

UNIVERSITY OF POONA & ORS.

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v.

SHANKAR NARHAR AGESHE & ORS.

April 30, 1971

[J. M. SHELAT, A. N. RAY AND V. BHARGAVA, JJ.]

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Election—System of proportional representation by single transferable vote by ballot—Equality of votes in second count—Exclusion of candidate by reference to votes on first count—Propriety.

Affiliation of Colleges to University—Delay in publication of notification—Effect on voting rights.

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Under s. 11 of the Poona University Act, 1948, the Vice Chancellor shall be elected by the Court of the University, from among three persons recommended by the Executive Council, and the election shall be made by the system of proportional representation by means of a single transferable vote by ballot: In the present case, the result of the ballot papers was that one candidate secured 58 first preference votes, the second secured 53 first preference votes, and the third candidate secured 37 first preference votes. The third candidate was eliminated on the first count on the basis of his securing the lowest number of first preference votes, and his second preference votes were distributed between the other two. This resulted in both of them securing an equal number of votes on the second count, and the candidate who had the majority in the first count was declared elected. The election was set aside by the High Court.

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On the questions: (1) Whether the tie should have been resolved by drawing of lots; and (2) Whether the principals of four colleges voted wrongly at the election because those colleges had not been duly affiliated at the date of election.

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HELD: (1) It is an established principle in the system of proportional representation by means of a single transferable vote by ballot, that where for one vacancy there are three candidates and one of them is excluded at the first count and the other two candidates continue and secure in the second count an equal number of votes, then the one who had the lower number of votes in the first count shall be excluded. Determination by lot in case of equality of votes is neither a principle of universal application nor is it a common law principle. It is only permissible when there is a specific statutory provision to that effect. In the absence of such a statutory provision the method of decision by lot is not resorted to when there is another rational method. The principle of decision by lot is dependent on chance and accident whereas the principle of exclusion with reference to difference of votes on the original count is based on reason and legislative principles.

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The principles of exclusion are not to be found in any statutory enactment in the present case. On the other hand there is the support of legislative measures embodying the principle of exclusion by reference to original count. [605D, H; 606A-C]

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(a) Rule 75(4) of the Conduct of Election Rules indicates that when two or more candidates have been credited with the same value and stand lowest on the poll the candidate for whom the lowest number of original

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A votes are recorded shall be excluded. The rule applies when there are two or more candidates and not only when there are more than two candidates. The words 'stand lowest on the poll' qualify 'two or more' candidates who have been credited with the same value'. The High Court overlooked the rational of the principle embodied in this rule that in the case of two continuing candidates each having the same value of votes to fill in one vacancy the tie between the two would be resolved by having regard to their *original* votes in the first count. [604B, F]

B (b) Rule 6 in the Schedule to the Presidential and Vice-Presidential Election Rules, 1952, and Statute No. 158 framed under the Poona University Act, though it does not in terms apply to the election of a Vice-Chancellor, also embody this principle. [603B]

C (c) The High Court's reliance on r. 81(13) of the Conduct of Election Rule, 1961, in support of the conclusion that the only system of exclusion in a case of the present type should be by lot is erroneous. The principle in r. 81(3) applies only where more than one seat is to be filled and only one vacancy remains unfilled with only two continuing candidates and each of them has the same value of votes at that count. [605C]

D (d) The defeated candidate himself made a petition to the Chancellor under s. 60 of the Act, which provides that if any question arises as to whether a person has been duly elected the matter may be referred to the Chancellor whose decision shall be final, not to confirm the election. The Court of the University has thus laid down its own procedure for correction. When there is discretion to choose between two principles of exclusion, this Court would not command the University to exercise the discretion in a specific way. [606E]

E (2) The four colleges were in fact affiliated before the date of election but there was delay in the publication of the notification. Such delay would not detract from the sanction previously granted. [607A]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5 of 1971.

F Appeal from the judgment and order dated December 18, 21, 1970 of the Bombay High Court in Special Civil Application No. 1583 of 1970.

S. J. Sorabeje, M. O. Chinoy, J. R. Gagrat, and B. R. Agarwala, for the appellants.

G *V. S. Desai and S. B. Wad*, for the respondents Nos. 1, 2, 4 and 7.

The Judgment of the Court was delivered by

Ray, J.—This is an appeal by certificate under Article 133(1) (c) of the Constitution from the judgment dated 18 and 21 December, 1970 of the Bombay High Court.

H The Bombay High Court issued a writ of *quo warranto* declaring that respondent No. 3 Dr. Balkrishna Pandurang Apte is not entitled to act as the Vice-Chancellor of the University of Poona

is pursuance of the election held on 9 May, 1970 and further restraining him from acting as the Vice-Chancellor.

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H. V. Pataskar, the Vice-Chancellor of the University of Poona died on 21 February, 1970. The Governor of Bombay who is the Chancellor of the University then nominated Maha Mahopadhyaya Datto Vaman Potdar to act as the Vice-Chancellor until the date on which another Vice-Chancellor was elected under sub-section (1) of section 11 of the Poona University Act, 1948 (hereinafter referred to as the Act).

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Under section 12 of the Act the Vice-Chancellor is the principal executive and academic officer of the University. Under section 11 of the Act the Vice-Chancellor shall be elected by the Court from among three persons recommended by the Executive Council. Section 56 of the Act provides that every election to the office of the Vice-Chancellor and every recommendation for the nomination to the office of the Vice-Chancellor under the Act shall be made by the system of proportional representation by means of a single transferable vote by ballot in such manner as may be prescribed by the Statutes.

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At the meeting of the Executive Council held on 28 February, 24 March and 18 April, 1970 the Executive Council recommended a panel of three persons. They were Dr. Balkrishna Pandurang Apte, Principal Narayan Ramchandra Kulkarni and Principal Narhar Govind Suru for election to the office of the Vice-Chancellor. These were the three candidates from amongst whom the Court of the University had to elect one as the Vice-Chancellor.

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The said meeting of the Court of the University was convened under notice dated 22 April, 1970 for 9 May, 1970 for election of the Vice-Chancellor from amongst those three persons. At the election held on 9 May, 1970 the total number of votes tendered was 149. One of the votes was invalid. The valid votes were 148. The election was in accordance with section 56 of the Act by the system of proportional representation by means of a single transferable vote by ballot. The result of the ballot papers appeared to be that Dr. Apte secured 58, Principal Kulkarni 37 and Principal Suru 53 first preference votes. Principal Kulkarni was thus eliminated on the first count on the basis of the lowest number of first preference votes. 8 of the voters who had given first preference votes to Principal Kulkarni had not exercised second preference in favour of either of the remaining two candidates Dr. Apte and Principal Suru. The remaining 29 voters gave 12 second preference votes to Dr. Apte and 17 second preference votes to Principal Suru. This resulted in both the continuing candidates Dr. Apte and Principal Suru each securing 70 votes on

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- A** the second count. Dr. Apte was declared elected because in the first count, namely, the count previous to the one in which both obtained equal number of votes. Dr. Apte had a clear majority of 5 votes and therefore Principal Suru was excluded from the election.
- B** The election of Dr. Apte was challenged in the High Court on three principal grounds. First, it was contended that the tie between Dr. Apte and Principal Suru at the second count was to be resolved by drawing of lots, because it was the ordinary practice in elections held under the system of proportional representation by means of a single transferable vote by ballot for election to a single seat that the tie of the above kind must be resolved by drawing of lots. Secondly, it was said that the Principal of four Colleges, *viz.* N. D. M. V. P. Samaj's Arts and Commerce College, Sinnar ; V. P. Mandal's Arts, Science and Commerce College, Thana ; Narhar Balwant Thakur Law College, Nasik and G. E. Society's College for Education, Sangamner which had not been duly affiliated at the date of the election had acted and voted at the election as members of the Court, and, therefore, the votes given by the members of those four colleges were invalid. Thirdly, it was contended that the meeting for the election of the panel of respondents Dr. Apte, Principal Kulkarni and Principal Suru for election to the office of the Vice-Chancellor was an invalid meeting and therefore the election was void.

- E** The High Court upheld the first contention and rejected the other two. The High Court held that when upon final count the continuing candidates Dr. Apte and Principal Suru secured equal majority of valid votes the system of proportional representation by means of a single transferable vote by ballot never aimed at excluding one of such continuing candidates by reference to any of the previous counts and/or of original vote. The High Court held that where only two continuing candidates remained to fill up only one vacancy and both of them had the same number of votes the tie of votes between the two continuing candidates was to be solved by the principle of decision by lot.

- G** Section 56 of the Act speaks both of election to the office of the Vice-Chancellor or any authority of the University by the system of proportional representation by means of a single transferable vote by ballot in such manner as may be prescribed by the Statutes. The authorities of the University are mentioned in section 15 of the Act. The Vice-Chancellor is not one of the authorities mentioned there. The Vice-Chancellor is one of the officers of the University. The officers of the University are mentioned in section 8 of the Act.
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Section 18 of the Act contemplated making of Statutes. Statutes No. 142 to 165 are the relevant Statutes for elections to authorities. These Statutes do not apply to election of Vice-Chancellor because he is not an authority. The system of election by proportional representation by means of a single transferable vote by ballot is the prescribed system of election to authorities. The relevant Statute for election to authorities on which counsel for the appellants relied is Statute No. 158 in support of the proposition that it embodied the rule of exclusion of one of the two continuing candidates both of whom secured equal number of votes in the second count by reference to the principle as to which of the two continuing candidates had the lowest number of votes at the first count. There is no doubt that Statute No. 158 does not in terms apply to the election of Vice-Chancellor but it is manifest that Statute No. 158 embodies a rule of exclusion of one of the candidates at the second count on the ground that that candidate had the lowest number of votes at the first count.

Election by proportional representation by means of a single transferable vote by ballot is often described as the Hare system of proportional representation named after the English political reformer Thomas Hare. This system of election is based on a quota determined by the following formula. The total votes cast is divided by the number of seats to be filled plus one, and one is added to the quotient. If 100,000 votes are cast and 4 seats are to be filled, divide by 5 to get a quotient of 20,000 then add 1 to get 20,001, which is the quota. A candidate receiving the quota of first-choice of votes is elected. Under this system electors express first, second, third or additional choices according to the number of candidates. An elector does not waste his vote. If the candidate for whom he has expressed his choice, does not need his vote, the surplus votes are distributed in accordance with the indicated second choices among candidates whose quotas have not been filled. If enough candidates are not elected by this process the candidate with the smallest number of choices is then excluded and his votes are distributed in the same way. This process of exclusion or elimination goes on until enough candidates have filled their quotas or until the successive eliminations have left no more than enough to fill the vacancies.

In working out the method of election in the present case, it has to be noticed whether the manner in which Principal Suru has been excluded at the second count and Dr. Apte has been declared elected at the second count is a principle of exclusion which has been recognised in the system of proportional representation by means of a single transferable vote by ballot. Counsel for the appellants contended that there was legislative recognition of this principle in three cases. The first is rule 75 of the Conduct of

A Elections Rules, 1961. The second is rule 6 in the Schedule to the Presidential and Vice-Presidential Elections Rules, 1952. The third is Statute No. 158 in the Statutes of the Poona University Act. Rule 75 of the Conduct of Elections Rules is applicable in the case of counting of votes where only one seat is to be filled. The two sub-rules of Rule 75 on which reliance was placed by counsel for the appellants for the legislative recognition of the principle of exclusion are (3) and (4) which are as follows :—

“(3). If, at the end of any count, no candidate can be declared elected, the returning officer shall—

C (a) exclude from the poll the candidate who up to that stage has been credited with the lowest value;

D (b) examine all the ballot papers in his parcel and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each sub-parcel and credit it to the candidate for whom such preference is recorded, transfer the sub-parcel to that candidate and make a separate sub-parcel of all the exhausted papers ; and

E (c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

F (4) If, when a candidate has to be excluded under clause (a) of sub-rule (3), two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded shall be excluded, and if this number also is the same in the case of two or more candidates the returning officer shall decide by lot which of them shall be excluded”.

G Sub-rule (4) indicates that if when a candidate has to be excluded two or more candidates have been credited with the same value and stand lowest on the poll the candidate for whom the lowest number of original votes are recorded shall be excluded. In the present case at the first count Principal Kulkarni was excluded because he received the lowest number of votes on the first count. At the second count Dr. Apte and Principal Suru were the two continuing candidates. Of these two one had to be excluded. Therefore the principle of exclusion is that the candidate for whom the lowest number of original votes are recorded shall be excluded. The original first preference votes indicated that Dr. Apte

had 58 votes and Principal Suru had 53 votes. Therefore, Dr. Apte had larger first preference votes. The other part of sub-rule (4) of rule 75 is that if both at the first count and at the second count they had equal number of votes then one of them was to be excluded on the principle of decision by lot.

Rule 6 in the Schedule to the Presidential and Vice-Presidential Elections Rules, 1952 on which counsel for the appellants relied embodied the same principle which is as follows :—

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“If, when a candidate has to be excluded under clause (a) above, two or more candidates have been credited with the same number of votes and stand lowest on the poll, exclude that candidate who had secured the lowest number of first preference votes, and if that number also was the same in the case of two or more candidates, decide by lot which of them shall be excluded”.

Statute No. 158(3) on which counsel for the appellants relied is as follows :—

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“If, when a candidate has to be excluded, two or more candidates have each the same number of votes, and are lowest on the poll, the candidate with the lowest number of votes at the first count at which the candidates in question have an unequal number of votes shall be excluded and, when the number of votes credited to the candidates are equal at all counts, the Registrar shall determine by lot who shall be excluded”.

These provisions were referred to and relied on by counsel for the appellants only for the limited purpose of establishing that where two continuing candidates at the second count have equal number of votes in the second count and there is one vacancy to be filled up the candidate who had the lower number of votes at the first count shall be excluded.

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The High Court held that the words “two or more candidates” and the other words “stand lowest on the poll” in rule 75(4) of the Conduct of Elections Rules indicated that the principle embodied in that rule would apply only where the contest continued between three and more continuing candidates and the question could not arise when the contest was only between two candidates left over as continuing candidates. The other reason given by the High Court was that when there were two continuing candidates they could never stand lowest on the poll and the two candidates, according to the High Court, could stand lowest on the poll

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A only if there were other remaining or continuing candidates with larger and better value of votes. The interpretation of rule 75(4) by the High Court is erroneous. The rule itself speaks of two or more candidates and does not speak of more than two candidates as the High Court construed it. The words "stand lowest on the poll" occur along with two or more candidates who have been credited with the same value. It is because they have the same value that both of them stand lowest on the poll. Therefore, rule 75(4) resolves that tie by adopting the principle of exclusion of one of the candidates with regard to the number of original votes at the first count.

C The High Court held that the principle in rule 75(4) would not apply in the present case with only two continuing candidates for filling in one vacancy because there would be no possibility of transfer of the excluded candidate's votes in favour of the other candidate. The High Court therefore relied on rule 81(3) of the Conduct of Elections Rules, 1961 to support the conclusion that the only system of exclusion in a case of the present type would be decision by lot. Rule 81(3) is as follows :—

"When at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be excluded ; and after excluding him in the manner aforesaid, declare the other candidate to be elected".

F The High Court overlooked the rational of the principle embodied in rule 75(4) that in the case of two continuing candidates each having the same value of votes to fill in one vacancy the tie between the two would be solved by having regard to their original votes in the first count. There would be no occasion for transfer of excluded candidate's votes in such a contingency. Where two or more candidates continued for one vacancy and each of the candidates would have the same value of votes at the end of a count the tie between the two or more candidates having equality of votes would be solved by excluding the one who had the lowest number of votes on the first count and thereafter the excluded candidate's second choice would be transferred to the continuing candidates until the vacancy would be filled up by the principle of exclusion embodied in rule 75(4).

H The principle in rule 81(3) is applicable where more than one seat is to be filled and only one vacancy remains unfilled with only two continuing candidates and each of them has the same

value of votes at that count. In such a case the exclusion of one of the candidates is decision by lot. The reason for decision by lot in rule 81(3) is that the two continuing candidates by reason of the transferred votes at the last count have the same value of votes. The values of their votes in the previous counts have already been worked out by rule 80(7) of the Conduct of Elections Rules, 1961 which embodied the principle of exclusion of a candidate where two or more candidates have the same value of votes by having regard to the original votes of each candidate and excluding the candidate for whom fewest original votes are recorded. The principle of Rule 81(3) does not apply to the present case because that rule applies to counting of votes where more than one seat is to be filled. This is not the case here. Rule 81(3) resolves tie on count of votes between the last two contesting candidates at the last count on transfer of votes from the previous count.

It is an established principle in the system of proportional representation by means of a single transferable vote by ballot that where for one vacancy there are three candidates and one of them is excluded at the first count and the two candidates continued and in the second count both of them have equal number of votes then one of the two candidates who had the lower number of votes than the other continuing candidate in the first count shall be excluded. The present election was held on this principle. Section 56 of the Act only speaks of election by the system of proportional representation by means of a single transferable vote. It cannot be said in the present case that there is any statutory infringement of election by the system of proportional representation by means of a single transferable vote. The two rival contentions were that according to the University authorities Principal Suru was to be excluded at the second count because his votes on the original count were lower than that of Dr. Apte whereas according to the persons who impeached the election the only method of exclusion was decision by lot. It appears that there is legislative sanction in support of the contention on behalf of the University authorities that resolving equality of votes by reference to first preference or original votes is a known recognised method in the system of proportional representation by means of a single transferable vote. Even if Statute No. 158 of the Poona University does not in terms apply, Statute No. 158 furnishes a valuable guide regarding the working of the system of proportional representation mentioned in section 56 of the Act and principles analogous to Statute No. 158 are applicable and have been applied by the authorities who conducted the election in the present case.

Determination by lot in case of equality of votes in neither a principle of universal application nor is it a common law principle.

- A It is only permissible when there is a specific statutory provision to that effect. In the absence of a statutory provision the method of decision by lot is not resorted to when there is other rational method. The principle of decision by lot is dependent on chance and accident whereas the principle of exclusion with reference to difference of votes on the original count is based on ~~reason~~ legislative principles.
- B In the present case the Statute imposed a duty of election by the system of proportional representation by means of a single transferable vote. The principles of exclusion are not to be found in any statutory enactment in the present case. On the one hand there is the support of legislative measures embodying the principle of exclusion by reference to original count.
- C The principle of exclusion by lot on the other hand is adhered to only if the Statute has a compelling force to that effect. In the present case there is no such statutory compulsion of deciding by lot in the eventuality which happened. If there are two principles of exclusion and the authority has a discretion in the mode of performing the duty, the authority cannot be commanded to a duty in a specific way (See Halsbury's Laws of England, Third Edition, Vol. 11, Para. 160, page 85).

- D The election was held by the continuing Vice-Chancellor. The Court of the University was master of its own procedure. It adopted one of the principles of exclusion by reference to votes on the original count. In following that procedure it cannot be said that there is violation of statute. It is not out of place to mention here that Principal Suru himself made a petition to the Chancellor under section 60 of the Act asking him not to confirm the election. Under section 60 of the Act if any question arises as to whether a person has been duly elected or appointed the matter may be referred on a petition to the Chancellor who shall decide the question and his decision shall be final. We are not basing our decision on the finality of the decision of the Chancellor in the present case but this is a feature which is not to be lost sight of by reason of the fact that the candidate who lost at the election made representation for redress of his grievances to the Chancellor.
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- G Counsel on behalf of the respondents repeated the contention which had been advanced in the High Court that Principals of 4 unaffiliated Colleges attended the Court meeting and therefore the election was bad. The High Court rightly rejected that contention. There is evidence to show that in the month of June, 1969 the Government sanctioned the recommendation of the University for affiliation of these Colleges to the University. The affiliation was for three years from 1969. In these orders it was stated that the final Government notification would be issued after the University submitted a report to the Government of fulfilling the conditions. The respondents' contention was that the notification was published after the month of May, 1970. The High Court rightly held
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that the sanction was granted by the Government. Delayed publication of the notification would not detract from the sanction previously granted. The third contention which had been urged in the High Court was not pressed here. A

For these reasons, we accept the appeal and set aside the judgment of the High Court. Each party will pay and bear its own costs in this Court. B

V. P. S.

Appeal allowed.