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**DHARA SINGH**

v.

**DISTRICT JUDGE, MEERUT & ANR.**

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August 18, 1967

[J. C. SHAH, S. M. SIKRI AND J. M. SHELAT, JJ.]

*Uttar Pradesh Kshettra Samitis and Zilla Parishads Adhinayam (33 of 1961), and Settlement of Election Disputes Rules, 1962, rr. 37, 39, 40 and 43, and Schedule II, Instruction 1—Returned Candidate—Defences open when election challenged—'Exhausted Paper', meaning of.*

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Election for the office of Pramukh of a block was held under the provisions of the Uttar Pradesh Kshettra Samitis and Zilla Parishads Adhinayam, 1961. On one of the ballot papers, the second respondent had a third preference recorded in his favour and a second preference in favour of another candidate who was eliminated at one stage. The Returning Officer did not count the third preference in favour of the second respondent and found at the final counting that the appellant and the second respondent had secured an equal number of votes. He therefore drew a lot as per the Instructions in Schedule II and declared the second respondent duly elected. The appellant then filed an election petition on various grounds before the District Judge who dismissed it, holding that the Returning Officer erred in not crediting the second respondent with the third preference and that if that was done there was no necessity for drawing lots at all and that the second respondent should have been declared elected as a result of the counting itself. The appellant's writ petition challenging the District Judge's order was dismissed.

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In appeal to this Court he contended that: (1) under rr. 37 and 39 the trial of an election petition takes place in two parts; first, to judge whether the returned candidate's election is void and then to decide whether any other candidate should be declared to be duly elected, that it was only in the latter case the returned candidate had the right to claim that ballot papers not already counted in his favour should be so counted, and that therefore, the District Judge had no jurisdiction to count the ballot paper containing the third preference in favour of the second respondent; and (2) the ballot paper was an 'exhausted paper' within Instruction 1(5) of Schedule II to the Rules, and that therefore the District Judge erred in law in counting it in favour of the second respondent.

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*Held:* (1) The District Judge was entitled to go into the question whether the uncounted ballot paper should have been counted in favour of the second respondent. [249G]

According to r. 37(a) read with r. 40 which generally applies the procedure in the Civil Procedure Code to the trial of election petitions under the Act, and r. 43 which deals with the findings of the trial Judge, the returned candidate can take any defence to show that he has been validly elected. He could therefore allege and prove that certain votes should have been counted in his favour. [249E—G]

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*Jabar Singh v. Genda Lal*, [1964] 6 S.C.R. 54, explained.

(2) The fact that the candidate with the second preference in the uncounted ballot paper was eliminated at one stage, did not make the ballot paper an 'exhausted paper' within the definition in the Rules. The second respondent was a continuing candidate, as per the Rules, and there was a preference recorded for him on the ballot paper and the District Judge was right in holding that it should have been counted in his favour, by the Returning Officer. [250A—C]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2232 of 1966.

Appeal by special leave from the judgment and order dated July 22, 1965 of the Allahabad High Court in Civil Misc. Writ Petition No. 75 of 1964.

*S. C. Agarwala, Anil Kumar and Shiva Pujan Singh*, for the appellants.

*B. D. Sharma*, for respondent No. 2.

The Judgment of the Court was delivered by

**Sikri, J.** This appeal by special leave is directed against the judgment of the Allahabad High Court dismissing the writ petition under Art. 226 of the Constitution filed by Dhara Singh, appellant before us. Dhara Singh had prayed for a writ, order or direction in the nature of *certiorari* quashing the judgment of the District Judge, Meerut, dismissing the election petition filed by Dhara Singh challenging the election of Pitam Singh to the office of Pramukh, Block Jani, on July 8, 1962.

Two points were raised before us: first, that the District Judge had no jurisdiction to count ballot paper No. 0045 in favour of Pitam Singh and that the returned candidate had no right to claim that ballot papers not already counted in his favour should be so counted; and secondly, that, at any rate, the District Judge erred in law in counting ballot paper No. 0045 in favour of Pitam Singh.

The relevant statutory provisions are as follows: The election is governed by the provisions of the U.P. Kshettra Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1962—hereinafter called the Rules. Rules 37, 39, 40, 43 and 44 are as follows:

“37. Relief that may be claimed by the petitioner—  
A petitioner may claim either of the following declarations—

- (a) that the election of the returned candidate is void;
- (b) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

A 39. Recrimination when seat claimed—When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

B 40. Procedure—(1) Except so far as provided by the Act or in these Rules, the procedure provided in the Civil Procedure Code, 1908, in regard to suits, shall in so far as it is not inconsistent with the Act or any provisions of these Rules and it can be made applicable, be followed in the hearing of the election petitions:

C Provided that—

(a) any two or more election petitions relating to the election of the same person may be heard together;

D (b) The Judge shall not be required to record or to have recorded the evidence in full but shall make a memorandum of the evidence sufficient in his opinion for the purpose of deciding the case;

E (c) the Judge may, at any stage of the proceedings, require the petitioner to give further cash security for the payment of the costs incurred or likely to be incurred by any respondent;

(d) for the purpose of deciding any issue the Judge shall be required to order production of or to receive only so much evidence, oral or documentary, as he considers necessary;

F (e) no appeal or revision shall lie on a question of fact or law against any decision of the Judge;

(f) the Judge may review his decision on any point on an application being made within fifteen days from the date of the decision, by any person considering himself aggrieved thereby;

(g) no witness or other person shall be required to state for whom he has voted at an election.

G (2) The provisions of the Indian Evidence Act, 1872 (Act No. 1 of 1872) shall be deemed to apply in all respects to the trial of an election petition.

H (3) Before the hearing of an election petition commences or before the final hearing takes place, the petition may be withdrawn by the petitioner or the petitioners, as the case may be, by making an application to the Judge requesting for the withdrawal of the petition

and upon the making of such an application the petition shall stand withdrawn and no further action shall be taken for its trial.

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43. Findings of the Judge—(1) If the Judge after making such inquiry as he deems fit finds in respect of any person whose election is called in question by a petition, that his election was valid he shall dismiss the petition as against such person and award costs at his discretion.

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(2) If the Judge finds that the election of any person was invalid he shall either—

(a) declare a casual vacancy to have been created, or

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(b) declare another candidate to have been duly elected and in either case may award costs at his discretion.

44. Grounds on which a candidate other than the returned candidate may be declared to have been elected—If any person who has lodged an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is of the opinion that in fact the petitioner or such other candidate received a majority of the valid votes, the Judge shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate as the case may be, to have been duly elected:

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Provided that the petitioner or such other candidate shall not be declared to be duly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.”

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Relevant part of Schedule II to the Rules is as follows:

“Schedule II—Instructions for the Determination of Result.

1. In this Schedule—

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(1) the expression ‘continuing candidate’ means any candidate not elected and not excluded from the poll at any given time;

(2) the expression ‘first preference’ means the number 1 set opposite the name of any candidate’ the expression ‘second preference’ similarly means the number 2, the expression ‘third preference’ the number 3 and so on;

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**A** (3) the expression 'next available preference' means the second or subsequent preference recorded in consecutive numerical order for a continuing candidate, preferences for candidates already excluded being ignored;

**B** (4) the expression 'unexhausted paper' means a ballot paper on which a further preference is recorded for a continuing candidate;

(5) the expression 'exhausted paper' means a ballot paper on which no further preference is recorded for a continuing candidate; provided that a paper shall be deemed to be exhausted in any case in which—

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- (a) the names of two or more candidates whether continuing or not are marked with the same figure, and are next in order of preference; or
  - (b) the name of the candidate next in order of preference whether continuing or not, is marked by a number not following consecutively after some other number on the ballot paper or by two or more numbers."

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The relevant facts are that election for the office of Pramukh of Block Jani was held on July 8, 1962, under the provisions of Uttar Pradesh Kshetra Samitis and Zila Parishads Adhiniyam, 1961 (U.P. Act No. XXXIII of 1961)—hereinafter referred to as the Act. At the said election following six persons were the candidates:

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1. Shri Dhara Singh
  2. Shri Pitam Singh
  3. Shri Mahabir Singh
  4. Shri Sham Singh
  5. Shri Kalloo Singh
  6. Shri Budh Singh
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After following the instructions contained in Schedule II, the Returning Officer found that Dhara Singh and Pitam Singh had obtained equal number of votes and chose to draw a lot, and declared Pitam Singh as the elected candidate. Dhara Singh thereupon filed an election petition under the Act and the Rules raising a number of points. The District Judge, who heard the election petition, held that the Returning Officer made a mistake in not crediting Pitam Singh with the third preference in ballot paper No. 0045. The District Judge held:

**H** "The only point that has to be seen is whether this third preference should have been credited to Pitam Singh or not. The definition of the expression 'next

available preference' has already been given above. Under Rule 6(b) the sub parcels are to be arranged according to the next available preferences. The ballot paper does not become exhausted as long as there is a preference recorded in it for a continuing candidate. Pitam Singh was a continuing candidate when the ballot papers cast in favour of Shiam Singh were to be arranged in sub parcels containing the exhausted and unexhausted ballot papers. The learned counsel for the petitioner has contended before me that the third preference could not have been credited in favour of Pitam Singh inasmuch as the second preference in favour of Mahabira had not been utilised as he was the first to be excluded on the basis of the first preference votes and his contention is that the third preference cannot be taken into consideration. This contention to my mind has no force. Under the scheme of the counting as provided in the instructions a voter could have given his preference in the present case upto six preferences as there were six candidates who were seeking election. To my mind as long as there is any preference in a ballot paper which has not been exhausted according to the rules that preference has to be taken into consideration and to be credited to the continuing candidate in whose favour the preference is. Consequently, to my mind the Presiding Officer was in error when he did not count the preference in favour of Pitam Singh recorded in the ballot paper No. 0045. Crediting this preference to Pitam Singh, we find that the total number of votes which he obtained comes to 20 as against the total number of 19 in favour of Dhara Singh on the third counting. Thus, in this case to my mind there was no necessity for drawing the lots and Pitam Singh should have been declared as elected as a result of counting itself as there were only two continuing candidates and out of these continuing candidates Pitam Singh had secured the larger number of votes."

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It is not necessary to set out the findings on other points which are no longer in issue before us.

Dhara Singh then filed a writ petition under Art. 226 of the Constitution challenging the declaration given by the Returning Officer and the order of the District Judge, referred to above. The High Court held that the District Judge was correct in allotting ballot paper No. 0045 to Pitam Singh. The High Court also repelled the contention that the District Judge was not entitled to take into account ballot paper No. 0045, and to award it to Pitam Singh, because Pitam Singh had not filed any recrimination in the case in order to claim the benefit of the ballot paper. The

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**A** High Court was of the view that this was a case of rebuttal and not recrimination, as held in the Full Bench decision of the Allahabad High Court in *Nathu Ram v. R. P. Dikshit*<sup>(1)</sup>. According to it the decision of this Court in *Jabar Singh v. Genda Lal*<sup>(2)</sup> was not applicable to the facts of the case.

**B** It has been strongly contended before us by the learned counsel for the appellant that the decision of this Court in *Jabar Singh v. Genda Lal*<sup>(2)</sup> governs the interpretation of the Rules. In that case, this Court was concerned with the interpretation of ss. 97, 100(1)(d) and 101(a) of the Representation of the People Act (43 of 1951) and r. 57(1) of the Conduct of Election Rules, 1961. We find that the terms of those sections are different and, in particular, s. 100(1)(d) is materially different because it uses the words “that the result of the election, in so far as it concerns a returned candidate, has been materially affected” which do not occur in rr. 37 and 39. It was these words which were in part relied on to limit the scope of the enquiry in cases arising under the Representation of the People Act. But the language of the rules here is simple and quite different. It would be noticed that r. 37(a) is wide and no rule prescribes the grounds on which the election of the returned candidate is to be declared void. In this case we are not concerned with r. 37(b) or r. 39. But the learned counsel for the appellant contends that reading rr. 37 and 39 together it is clear that the trial of the election petition takes place in two compartments; first, to judge whether the returned candidate’s election is void and, then, to decide whether any other candidate should be declared to be duly elected. He says that it is only in the latter case that any recrimination can be made under r. 39. We are unable to agree with this contention. It seems to us that according to r. 37(a), read with r. 40, which except for certain sections, applies the procedure in the Civil Procedure Code, the returned candidate can take any defence to show that he has been validly elected. If the petitioner in the election petition can allege and prove that some votes cast in favour of the returned candidate should be rejected, there is no reason why the returned candidate should not be able to allege and prove that certain votes should have been counted in his favour. Rule 43 which deals with the findings of the Judge also shows that the suggested limitation on his jurisdiction does not exist.

**E** It is not necessary to decide in this case whether *Nathu Ram v. R. P. Dikshit*<sup>(1)</sup> was correctly decided or not. Accordingly, we hold that the District Judge was entitled to go into the question whether ballot paper No. 0045 should have been counted in favour of Pitam Singh or not.

**G** Coming to the second point, the learned counsel contends that ballot paper No. 0045 was an “exhausted paper” within the definition quoted above. The contention seems to be contrary

(1) A.I.R. 1965 All, 454.

(2) [1964] 6 S.C.R. 54.

to the definition because the definition expressly says that a ballot paper on which no further preference is recorded for a continuing candidate shall be an exhausted paper. On the facts, of this case, Pitam Singh was a continuing candidate and there was a preference recorded for him on ballot paper No. 0045. But the learned counsel says that this was a third preference and the second preference on this paper was for Mahabir Singh who was eliminated at one stage. Now, the fact that Mahabir Singh was eliminated does not make the ballot paper an exhausted paper within the definition given in the Rules. We agree with the conclusion of the District Judge on this point.

In the result the appeals fails and is dismissed. Under the circumstances there will be no order as to costs.

V.P.S.

*Appeal dismissed.*