P. W. 7, Laxman Pandey, P. W. 8, Tarkeshwar Pandey, P. W. 9, Santosh Jha, P. W. 10, Indrasan Dubey have stated that in EVM instead of Bargad

tree, the symbol of Palm tree had been printed. They have also stated that they did not cast vote as there was no election symbol of Bargad tree displayed against the name of petitioner.

20. Witnesses examined on behalf of respondent have not stated that Bargad tree had not been displayed in EVM. They have simply stated that symbol of tree had been displayed in the EVM.

21. Apart from oral evidence on the point of misprinting of election symbol against the name of petitioner no. 1, there are documents also. Ext. 2 is the objection petition dated 8.10.2005 filed by the petitioner no. 1 before the returning officer for cancellation of election due to change of election symbol in EVM. It has been stated that he was allotted Bargad tree but in collusion with his adversaries his symbol was changed and palm tree was printed instead of Bargad tree, as a result several voters did not cast their vote. It appears from Ext. 6 that District Election Officer, Buxar enquired into the matter and submitted his report to the Chief Election Officer Bihar, Patna. District Election Officer while accepting the error in printing of ballot papers has stated that it was not intentional and the petitioner also did not raise this question although EVM was sealed after giving information to the candidates through press communiqué. Petitioner did not turn up to oversee this particular process and also did not approach any authority till the date of election. Petitioner raised objection only at the time of close of the voting.

22. Thus, from the above discussions of oral as well as documentary evidence there can be no doubt that there had been misprinting of election symbol of petitioner no. 1 in the ballot papers as well as EVM. The symbol of Bargad tree allotted to the petitioner no. 1 was not reflected in the EVM or ballot papers and instead of it symbol of palm tree was printed in EVM/ ballot papers.

23. It was contended by learned counsel for the petitioners that misprinting of election symbol of petitioner was a serious irregularity which materially affected the result of election. As a result of wrong printing of election symbol large number of

illiterate voters were deprived of their right to exercise their right to franchise properly. They intended to cast vote in favour of petitioner but they could not cast due to confusion with regard to symbol. It was, further contended that it is the statutory duty of Returning Officer to check and verify at the time of sealing of EVM as to whether the allotted symbol of a particular candidate is there or not. Mere absence of a candidate or his agent at the time of sealing of EVM does validate misprinting of ballot papers. It is bound to affect the result of election.

24. On the other hand, learned counsel for the respondent urged that mere non-compliance of any act or rule or order with regard to election does not ipso facto gives jurisdiction to the Court to declare the result of any election void in terms of Section 100(i)(d)(iv) of the Representation of People Act. The onus is upon the petitioner to prove that non-compliance of any rule or order materially affected the result of election in so far as it concern to returned candidate. Mere surmises, conjectures and guess are not sufficient to invalidate the result of returned candidates. It was further contended that the margin of defeat and number of votes polled by petitioner does not give any room for any reasonable guess in favour of petitioners and against the result of respondent. Section 100(i)(d)(iv) of the Act gives power to the High Court to declare the election of returned candidate as void for non compliance of the provisions of constitution, act, rule or order made under the Act provided it materially affect the result of returned candidate.

25. In this case, there is no doubt that misprinting of election symbol of petitioner in EVM/ballot papers is violation of provision of conduct of election rules as well as the Election Symbols (Reservation and Allotment) Order, 1968 read with list of symbols specified by the Election Commission. However, the main question is as to whether it actually materially affected the result of returned candidate/respondent.

26. The petitioners in paragraph 14 of the election petition have set out in so many words as to what extent the voting was affected and result was materially

affected. It has been stated that as a result of wrong printing of election symbol more than 20,000 illiterate voters were misled and thus election in question was materially affected. In paragraph 10 of the election petition details of the votes polled in favour of each candidate in the impugned election have been given. According to it, the elected candidate respondent-Ajit Choudhary polled 32,138 valid votes whereas petitioner no. 1 polled only 568 valid votes. Thus, petitioner lost the election by margin of more than 31,000 votes. Even though the petitioner had got 20,000 votes polled in his favour it was not going to affect the result of respondent. Margin of defeat of petitioner no. 1 or win of respondent was such a huge that no inference could be drawn that the result of respondent was materially affected as a result of misprinting of election symbol.

27. In this regard, I am tempted to rely upon the decision reported in AIR 2002 (Calcutta) page 261: Baburam Tuddu vs. Shambhunath Mandi & others. The case is identical. The election of returned candidate was challenged on the ground of misprinting of election symbol of petitioner. The petitioner had been allotted symbol of Jug but in ballot papers the symbol was of 'bottle' was printed. The returned candidate had polled 47,000 and odds votes whereas the petitioner had polled only 9000 and odds votes. The Court relying upon the decision of the Apex Court, in paragraphs 30 and 31 has held as follows;

“30. Mr. Gangapadhya the learned Advocate for respondent no. 1 has pertinently cited the decision of the Supreme Court in S. N. Balakrishna v. Fernandez reported in AIR 1969 SC 1201 where at page 1225 (para 58) the Supreme Court held as follows:-

“In our opinion the matter cannot be considered on possibility, Vashist Narain's case insists on proof. If the margin of votes were small something might be made of the point mentioned by Mr. Jethamalani. But the margin is large and the number of

votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature. In *Bashist's case*, 1955(1) SCR 509; AIR 1954 SC 513 and in *Inayatullah v. Diwanchand Mahajan*, (1958) 15 Ele LR 219 at pp. 235-236 (Madh Pra) the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged.”

31. Applying the principles of law laid down by the Supreme Court in the above noted decisions to the facts and circumstances of the present case I am clearly of the view that the present petitioner has failed to discharge the onus of proving that the result of the election in so far as it concerned the returned candidate being respondent No. 1 was materially affected.”

28. It is well settled law (see 1964 SC 1200) that in order to get the election of returned candidate cancelled under Section 100(i) (d) (iv) of the Act it is not enough only to prove existence of one or other grounds specified in Clauses (i) to (iv) but it has to establish that as a result of existence of said grounds the result of the election in so far as it concerns to returned candidate has been materially affected.

29. In the present case also, petitioners have been able to prove the existence of ground specified in clause IV of the Section but they have failed to show that existence of that ground has materially affected the result of the returned candidate i.e. respondent. Therefore, petitioners are not legally entitled to get the result of election of respondent declared as void. Accordingly, the aforesaid issues are answered in the manner said above.

Issues No. (i), (ii), & (vi):-

30. So far as above issues are concerned, in view of the aforesaid findings, it would be futile exercise to discuss and decide these issues on merit. Apart from it, learned counsel for the respondent also did not press for decision of these issues on merit.

31. In the result, this election petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Patna High Court
Dated the 29th April, 2008.
AFR/ Kanchan

(Ghanshyam Prasad, J.)

