

1964

January, 17

RAM SEWAK YADAV

v.

HUSSAIN KAMIL KIDWAI & ORS.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR JJ.)

Election—Challenge on the ground of improper reception, refusal and rejection of votes at the time of counting—Tribunal rejecting claim for inspection of the ballot papers—Validity—Representation of the People Act, 1951 (43 of 1951), ss. 100, 101 and 102 and conduct of Election Rules, 1961. r. 93.

The respondent challenged the election of the appellant, *inter alia*, on the ground that there had been improper reception, refusal and rejection of votes at the time of counting and that on a true count he would have received a majority of valid votes and that he was entitled to be declared duly elected. He claimed that by inspection of the ballot papers he would be able to establish his case on the aforesaid allegations and that the Tribunal was bound to grant an order for inspection, because he had tendered the sealed boxes of ballot papers in evidence, and on that account all the ballot papers were part of the record. The Tribunal in its order stated that nothing was brought to its notice which would justify granting an order for inspection. It further observed: "If in future from the facts that may be brought to the notice of the Tribunal, it appears that in the interests of justice inspection should be allowed, necessary orders allowing an inspection could always be passed". Thereupon, another application was submitted by the respondent asking for inspection but no additional materials were placed before the Tribunal and no oral evidence was led at the trial. The Tribunal rejected the application for inspection. On appeal, the High Court held that ballot papers had actually been called for from the Returning Officer and were before the Tribunal, and there was nothing in the Code of Civil Procedure which prevented the Tribunal from allowing inspection of the ballot papers in the custody of the Court. The Tribunal had therefore rejected the application for inspection without any adequate reasons.

The sole question for determination was whether the Election Tribunal erred in declining to grant an order for inspection of the ballot papers which had been, pursuant to an order in that behalf, lodged before the Tribunal in sealed boxes by the Returning Officer.

Held: By the mere production of the sealed boxes, the ballot papers did not become part of the record and they were not liable to be inspected unless the Tribunal was satisfied that such inspection was in the circumstances of the case necessary in the interests of justice.

The Returning Officer is not a party to an election petition, and an order for production of the ballot papers cannot be made under O. XI of the Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. Where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers: that power is clearly implicit in ss. 100(1)(d)(iii), 101, 102 of the Representation of the People Act, 1951 and rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from O. XI Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot papers prescribed by ss. 94 and 128(1) of the Act.

Bhim Sen v. Gopali, 22 E.L.R. 288, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1064 of 1963.

Appeal by special leave from the judgment and order dated July 23, 1963, of the Allahabad High Court (Lucknow Bench) in First Civil Appeal No. 11 of 1963.

N. C. Chatterjee and *J. P. Goyal*, for the appellant.

S. P. Sinha and *S. Shaukat Hussain*, for respondent No. 1.

January 17, 1964. The Judgment of the Court was delivered by

SHAH J.—At the general elections held in February 1962, five candidates contested the election to the House of the People from the Barabanki single-member constituency. The appellant Ram Sewak Yadav—who will be referred to as Yadav—was at the counting of votes found to have secured the highest number of votes and he was declared elected. Hussain Kamil Kidwai—hereinafter called Kidwai—who was one of the candidates at the election submitted a petition on April 6, 1962, to the Election Commission for an order declaring the election of Yadav void and for an order that he (Kidwai) be declared duly elected. The Election Tribunal, Lucknow, to which the petition was referred for trial dismissed the petition. In appeal to the High Court of Allahabad the order passed by the Election

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Tribunal was reversed and the proceedings were remanded for trial with a direction, among others, that the Tribunal do give reasonable opportunity to both the parties to inspect the ballot papers and other connected papers. With special leave, Yadav has appealed against the order of the High Court.

The principal grounds set up by Kidwai in support of his petition were—

- (1) that there had been improper reception, refusal and rejection of votes at the time of counting, and in consequence thereof the election was materially affected;
- (2) that there were discrepancies between the total number of votes mentioned in Form 16 and Form 20;
- (3) that the tendered votes were wrongly rejected by the returning officer and on that account the election was materially affected;
- (4) that at the polling station No. 29, Majgawan in Bhitauli Unit and Kursi polling station in Kursi Assembly Unit, the polling officers did not give ballot papers to the voters;
- (5) that the counting of votes of Bhitauli Assembly Unit continued till 8-30 P.M. in insufficient light notwithstanding the protest lodged by the petitioner; and
- (6) that on a true count he (Kidwai) would have received a majority of valid votes and that he was entitled to be declared duly elected.

These allegations were denied by Yadav.

At the trial before the Tribunal the parties led no oral evidence. In respect of the pleas (3), (4) and (5) the burden of proof lay upon Kidwai and as no evidence was led to substantiate the same, those pleas failed. Again in the view of the Tribunal, Kidwai could discharge the burden of proof which lay upon him to establish that there were discrepancies between the original and the certified copies of Forms Nos

16 & 20, and as the original forms were not called for by Kidwai, his second ground must also fail. Kidwai claimed that he would be able to establish his case on pleas (1) & (6) from the ballot papers, and submitted that an order for inspection of the ballot papers be made and that he be permitted to show from the ballot papers that the Returning Officer had improperly received, refused or rejected the votes, and that on a true count he would get the largest number of valid votes. The Tribunal rejected the application for inspection holding that ballot papers may be allowed to be inspected only if it is necessary in the interest of justice and to support an order for inspection facts must be brought to its notice making out a *prima facie* case disclosing that errors were committed in the reception, refusal or rejection of votes at the time of counting, and unless a *prima facie* case was made out the Tribunal would be justified in declining to make an order for inspection. The High Court however held that ballot papers had actually been called for from the Returning Officer and were before the Tribunal, that there was nothing in the Code of Civil Procedure which prevented the Tribunal from allowing inspection of the ballot papers in the custody of the Court, and that the Tribunal had rejected the application for inspection without any adequate reasons for so doing.

The only question which falls to be determined in this appeal is whether the Election Tribunal erred in declining to grant an order for inspection of the ballot papers which had been, pursuant to its order in that behalf, lodged before it in sealed boxes by the Returning Officer. In considering this question the material provisions of the Representation of the People Act, 1951, and the rules framed thereunder may first be noticed. Section 80 of the Act provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI. Section 83(1) states what the election petition shall contain. It states:

“An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;

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- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings:”

The rest of the section is not material.

Section 90(1) prescribes the procedure to be followed by the Tribunal. It states:

“Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits:”

Section 92 enumerates the powers which a Tribunal trying an election petition may exercise and the powers so enumerated are the powers which a Court under the Code of Civil Procedure, when trying a suit, may exercise in respect of discovery and inspection, enforcing attendance of witnesses, compelling production of documents, receiving evidence taken on affidavits and issuing commissions for the examination of witnesses. Rules have been framed under the Act relating to production and inspection of election papers. By rule 93 of the Conduct of Election Rules, 1961, it is provided that:

“(1) While in the custody of the returning officer—

- (a) the packets of unused ballot papers;
- (b) the packets of used ballot papers whether valid, tendered or rejected;
- (c) 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 section 152; and

- (d) 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 or tribunal.

- (2) All other papers relating to the election shall be open to public inspection subject to such conditions and to the payment of such fee, if any, as the Election Commission may direct.
- (3) Copies of the returns by the returning officer forwarded under rule 64 or as the case may be under sub-rule (3) of rule 84 shall be furnished by the chief electoral officer of the State concerned on payment of a fee of two rupees for each such copy."

The rule makes a clear distinction between ballot papers and other election papers: ballot papers may be inspected only under the order of a competent court or tribunal, but other documents are, subject to certain conditions, open to public inspection.

In this case, on an oral request made by Kidwai all the ballot papers in sealed boxes were lodged with the Election Tribunal. Kidwai claimed in the first instance that the Tribunal was bound to grant an order for inspection, because he had tendered the sealed boxes of ballot papers in evidence, and on that account all the ballot papers were part of the record. The Tribunal rightly rejected this plea, for by the mere production of the sealed boxes pursuant to its order the ballot papers did not become part of the record and they were not liable to be inspected unless the Tribunal was satisfied that such inspection was in the circumstances of the case necessary in the interests of justice.

An election petition must contain a concise statement of the material facts on which the petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a civil court is invest-

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ed under the Code of Civil Procedure when trying a suit. But the power which the civil court may exercise in the trial of suits is confined to the narrow limits of O.11, Code of Civil Procedure. Inspection of documents under O.11, Code of Civil Procedure may be ordered under rule 15, of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under rule 18(2) of other documents in the possession or power of the other party. The Returning Officer is not a party to an election petition, and an order for production of the ballot papers cannot be made under O.11 Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. That power is clearly implicit in ss. 100(1)(d)(iii), 101, 102 and rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from O.11 Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by ss. 94 and 128(1).

An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled:

- (i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and
- (ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with pre-

cision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

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It must be remembered that the rules framed under the Representation of the People Act, 1951, set up an elaborate machinery relating to the stage of counting of votes by the Returning Officer, and provide ample opportunity to the candidate who has contested the election or his agents to remain present and to keep an eye on any improper action which may be taken by the Returning Officer. Rule 53 provides for the admission of only certain classes of persons to the place fixed for counting and amongst such persons are expressly included candidates, their election agents and counting agents, who may watch the counting subject to the directions which the returning officer may give. Rule 55 deals with the procedure for scrutiny and opening of ballot boxes. The Returning Officer has to satisfy himself that "none of the ballot boxes has in fact been tampered with" and before any ballot box is opened at the counting table, the counting agents present at that table are allowed to inspect the seal affixed thereon and to satisfy themselves that it is intact. If the Returning Officer is satisfied that any ballot box has in fact been tampered with, he is prohibited from counting the ballot papers contained in that box and he has to follow the procedure prescribed in that behalf in s. 58. Clause (1) of rule 56 provides for the scrutiny and rejection of ballot papers. Clause (2) sets out detailed provisions relating to cases in which the Returning Officer shall reject a ballot paper. By cl. (3) it is provided that before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect such ballot papers. The Returning Officer has then to record on every ballot paper which he rejects the grounds of rejection. All the rejected ballot papers are required to be put in one bundle. Rule 57 deals with the counting of votes. Each ballot paper which is not rejected is counted

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as one valid vote. The Returning Officer has to make the entries in a result sheet in Form 20 after counting of the ballot papers contained in all the ballot boxes used at the polling stations. Clause (3) of rule 57 enacts an elaborate set of rules about the entries to be made in respect of the counting and scrutiny of the ballot papers. By rule 60 counting has to be continuous, and rule 63(1) provides that after the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the result. By cl. (2) of rule 63 it is provided that after such announcement is made, a candidate or his election agent may apply in writing to the Returning Officer for a re-count of all or any of the ballot papers already counted stating the grounds on which he demands such re-count. The Returning Officer must decide the application and record his reasons in support of his decision and he may allow the application in whole or in part or may reject it if it appears to him to be frivolous or unreasonable. After the total number of votes polled by each candidate has been announced, the Returning Officer must complete and sign the result sheet in Form 20 and after such form is completed no application for re-count may be entertained. Under rule 64 the declaration of the result of the election is made by declaring elected a candidate who has secured the largest number of valid votes, and the Returning Officer is required to complete and certify the return of election.

There can therefore be no doubt that at every stage in the process of scrutiny and counting of votes the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the Returning Officer, inspecting any rejected votes, and to demand a re-count. Therefore a candidate who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinized and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a re-count. It is in the light of the provisions of s. 83(1) which require a concise statement of material facts

on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a recount that the application for inspection must be considered.

In the petition filed by Kidwai the material allegations in support of the claim that there had been improper reception, refusal or rejection of votes were contained in paragraphs 6(H), 6(K) and 12. In paragraph 6(H) it was averred that numerous ballot papers cast in favour of the petitioner were wrongly included in the "bundles of the respondents." In paragraph 6(K) it was averred that due to "a deficiency in the supply of sealing ink, marks on some ballot papers, though not quite clear, yet the marks clearly indicating the intention of the voters, were wrongly rejected as invalid by the returning officer." In paragraph 12 it was averred that "the petitioner is confident that if the votes actually cast in favour of the petitioner are counted as votes of the petitioner and if the improperly accepted votes which have been counted in favour of other respondents are taken out, and if the ballot papers are correctly sorted, counted and bundled, the respondent No. 1 will be found to have polled less votes as compared to . . . petitioner. The petitioner further submits that the result of the Election has been materially affected by the improper acceptance and refusal of votes and by the incorrect sorting, counting and bundling of ballot papers." These averments in the petition for setting aside the election on the ground of improper acceptance or rejection of votes were vague, and did not comply with the statutory requirements of s. 83(1)(a). Paragraph 12 is deficient in the recital of material facts which must be deemed to be within the knowledge of the petitioner, and merely asserts that if the votes actually cast in favour of the petitioner are counted, the total number of valid votes found in his favour would exceed the number of votes received by Yadav. Having regard to this infirmity the Tribunal was justified in declining to make an order for inspection of the ballot papers unless a *prima facie* case was made out in support of the claim. The Tribunal has undoubtedly to exercise its discretion if it appears to be in the interests of justice, but the discretion has manifestly to be exercised having regard to the nature of the allegations made. The Tribunal would be justified in

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refusing an order where inspection is claimed with a view to fish out materials in support of a vague plea in the case set out in the petition. The Tribunal was conscious of the true principle: it stated in its order dated August 25, 1962, that nothing was brought to its notice which would justify granting an order for inspection prayed for by the petitioner at that stage. The Tribunal further observed:

“If in future from facts that may be brought to the notice of the Tribunal, it appears that in the interests of justice inspection should be allowed, necessary orders allowing an inspection could always be passed”.

Relying upon these observations another application was submitted by Kidwai asking for inspection but no additional materials were placed before the Tribunal. As we have already observed Kidwai led no real evidence at the trial. In his second application for inspection he merely averred that “the petitioner was almost sure” that on inspection and scrutiny of ballot papers, the allegations contained in the various paragraphs would be proved. The allegation of Kidwai that he was satisfied that on inspection and scrutiny of ballot papers he would be able to demonstrate that there had been wrong counting on account of improper reception, refusal or rejection of votes was wholly insufficient to justify a claim for inspection. He had to place before the Tribunal evidence *prima facie* indicating that an order for inspection was necessary in the interests of justice, which he failed to do.

Reliance was placed before this Court and the High Court upon the decision of this Court in *Bhim Sen v. Gopali and others*⁽¹⁾ in support of the plea that mere absence of particulars will not furnish a ground for declining to grant inspection and that a defeated candidate is entitled to establish his case that void votes had been counted and included in the votes of the successful candidate from the evidence collected from inspection of the ballot papers. In *Bhim Sen's* case⁽¹⁾ a petition was filed for setting aside an election of a candidate in a reserved seat in a double member constituency. The principal ground in support of the petition

(1) 22 E.L.R. 288.

was that it was incumbent upon the Returning Officer to go into each case of double voting in order to reject one of the two votes cast in contravention of s. 63(1) of the Representation of the People Act, and that the Returning Officer having failed to discharge his duty to reject ballot papers cast in contravention of s. 63 the petitioner *believed* that the successful candidate "*could* receive many void votes." The ballot boxes were opened and it was found that 37 void votes were counted in favour of the successful candidate and in view of the disclosure made by the inspection of the ballot papers the petitioner applied for leave to amend the petition by adding a specific averment that 37 void votes had in fact been counted in favour of the successful candidate and that the words "alleges" and "did" be substituted respectively for the words "believes" and "could". Along with the petition for leave to amend he filed a list giving the particulars of the void votes. This application was allowed by the Tribunal but the order was reversed by the High Court on the ground that the Tribunal had erred in allowing the amendment. In appeal to this Court it was held that in a case like the one before the Court, definite particulars about the number and nature of the void votes that had been counted could only be supplied after inspection of the ballot papers, and the election petition as originally presented must therefore be regarded as having furnished the material particulars, and the amendment petition must be treated merely as an application for clarification of the pleadings. We do not think that *Bhim Sen's* case⁽¹⁾ lays down any general principle that a party is entitled without making allegations of material facts in support of his plea to set aside an election to claim an order for inspection of the ballot papers and seek to supply the lacuna in his petition by showing that if all the votes are scrutinized again by the Tribunal it may appear that there had been improper reception, refusal or rejection of votes at the time of counting. To support his claim for setting aside the election the petitioner has to make precise allegations of material facts which having regard to the elaborate rules are or must be deemed to be within his knowledge. The nature of the allegations must of course depend upon the facts of each case. But if material facts are not

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stated, he cannot be permitted to make out a case by fishing out the evidence from an inspection of the ballot papers. In *Bhim Sen's* case⁽¹⁾ the Court was primarily concerned with the question whether amendment of the petition to set aside an election should be granted. It was alleged by the defeated candidate that there had been contravention of the provisions of s. 63(1) of the Act by the Returning Officer and the election was materially affected on that account. The applicant had stated that he believed that the respondents had received many votes which were void. When the ballot box was opened it was found that among the votes credited to the successful candidate were 37 votes which were void. Thereafter the applicant applied to substitute the words "alleges" for "believes" and "did" for "could". In that case the Court was not concerned to decide whether the order for inspection was properly made: the propriety of the order granting inspection does not appear to have ever been questioned. The principal question raised in the appeal was whether the amendment of the petition should, in the circumstances, be granted and the observation of the Court that "definite particulars about the number and nature of the void votes that had been counted could only be supplied after inspection of the ballot papers" was not intended to be a general statement of the law that whenever an allegation is made in a petition to set aside an election that void votes have been included in the counting of votes received by a successful candidate, definite particulars with regard to the said void votes may only be supplied after the ballot papers are inspected, and that a defeated candidate may claim inspection of the ballot papers without making any specific allegations of material facts and without disclosing a *prima facie* case in support of the claim made.

In our view the High Court was in error in interfering with the exercise of discretion by the Election Tribunal which proceeded upon sound principles. The appeal therefore is allowed and the order of the High Court is set aside. The order of the Tribunal is restored with costs in this Court and the High Court.

Appeal allowed.

⁽¹⁾ 22 E.L.R. 288