

BASANAGOUDA
v.
DR. S. B. AMARKHED AND ORS.

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MARCH 31, 1992

[KULDIP SINGH AND K. RAMASWAMY, JJ.]

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Election:

Representation of the People Act, 1951/Conduct of Election Rules, 1961:

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Sections 87, 100(1)(b) & (d), 135A/Rule 93:

Corrupt practice—Booth capturing—Allegations must be specifically pleaded with material particulars—Production of documents sought—Court's discretion to examine expediency, justness and relevancy of documents in the light of clear pleadings—Need for maintaining secrecy of ballots—Suggestion to Rule making authority—To have fresh look into the mandatory language of Rule 93(1) bringing it in conformity with section 135A.

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Code of Civil Procedure, 1908 :

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Order 11 Rule 14, Order 16 Rule 6:

Production of documents—Election matters—Relevant considerations for ordering production—What are.

The appellant was declared elected as a member of the State Assembly. The Respondent, who was the nearest unsuccessful candidate filed an Election Petition before the High Court, challenging the election of the appellant. One of the grounds alleged was that the appellant had indulged in booth capturing and rigging of booths in certain polling booths, with the connivance of police officials and election agents of the appellant. It was also alleged that the appellant and his supporters prevented the voters from exercising their franchise by threatening them; that the ballot papers were seized from the officials and were marked in favour of the appellant; and that the appellant's supporters forged the signatures/thumb impressions on the counter foil of ballot papers. The High Court framed 4 issues, the main among them being the alleged capturing and rigging of polling

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A booths.

The respondent also filed an application under Order XI Rule 14 read with Order XVI Rule 6 CPC seeking production of certain documents by the District Election Officer. The High Court allowed the petition and summoned the documents. Accordingly, the documents were produced by

B the Returning Officer.

The present appeal is against the said order of the High Court.

C On behalf of the appellants, it was contended that the respondent laid no factual foundation in the election petition with material particulars of the alleged capturing of the booths and rigging; that there were no pleadings at all and no case has been made out for opening the ballot boxes and examining the used ballots; and that the High Court did not appreciate the legal implication arising from its order.

D On behalf of the respondents it was contended that it would be impossible for a candidate to plead allegations with precision particularly when his election agents and the officials including the Police connived with the other candidate; that unless the election material is summoned and perused it would be difficult to substantiate such plea; and that the order challenged being an interlocutory one it could be assailed in the regular appeal, after the Election Petition was decided.

Partly allowing the appeal, this Court,

F HELD: 1. The High Court was wrong in holding that though no factual foundation has been laid in the election petition, but since there were allegations of booth-capturing and rigging in various paragraphs of the petition it was necessary to summon and examine the documents asked for by the respondent. The examination of marked ballot papers and other used ballot papers can in no way substantiate the allegations of booth-capturing. Neither the names of persons nor any other details were given in the election petition. Only bare allegations were made that votes of dead persons and those who had left the constituency had been cast. In the circumstances the High Court grossly erred in permitting the summoning of items (a) to (c) and (e) of para I of the application. As regards the other items, there is no need to interfere with the High Court's order. [407B-D]

H 2. The power to order production of documents is coupled with discre-

tion to examine the expediency, justness and the relevancy of the documents to the matter in question. These are relevant considerations which the Court shall have to advert to and weigh before deciding to summon the documents in possession of the party to the election petition. At the same time the election petition proceedings being of quasi-criminal nature the allegations in the petition must be pleaded clearly and with full particulars; especially the grounds of corrupt practices cannot be permitted to be tried on the basis of deficient pleadings or by filing applications for production of record to fish out grounds as material which is not part of the pleadings. In any case secrecy of the ballot boxes cannot be tinkered unless an iron-cast case is made out in the election petition. [403F-H]

3. Booth-capturing wholly negates the elections process and subverts the democratic set up which is the basic feature of our Constitution. Booth-capturing has now been made an offence under section 135A of the Representation of the People Act. The allegation of booth-capturing and rigging, if proved, is a corrupt practice under section 100(1)(b) and materially affects the result of the election under clause (1) (d) and also is a disqualification. Therefore, the allegation must be specifically pleaded giving material particulars. [405B-D]

4.1. The Court while exercising its power under Order XI Rule 14 and Order XVI Rule 6 CPC would also have to keep in view the rigour of sub-rule (1) of Rule 93 of the Conduct of the Election Rules, 1961, relating to production and inspection of election papers. [405D-E]

4.2. In order to maintain the secrecy of ballot papers, unless adequate material facts are on record which alone would afford adequate basis to exercise the discretion by the court, the packets or the used ballot papers with counter foils attached thereto or the packets of used ballot papers whether valid, tendered or rejected cannot be opened. Equally the packets or declarations by electors and the authorisation of their signatures shall not be opened unless ordered by the court in that behalf. The court shall not permit a roving enquiry to enable the defeated candidates/election petitioner to have access thereto to fish out the grounds. The High Court, would therefore, be circumspected to order summoning the records covered under Rule 93(1). [406F-H]

Hari Ram v. Hira Singh & Ors., [1984] 1 SCR 932 and *Ram Sewak Yadav v. Hussain Kapil Kidwal & Ors.*, [1964] 6 SCR 238, relied on.

A 5. To effectuate the objects of section 135A of the Representation of the People Act it may be open to the rule making authority to have fresh look into the mandatory language of Rule 93(1), so as to bring it in conformity with section 135A of the Act. [407A]

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1210 of 1992.

From the Judgment and Order dated 25.11.1991 of Karnataka High Court in E.P. No. 11 of 1990.

C Ms. Parmila M. Nesargi and R.C. Misra for the Appellant.

K. Madhava Reddy, B.Rajeshwar Rao, D. Prakash Reddy, Vimal Dave and M. Veerappa for the Respondents.

The Judgment of the Court was delivered by

D K. RAMASWAMY, J. Special Leave granted.

The appellant was declared on November 27, 1989 to have been elected as a member of the Karnataka Legislative Assembly from 23 Manavi Assembly Constituency from Raichur Dist. The respondent is the nearest unsuccessful candidate who called it in question in Election Petition No. 11 of 1990 in the High Court of Karnataka at Bangalore. He sought to declare that the election of the appellant as void under section

E 100(1)(a)(b) and (d) of the Representation of the People Act 43 of 1951 for short 'the Act'. One of the grounds alleged is corrupt practices stated in paragraphs IV(6) to (12) that the appellant had indulged in booth

F capturing and rigging of booths in Polling Booth Nos. 5, 6, 7, 68, 73, 74, 88, 91 to 96, 100, 102 & 103, most of which are said to be situated in Bagalwad Mandal Panchayat to which the appellant was the erstwhile Pradhan. According to the pleading, the *Modus operandi* adopted was that the

G appellant and his supporters "threatened the officials with full connivance of the police officials and that of the election agents of the petitioner, captured the booth.... Respondent No. 1 (appellant) and his supporters have prevented the voters from exercising the franchise and sent them away threatening them, thereafter seized the ballot papers from the officials and thus put the X-mark seal against the symbol of bicycle (election symbol of the appellant). They put them in the ballot boxes by using so respondent

H No. 1 (appellant) and his supporters put either thumb impression or forged

signatures on the counter foils of the Ballots, and in some counter-foils no signature was put. Thus it was alleged that the appellant secured 80 to 90 per cent of the votes polled. It was also stated that the Returning Officer lodged F.I.Rs., which were registered as case No. 371 of 1989 and 370 of 1989 in the Court of J.M.F.C., Manvi against the appellant. It was admitted in the written statement that repolling in Booth Nos. 6 & 7 was ordered which was accordingly held on November 26, 1989. The other material allegations were denied in the written statement of the appellant. As many as 4 issues have been framed. Issue No. 2 relates to the alleged capturing and rigging of the polling booths referred to hereinbefore. The respondent filed I.A. No. 5/1991 under Order XI Rule 14 read with Order XVI Rule 6 of the Code of Civil Procedure 1908 for short 'the Code' read with s. 87 of the Act.

In the I.A., the respondent sought production of the following documents by the 7th respondent, Dist. Election Officer, Deputy Commissioner, Raichur:

I. In respect of the following polling booths of 23-Manvi Assembly Constituency-Raichur-Booth Nos. 5, 68, 73, 74, 88, 91 to 96, 100, 102, 103 and 105, the following document.

(a) The packets of unused ballot papers with counter foils attached thereto.

(b) the packets of used ballot papers whether valid, tendered or rejected.

(c) the packets of the counterfoils of used ballot.

(d) the packets of the marked copy of the electoral roll; and

(e) the packets of the declaration by electors and the attestation of their signatures.

(f) report on the Election by the Returning Officer.

(g) Presiding Officers/Polling Officers diary maintained.

II. Complaint given presiding Officer/Polling Officers of polling booths Nos. 6 and 7 (only), to the CPI Manvi about corrupt practices by

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A Respondent No. 1 and his protagonists and also to Respondent No. 7.

III. Vehicle movement Register (diary) maintained by SSB wireless (mobile Unit II to SSB Raichur) on 23.11.89 and 24.11.89, from CPI Manvi.

B IV. Calling for original letter of resignation dated 6.12.89 given to Deputy Commissioner Raichur by Respondent No. 1.

C It would appear that the appellants's counsel in the High Court did not choose to file a counter but pressed for decision on the petition on merits. The High Court by its impugned order dated November 25, 1991 allowed the petition and summoned the above documents. As per the counter affidavit filed by the respondent (election petitioner) in this court, the documents were produced in the court on December 10, 1991 by the Returning Officer (7th respondent).

D The contention of the learned counsel for the appellant is that the respondent laid no factual foundation in the election petition with material particulars of the alleged capturing of the booths and rigging. Only bold allegations bereft of particulars was made. There are no pleadings at all and no case is made out for opening the ballot boxes and examining the used ballots. To fill in the gaps and to make roving enquiry to fish out grounds to set aside the election, the petition was filed to summon the documents. The High Court did not appreciate the legal implication arising from the order. This Court in catena of decisions deplicated such an attempt. In support thereof strong reliance was placed on *Hari Ram v. Hira Singh & Ors.*, [1984] 1 SCR 932, Sri K. Madhava Reddy, the learned Senior counsel for the respondent contended that apart from all other allegations the plea of capturing the booth and rigging at the poll is a serious offences punishable under section 135A of the Act, impinging upon the efficacy of democratic process of fair election and so it should be deplicated with heavy hands. It would be impossible for a candidate to plead allegations with precision in this behalf, in particular, when the election agents of the candidate (election petitioner) connived with the winning candidate and the officials or the police. Unless the election material is summoned and perused it would be difficult for the election petitioner to substantiate the plea. The previous decisions of this court are to be viewed in the light of the object of s.135A. Therefore, the High Court is justified in exercising its power under Order XI Rule 14 C.P.C. to produce the record. The order of the High Court thereof is not vitiated by an error of law. It is also

contended that the impugned order is an interlocutory one and it would be open to the respondent, if ultimately unsuccessful, to assail its validity in the appeal. A

The diverse contentions give rise to the question whether the order of the High Court is legal. Under s. 87 of the Act the High Court, subject to the provision of the Act and the Rules, if any, made thereunder, shall try the election petition as if it is the trial of the suit adopting as nearly as may be the procedure applicable to the suit under the Code. Order XI Rule 14 C.P.C. empowers discovery and inspection of the records and Rule 14 is as under : B

"Production of Documents – It shall be lawful for the court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just". C

The court, therefore, is clearly empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power relate to any matter in question in the suit provided the court shall think right that the production of the documents are necessary to decide the matter in question. The court also has been given power to deal with the documents when produced in such manner as shall appear just. Therefore, the power to order production of documents is coupled with discretion to examine the expediency, justness and the relevancy of the documents to the matter in question. These are relevant considerations which the court shall have to advert to and weigh before deciding to summoning the documents in possession of the party to the election petition. At the same time the election petition - proceedings being of quasi-criminal nature the allegations in the petition must be pleaded clearly and with full particulars, especially the grounds of corrupt practices cannot be permitted to be tried on the basis of deficient pleadings or by filing applications for production of record to fish out grounds as material which is not part of the pleadings. In any case secrecy of the ballot boxes cannot be tinkered unless an iron-cast case is made out in the election petition. Section 135A which was brought on statute with effect from H

A March 15, 1989 under Amendment Act 1 of 1989 prescribes booth capturing to be an offence and the person committing it shall be punishable with imprisonment for a term which shall not be less than six months and which may be extended to a maximum of two years and fine. Where such offence was committed by a person in the service of the Govt., he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and fine. Booth capturing has been explained in its explanation thus:

"For the purpose of this section "booth capturing" includes, among other things, all or any or the following activities, namely:—

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- (a) Seizure of a polling station or a place fixed for the poll by any person or persons, making polling authorities surrender the ballot papers or voting machines and doing of any other act which affects the orderly conduct of election;

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- (b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or their own supporters to exercise their right to vote and prevent others from voting;

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- (c) threatening any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;

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- (d) seizure of a place for counting of votes by any person or persons making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

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- (e) doing by any person in the service of Government, of all or any of the aforesaid activities of aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate."

H This is an inclusive explanation and seizure of polling station, taking possession thereof and making polling authorities to surrender the ballot papers or voting machines and doing of any other act which affects the orderly conducting of elections etc. have been enumerated. They are only

explanatory and inclusive but not exhaustive. The Parliament used words of width with generality to lug in or encompass diverse acts or omissions innovated with ingenuity to escape from clutches of law. It is common knowledge that in the recent past there have been various complaints regarding booth-capturing. The tendency to over-awe the weaker section of the society and to physically take over the polling booths meant for them is on the increase. Booth-capturing wholly negates the election process and subverts the democratic set up which is the basic features of our constitution. During the post independent era ten parliamentary elections have entrenched democratic polity in this country which cannot be permitted to be eroded by showing laxity in the matter of booth-capturing which has now been made an offence under s.135A of the Act. The allegation of booth capturing and rigging, if proved, is a corrupt practice under s.100(1)(b) and materially affects the result of the election under cl.(1)(d) and also is a disqualification. Therefore, the allegation must be specifically pleaded giving material particulars. The nature and various acts of capturing booths were enumerated in the explanation to s.135A. As stated they are only illustrative but not exhaustive. Diverse ways would be innovated to capture booths and rigging. The court while exercising its power under Order XI Rule 14 and Order XVI Rule 6 C.P.C. would also have to keep in view the rigour of sub-Rule (1) of Rule 93 of the Conduct of the Election Rules 1961 for short 'the Rules' which provides production and inspection of election papers thus:

"93(1). Production and Inspection of Election Papers while in the custody of the district election officer or, as the case may be, the returning officer -

- (a) the packets of the unused ballot papers with counterfoil attached thereto;
- (b) the packets of used ballot papers whether valid, tendered or rejected;
- (c) the packets of the counterfoils of used ballot papers;
- (d) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of s.152; and

A (e) the packets of the declarations by electors and the attestation of their signatures; shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

B (2) Subject to such conditions and to the payment of such fee as the Election Commission may direct, -

(a) all other papers relating to the election shall be open to public inspection; and

C (b) copies thereof shall on application be furnished.

(3) copies of the returns by the returning officer forwarded under rule 64, or as the case may be under clause (b) or sub-rule (1) of rule 84 shall be furnished by the returning officer, district election officer, chief electoral officer or the Election Commission on payment, of a fee of two rupees for each copy."

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This Court while considering the effect of Rule 93 held in *Hari Singh v. Hira Singh & Ors.* (supra), that perusal of this Rule clearly shows that the Legislature intended to make clear distinction between one set of documents and another. So far as counterfoils and the marked copy of the electoral rolls were concerned, there was a strict prohibition for opening these documents unless the court was fully satisfied that a cast iron case was made out for the same; whereas documents mentioned in clauses (a) and (d) of sub-rule (2) of Rule 93 could be liberally allowed to be inspected. This was also the view in *Ram Sewak Yadav v. Hussain Kamil Kidwal & Ors.*, [1964] 6 SCR 238. Thus to maintain the secrecy of ballot papers unless adequate material facts are on record which alone would afford adequate basis to exercise the discretion by the court; the packets or the used ballot papers with counterfoils attached thereto or the packets of used ballot papers whether valid, tendered or rejected cannot be opened. Equally the packets of declarations by electors and the authorisation of their signatures shall not be opened unless ordered by the court in that behalf. The court shall not permit a roving enquiry to enable the defeated candidate/election petitioner to have access thereto to fish out the grounds. The High Court, would therefore, be circumspect to order summoning that records covered under rule 93(1). To effectuate the ob-

jects of s.135A of the Act it may be open to the rule making authority to A have fresh look into the mandatory language of Rule 93(1), so as to bring it in confirmity with s.135A of the Act.

The High Court in the impugned order has held that though no factual foundation has been laid in the election petition, but since there are allegations of booth-capturing and rigging in various paragraphs of the petition it is necessary to summon and examine the documents asked for by the respondent. We do not agree with the High Court. The examination of marked ballot papers and other used ballot papers can in no way substantiate the allegations of booth-capturing. Mr Madhava Reddy, learned counsel for the respondent, contended that the marked ballot papers are required to prove that votes of dead persons and those who had left the constituency were polled. Neither the names of persons nor any other details are given in the election petition. Only bare allegations are made that votes of dead persons and those who had left the constituency had been cast. We are, therefore, of the view that the High Court grossly erred in permitting the summoning of items (a) to (c) and (e) of para I of the application. We set aside the High Court order to that extent. As regards items (d), (f) and (g) of para I and paras II and III of the application are concerned, we are not inclined to interfere with the order to the High Court. The appeal is partly allowed in the above terms with no order as to costs. B C D

G.N.

Appeal partly allowed.