A

J. CHANDRASEKHARA RAO

v.

V. JAGAPATHI RAO AND NINE OTHERS

DECEMBER 18, 1992

B

[A.M. AHMADI, M.M. PUNCHHI AND YOGESHWAR DAYAL, JJ.]

Election Law : Representation of the People Act, 1951—Section 100 (1)(C), 100(1)(d)(i), 100(1)(d)(iv)—Election Petition—Court to decide on

C *Positive and Affirmative evidence—Not on speculation and suspicion—Positive and reliable evidence—Burden of proof on petitioner—Courts not to set aside the election on surmises and conjectures—Probable distribution of wasted votes—Demonstrated pattern—Consideration of.*

The petitioner and Respondents 1 to 9 contested for an Assembly

D **seat. Respondent No. 1 won the election by securing 37248 votes whereas the petitioner secured 36821 votes and Respondent No. 2 secured 9569 votes.**

The petitioner filed a Election Petition before the High Court chal-

E **lenging the election of Respondent No. 1 on the grounds, namely, that Respondent No. 2 who was under 25 years of age and was not eligible to contest the election; that the difference in votes secured by the petitioner and Respondent No. 1 was only 427 and that the votes polled by Respondent No. 2 were more than 22 times the difference between the number of votes secured by the Respondent No. 1, the returned candidate, and his**

F **nearest rival the petitioner, and that the result of the election in so far as it concerned the returned candidate was materially affected by the non-compliance with the provisions of the Constitution of India and the Representation of the People Act, 1951.**

G **The High Court rejected the contentions and dismissed the Election Petition.**

Being aggrieved by the High Court's decision the appellant preferred the present appeal.

H **Dismissing the appeal, this Court**

HELD : 1. A decision in the election petition can be given only on positive and affirmative evidence and not merely on speculation and suspicion, however strong they are. [796-G] A

2. It is for the election petitioner to prove by positive and reliable evidence that either improper acceptance of the nomination of the candidate or on account of the non-compliance of the provisions of the Constitution or the Act, Rules or Order, etc. that the wasted votes would have been distributed in such a manner among the remaining candidates that any candidate other than the returned candidate would have polled the highest number of votes. Such a burden of proof may be difficult, say impossible, but the courts cannot set aside the election of the returned candidate on surmises and conjectures unless established by positive evidence that the election of the returned candidate has been materially affected. [796-H; 797-A,B] B C

Chhedi Ram **v.** *Jhilmit Ram & Others,* **[1984] 1 SCR 966,** *Vashist Narain Sharma* **v.** *Dev Chandra and Others,* **[1955] S.C.R. 509,** *Paokai Haokip* **v.** *Rishang and others,* **AIR 1969 S.C. 663 = [1969] 1 S.C.R. 637;** *Samam Singh* **v.** *Pushpa Devi and others,* **[1988] Suppl. S.C.C. 65;** *Samant N. Balakrishna, etc.* **v.** *George Fernandez and others etc.,* **AIR 1969 S.C. 1201,** *Smt. Lata Devi (Mali)* **v.** *Haru Rajwar,* **AIR 1990 S.C. 19 and** *Shiv Charan Singh* **v.** *Chandra Bhan Singh and others,* **AIR 1988 SC 637 = [1988] 2 S.C.R. 713, relied on.** D E

3. The demonstrated pattern of voting can be taken into consideration for reaching the conclusion with regard to the probable distribution of wasted votes among the validly nominated candidates. [797-C] F

Paokai Haokip **v.** *Rishang and others,* **AIR 1969 SC 663 = [1969] 1 S.C.R. 637, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4115 (NCE) OF 1991. G

From the Judgment and Order dated 12.9.1991 of the Andhra Pradesh High Court in Election Petition No. 6 of 1990.

P.P. Rao, B. Rajeshwar Rao, Vimal Dave and Ms. Neelam Kalsi for the Appellant. H

A K. Madhava Reddy, D. Prakash Reddy, G. Prabhakar, Ms. Rani Chhabra (NP) and S.C. Patel (NP) for the Respondents.

The Judgment of the Court was delivered by

YOGESHWAR DAYAL, J. This is an appeal against the decision of
B the learned Single Judge of the Andhra Pradesh High Court dated 12th September, 1991 whereby Election Petition No. 6 of 1990 filed by the appellant herein was dismissed.

We find it convenient to refer to the parties as they were before the High Court.
C

The petitioner and respondents 1 to 9 contested for membership of Andhra Pradesh Legislative Assembly from 254 Karimnagar Assemly constituency in the election which was held on 22nd November, 1989.

Before the High Court the petitioner had taken various grounds but
D only one ground was urged before us by learned counsel for the petitioner.

One of the grounds urged before the High Court was that the Returning Officer commited illegality in accepting the nomination paper of respondent No. 2 who was under 25 years of age and was not eligible
E to contest. He then pleaded that respondent No. 1 who was a winning candidate secured 37248 votes whereas the petitioner secured 36821 votes and respondent No. 2 who was not eligible, secured 9568 votes. It was then submitted that the difference in votes secured by the petitioner and respondent No. 1 was only 427 and the votes polled by respondent No. 2 were more than 22 times the difference between the number of votes secured by
F the respondent No. 1 the returned candidate, and his nearest rival, the petitioner. It was further pleaded that the result of the election in so far as it concerned the returned candidate has been materially affected by the non-compliance with the provisions of the Constitution of India and the Representation of the People Act, 1951 (hereinafter referred to as 'the
G Act') and the High Court may declare the election of the returned candidate as void and to declare the petitioner as having been duly elected from the aforesaid constituency.

The High Court on consideration of the evidence led before it took the view that the second respondent appeared to be properly qualified on
H the face of the electoral rolls and the nomination papers and since no

objection was raised to the acceptance of the nomination papers by the Returning Officer, it could not be said that there is any improper acceptance of any nomination paper under Section 100 (1)(d)(i) of the Act. The High Court on consideration of evidence also took the view that respondent No. 2 was less than 25 years of age on the date of scrutiny of nomination papers and, therefore, was not qualified to contest the election and it amounted to non-compliance with the provisions of the Constitution and the Act within the meaning of Section 100 (1) (d) (iv) of the Act. After giving this finding the High Court took the view that what is to be seen is whether the result of the election of respondent No. 1 has been materially affected by the non compliance with the provisions of the Constitution. The High Court on consideration of evidence took the view that it is not so proved and consequently dismissed the Election Petition.

Respondent No. 1 had filed his written statement and *inter alia* pleaded : that the voting pattern and trends of the election demonstrated that in the facts and circumstances of the case the presence of respondent No. 2 in the contest or the votes polled by him do not in any way affect the result of respondent No. 1. It was also submitted that the mere fact that the margin of votes by which respondent No. 1 succeeded over the petitioner is only 427 votes, it does not lead to necessary inference that the result of the election has been materially affected. It was further pleaded that it is not correct to say that by reason of respondent No. 2 polling more than 22 times the margin of votes by which the respondent No. 1 succeeded over the petitioner, the election result of respondent No. 1 has been materially affected. It was asserted that the voting pattern clearly indicates that it was well nigh impossible for the petitioner to have secured even a small percentage of the votes polled by respondent No. 2 let alone a substantial number of the same. It was submitted that in a multi-cornered contest the margins are unpredictable. In fact the respondent No. 2 took away chunk of votes from the urban strong hold of respondent No. 1 while the petitioner had no such disadvantage.

The High Court noticed that in the Election Petition no mention was made of the probable number of votes the petitioner would have got out of the wasted votes except stating that the margin by which respondent No. 1 succeeded over the petitioner is 427 whereas respondent No. 2 secured 9568 votes which is more than 22 times the margin of votes by which respondent No. 1 succeeded over the petitioner. The High Court also noticed that the petitioner as P.W. 1 stated that if the nomination paper of

A respondent No. 2 was not accepted he would have polled almost all the votes secured by respondent No. 2 as the workers of respondent No. 2 were in his favour and the acceptance of the nomination paper of respondent No. 2 materially affected his chances in the election. P.W. 2, respondent No. 2 in the Election Petition, has stated that there were general expectation that respondent No. 1 was likely to win 1989 elections. He did not say B how his votes would have been distributed between the petitioner and respondent No. 1. The High Court noticed that this is all the evidence adduced by the petitioner to prove that the election of respondent No. 1 has been materially affected.

On the other hand the High Court noticed that respondent No. 2 C secured 8269 valid votes from urban areas and 1293 valid votes from rural areas and both the respondent No. 1 and respondent No. 2 have secured their votes mainly from urban areas while the petitioner secured bulk of his votes from rural areas, since the election petitioner was not so popular in urban areas and therefore the respondent No. 1 would have secured more number of wasted votes of respondent No. 2 than the petitioner. The D High Court on consideration of the entire material took the view that having regard to demonstrated pattern of voting as could be seen from Ext. B. 7, the final result sheet, more of the wasted votes would have gone to respondent No. 1.

Mr. P.P. Rao, learned counsel for the petitioner, relied on the E decision of this Court in *Chhedi Ram* v. *Jhilmit Ram & others*, [1984] 1 S.C.R. 966, particularly on the following observations :

> "If the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately F large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable prob- G ability is that the result of the election has been materially affected and one may venture to hold the fact as proved.
>
> Under the Evidence Act, a fact to be proved when after considering the matters before it, the Court either H believes it to exist or considers its existence so probable

that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. If having regard to the facts and circumstances of a case, the reasonable probability is all one way a court must not lay down an impossible standard of proof and hold a fact as not proved.

In the instant case, the candidate whose nomination was improperly accepted had obtained 6710 votes, that is, almost 20-times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. Further, the number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate it was a little over one-third. In such a situation the result of the election may safely be said to have been affected.

It appears there was no evidence as to the trend of voting in that case and the learned Judges did not agree with the judgment of this Court in *Vashist Narain Sharma* v. *Dev Chandra and others*, [1955] S.C.R. 509.

The words the result of the election has been materially affected came up for consideration before this Court in the aforesaid case of *Vashist Narain Sharma.* In that case *Vashist Narain Sharma* appellant therein secured 12868 votes whereas Vireshwar Nath Rai secured 10996 votes. The fourth respondent, whose nomination was held to be improperly accepted secured 1983 votes. It was held that the words the result of the election has been materially affected in Section 100 (1)(c) of the Act prior to 1956 amendment indicate :

"that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

It was further held :

A "But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the B onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or C which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged. Should the D petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on the point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand."

E Accordingly the Tribunal's order was set aside and the result of the successful candidate was upheld.

The next case, in which the question of burden of proving that the result of election was materially affected came up for consideration, is F *Paokai Haokip* v. *Rishang and others*, AIR 1969 S.C. 663=[1969] 1 S.C.R. 637, and it accepted the principles laid down in *Vashist Narain Sharma's* case. It was held in that case thus :

"It is impossible to accept the *ipse dixit* of witnesses coming from one side or the other to say that all or some of the G votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by the positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can H come is that the burden is not discharged and that the

election must stand. A

In that case the successful candidate received 30403 votes as against the next candidate who received 28862 votes and thus secured a majority of 1541. The candidate who secured the second largest votes i.e. 28862 filed the election petition on the ground, that the changing of polling centres which was duly notified earlier without complying the provisions of the Act B and the Rules, has materially affected the result of the returned candidate. It was held that the burden is upon the election petitioner to show affirmatively that the result of the election has been materially affected. It has to be seen in every case whether this burden has been successfully discharged by the election petitioner by demonstrating to the Court either positively C or affirmatively that the poll would have gone against the returned candidate if the breach of the rules had not occurred and the polling booths had not been changed. It was observed, thus :

> "It is no doubt true that the burden which is placed by law is very strict; even if it is strict it is for the courts to apply it. It is for the legislature to consider whether it should be altered. If there is another way of determining the burden the law should say it and not the Courts. It is only in given instances that taking the law as it is, the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not." D E

It was further held, thus :

> "It is notorious that statistics can prove any thing and made to lie for either case, it is open to us in reaching our conclusion to pay attention to the demonstrated pattern of voting. Having done so, we are quite satisfied that 1541 votes could not, by any reasonable guess, have been taken off from the lead of the returned candidate so as to make the election petitioner successful." F G

Thus this Court has taken into consideration the demonstrated pattern of voting in arriving at the conclusion that the election petitioner would not have taken any of the votes from the lead of the returned candidate in a given case. H

In *Samam Singh* v. *Pushpa Devi and others*, [1988] Supp. S.C.C. 65, the successful candidate, first respondent, secured 23006 votes and the second respondent secured 20735 votes. The difference between the votes secured by the first and the second respondent was 2271. That the nomination of the eighth respondent, who secured 3606 votes i.e. more than the difference of votes between the first and the second respondent, was wrongfully accepted. This Court observed as follows:–

> "The appellant or any other party had not placed satisfactory evidence to reach the conclusion that all or a sufficient number of wasted votes which had been cast in favour of respondent 8 would have gone in favour of respondent 2, had respondent 8 not been one of the candidates at the election."

After referring to the decisions in the cases of *Vashist Narain Sharma* (Supra), *Samant N. Balakrishna, etc.* v. *George Fernandez and others etc.*, AIR 1969 S.C. 1201 and *Smt. Lata Devi (Mali)* v. *Haru Rajwar*, AIR 1990 S.C. 19 it was held that having regard to the facts of the case it was not possible to hold that the appellant has established that the result of the election of the returned candidate has been materially affected. It was observed as follows:-

> "In our opinion the matter cannot be considered on possibility. *Vashist Narain's* case insists on proof. If the margin of votes was small something might be made of the points mentioned by Mr. Jethmalani. 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 or what it should contain is not provided by the legislature. In *Vashist's* case [1955] 1 S.C.R. 509= AIR 1954 S.C. 513 and in *Inayatullah Khan* v. *Diwanchand Mahajan*, 15 ELR 219 at 235-36 (MP), 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. We cannot overlook the rulings of this Court and follow the English rulings cited to us."

In *Shiv Charan Singh* v. *Chandra Bhan Singh and others*, AIR 1988 SC 637=[1988] 2 S.C.R. 713 the Supreme Court again considered the question of burden of proof under Section 100(1)(d)(i) of the Act. In the said case *Shiv Charan Singh* was elected having secured 21443 votes. The next highest votes secured by Kanhaiya Lal was 17341. Roshan Lal secured 16345 votes. Contending that the nomination paper of Kanhaiya Lal was improperly accepted by the Returning Officer, election petition was filed questioning the election of Shiv Charan Singh. The High Court held, relying on the decision of Supreme Court in *Cheddi Ram's* case (Supra) since the wasted votes are 17341 whereas the difference between Shiv Charan Singh and Roshan Lal was 4497, that the result of the election was materially affected in view of the margin of difference between Shiv Charan Singh and Roshan Lal and votes secured by Kanhaiya Lal. In appeal the Supreme Court reversed the said judgment and held that since the election petitioner failed to prove that the election was materially affected the election cannot be declared as void. It was held :

> "We are in respectful agreement with the view taken by this Court in the aforesaid decisions. The election of a returned candidate cannot be declared void on the ground of improper acceptance of nomination paper of a contesting candidate unless it is established by positive and reliable evidence that improper acceptance of the nomination of a candidate materially affected the result of the election of the returned candidate. The result of the election can be affected only on the proof that the votes polled by the candidate whose nomination paper had wrongly been accepted would have been distributed in such a manner amongst the remaining candidates that some other candidate (other than the returned candidate) would have polled the highest number of valid votes. In other words the result of the election of the candidate cannot be held to have been materially affected unless it is proved that in the absence of the candidate whose nomination paper was wrongly accepted in the election contest, any other candidate (other than the returned candidate) would have polled the majority of valid votes. In the absence of any such proof the result cannot be held to have been materially affected. The burden to prove this material effect is difficult

A and many times it is almost impossible to produce the requisite proof. But the difficulty in proving this fact does not alter the position of law. The legislative intent is clear that unless the burden, however difficult it may be, is discharged, the election cannot be declared void. The difficulty of proving the material effect was expressly noted B by this Court in *Vashist Narain Sharma's,* AIR 1954 SC 513 and *Paokai Haokip*, AIR 1969 SC 663 cases and the Court observed that the difficulty could be resolved by the Legislature and not by the Courts. Since then the Act has been amended several times, but Parliament has not altered the C burden of proof placed on the election petitioner under S. 100 (1)(d) of the Act. Therefore, the law laid in the aforesaid decisions still hold the field. It is not permissible in law to avoid the election of the returned candidate on speculations or conjectures relating to the manner in which the wasted votes would have been distributed amongst the D remaining validly nominated candidates. Legislative intent is apparent that the harsh and difficult burden of proving material effect on the result of the election has to be discharged by the person challenging the election and the Courts cannot speculate on the question. In the absence of E positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures."

F It was held that the decision in *Cheddi Ram's* case (supra) does not overrule the earlier decisions. It was also observed that the decision in *Cheddi Ram's* case rests on its own facts.

A decision in the election petition can be given only on the positive and affirmative evidence and not merely on speculation and suspicion, G however, strong they are. In the instance case there is no such positive and affirmative evidence.

Thus it can be seen from all the aforesaid decisions of this Court that it is for the election petitioner to prove by positive and reliable evidence H that either improper acceptance of the nomination of the candidate or on

account of the non-compliance of the provisions of the Constitution or the Act, Rules or orders etc. that the wasted votes would have been distributed in such a manner among the remaining candidates that any candidate other than the returned candidate would have polled the highest number of valuable votes. Such a burden of proof may be difficult, say impossible, but the Courts cannot set aside the election of the returned candidate on surmises and conjectures unless established by positive evidence that the election of the returned candidate has been materially affected.

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B

We have already noticed the fact that the High Court had accepted the evidence of respondent No. 1 as to the trend of voting. No argument was advanced before us challenging this finding. The demonstrated pattern of voting can be taken into consideration for reaching the conclusion with regard to the probable distribution of wasted votes among the validly nominated candidates as laid down by Hidayatullah, C.J. in *Paokai Haokip's* case (supra).

C

In view of these facts we have no option but to dismiss the appeal. The same is accordingly dismissed with costs.

D

V.M. Appeal dismissed.