

## ANIRUDH PRASAD

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v.

## RAJESHWARI SAROJ DAS &amp; OTHERS

April 20, 1976

[Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND A. C. GUPTA, JJ.]

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*Election—Representation of People Act, 1951—Sec. 97—Recriminatory petition—Nature and scope of—Conduct of Election Rules 1961—Rule 73(2)(d)—Ballot papers containing identification marks.*

19 persons contested biennial elections to the Bihar Legislative Council for filling 11 vacancies. The appellant and respondents No. 1 to 10 were declared as the successful candidates. Election was held by the system of proportional representation by a single transferable vote. The votes were counted in accordance with the procedure prescribed in para 7 of the Conduct of Election Rules 1961, read with the relevant provisions of the Representation of the People Act, 1951. The Returning Officer rejected 9 ballot papers and accepted 306. The Returning Officer by application of rule 6 fixed the minimum quota of votes sufficient to secure the return of a candidate at 2551. In first three rounds respondents 1 to 7 were declared elected. None of the candidates could be declared successful in the fourth round. In the fifth and 6th rounds respondents 8 and 9 were declared elected. In the seventh round, respondent No. 18 (*Election Petitioner*) was eliminated and in the last round, i.e. the 8th round, the appellant and respondent No. 10 were declared as the successful candidates.

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Respondent No. 18 filed an Election Petition in the High Court challenging the election of the successful candidates on the ground that the rejection of 3 ballot papers having first preference votes in its favour, the rejection of 2 ballot papers having first preference votes in favour of respondent No. 9 the illegal acceptance of one ballot paper having first preference vote in favour of respondent No. 8 and wrong counting of votes in the fourth round of counting had materially affected the result of the election. The Returning Officer had rejected one ballot paper on the ground that it contained merely a horizontal line, another on the ground that it had a faint mark and the third on the ground that the voter had scored through the fourth preference vote in favour of one candidate and had assigned it to another. Respondent No. 8 and some other respondents did not enter appearance in the High Court. Respondent No. 9 filed a written statement as well as recriminatory petition. He contended that the Returning Officer had wrongly rejected 2 ballot papers which contained first preference votes in his favour and one other ballot paper having a second preference vote in his favour. The appellant who was respondent No. 10 in the High Court contested the petition. The High Court with the consent of parties decided as preliminary issue whether the election petition was maintainable and whether the Returning Officer wrongly and illegally rejected the ballot papers and, if so, whether the result of the election had been materially affected. The High Court also held that the three disputed ballot papers did not contain any identification marks within the meaning of rule 73(2)(d) of Conduct of Election Rules, 1961 and, therefore, the Returning Officer was in error in rejecting those ballot papers as invalid. It was not disputed before the High Court that if the 3 ballot papers that were wrongly rejected were not eliminated respondent No. 18 would have been declared elected. Consequently, the High Court recorded the finding that the election of the Election Petitioner was materially affected by the rejection of the 3 ballot papers. The High Court also held that as a result of the illegal rejection of the three votes respondent No. 9 was required to trial behind until the sixth round and that but for the wrongful rejection respondent No. 9 would have been declared elected in the very first round. Special leave Petition filed by the Election Petitioner in this Court against the findings of the High Court on issues No. 1, 2 and 3 was dismissed.

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A Thereafter, the High Court proceeded with the election petition and tried the remaining issues. The votes were recounted by an Officer appointed by the court in the presence of parties and their counsel. A fair copy of the result sheet was thereafter prepared signed by all concerned in token of its correctness. The High Court consequently allowed the election petition, declared the election petitioner as elected and set aside the election of the appellant who had secured the smallest number of votes on recounting.

B It was contended by the appellants before this Court;

Since respondent No. 8 had not filed the recriminatory petition he had disintended himself from claiming any benefit under the ballot papers which were initially rejected by the Returning Officer but which were accepted by the High Court as valid.

Dismissing the appeal,

C HELD: Section 97 of the Representation of People Act, 1951 provides that when in election petition a declaration is sought that any candidate other than the returned candidate has been duly elected 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. The proviso to the said section provides that the returned candidate or such other party shall not be entitled to give such evidence unless he has within 40 days from the date of commencement of the trial given notice to the High Court of his intention to do so. Section 97 applies if a composite claim challenging the election of the returned candidate and for a declaration that some other candidate should be declared elected is made. The returned candidate in that case recriminates against the person in whose favour the declaration is claimed. The recriminatory plea of defence in one's own election is in truth and substance not so much a plea though that be its ultimate purpose and effect, as a plea of attack by which a successful candidate assumes the role of counter-petitioner and contends that the election of the candidate in whose favour the declaration is claimed would have been void if he had been the returned candidate and a petition had been presented calling his election in question. Since the election petitioner had asked for a composite relief the conditions necessary for attracting section 97 were undoubtedly present. The contention of the appellant was, however, altogether of a different kind. It was argued that respondent No. 8 cannot take advantage of the first preference votes cast in his favour without a recriminatory petition. This contention is outside the scope of s. 97, because in claiming the first preference vote respondent No. 8 is not in any manner challenging the validity of any of the votes cast and counted in favour of the election petitioner or any step taken by or on behalf of the election petitioner in furtherance of his election. Respondent No. 8 made no contention and wanted to make none in regard to the claim of the election petitioner that he should be declared elected. There was no conflict of interest between the election petitioner and respondent No. 8 on the question whether the particular vote should be counted in favour of the latter. If the 3 ballot papers in question were valid they must be treated as valid for all purposes and, therefore, votes cast in favour of respondent No. 8 under those ballot papers must be counted in his favour.

[97 C, 98 A, D-F, 99-D]

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

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 714 of 1975.

From the Judgment and Order dated 18th April 1975 of the Patna High Court in Election Petition No. 2/74.

H *Prämód Swarup and K. K. Chaudhury*; for the Appellants.

*K. P. Verma, B. B. Sinha and S. C. Patel*; for Respondents Nos. 8 and 9.

*J. P. Goyal and M. P. Mukerjee*; for Respondent No. 18. A

*Shree Pal Singh*; for Respondents Nos. 10, 12 and 17.

The Judgment of the Court was delivered by—

CHANDRACHUD, J.—Nineteen persons contested the biennial elections to the Bihar Legislative Council which were held on March 29, 1974 for filling 11 vacancies. The appellant, Anirudh Prasad, and respondents 1 to 10 were declared as the successful candidates. B

The elections having been held by the system of proportional representation by a single transferable vote, votes were counted in accordance with the procedure prescribed in Part VII of the Conduct of Election Rules, 1961 (hereinafter called the Rules), read with the relevant provisions of the Representation of the People Act, 1951 (hereinafter called the Act). The Secretary of the Bihar Legislative Assembly who acted as the Returning Officer rejected 9 ballot papers and accepted the remaining 306 ballot papers as valid. Considering that 11 seats were to be filled on the basis of votes cast in 306 ballot papers, the Returning Officer, by the application of Rule 76, fixed the minimum quota of votes sufficient to secure the return of a candidate at 2551. The technical arithmetical formulae were applied during counting from time to time, votes were likewise added and subtracted from one round to another of counting and the result of the none-too-simple procedure was entered by the Returning Officer in a form prescribed by the rules for that purpose. C

In the first round of counting, respondents 1 to 5 were declared elected as they secured more votes than the fixed quota of 2551. In the second and third rounds of counting, respondent 6 (since deceased) and respondent 7 were declared successful on the basis of transfer of surplus votes. None of the candidates could be declared successful in the fourth round but in the fifth round, respondents 8 and 9 and in the sixth round, respondent 9, were declared elected. In the seventh round of counting respondent 18 (Indra Kumar) was eliminated and in the eighth round, which was the last round of counting, the appellant Anirudh Prasad and respondent 10 were declared as the successful candidates. D

Respondent 18 filed an election petition in the Patna High Court challenging the election of the successful candidates on the ground that the rejection of 3 ballot papers having First Preference votes in his favour, the rejection of 2 ballot papers having First Preference votes in favour of respondent 9, the illegal acceptance of one ballot paper having a First Preference vote in favour of respondent 8 and a wrong counting of votes in the fourth round of counting had materially affected the result of the election. Out of the 3 ballot papers which according to respondent 18 were wrongly rejected by the Returning Officer, one was rejected on the ground that it contained a small horizontal line, another on the ground that it contained a faint mark and the third on the ground that the elector had scored through the Fourth Preference vote cast in favour of one candidate and had assigned it to E

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A another. The rejection of these 3 ballot papers which contained First Preference votes in favour of respondent 18 was partly based on the view that while casting their votes, the voters connected with the particular ballot papers had resorted to devices by which their identity could be established. Respondent 18 prayed that the election of successful candidates or of the candidate receiving the smallest number of votes on recount be declared as void and that he himself be declared as duly elected. The rest of the 18 contestants were pleaded as respondents to the Election Petition.

B Respondents 1 to 6, 8 and 11 to 17 did not enter appearance in the High Court. Respondents 7 and 10 appeared in the election petition and filed their written statements. But they took no further part in the proceedings.

C Respondent 9, Nathuni Ram, filed a written statement as well as a recriminatory petition. He contended that the Returning Officer had wrongly rejected 2 ballot papers which contained First Preference votes in his favour and one other ballot paper having a Second Preference vote in his favour. According to respondent 9, even if the grievance made by respondent 18 in the election petition was to be accepted as valid, that would not affect his election as, in any view of the matter, he would be entitled to additional votes which were wrongly rejected by the Returning Officer.

D The appellant Anirudh Prasad, who was respondent 10 in the High Court, appeared in the case and filed his written statement. The High Court accepted his written statement subject to the condition that he paid costs of respondent 18 who had filed the election petition and of respondent 9 who was the sole contesting respondent. This condition was imposed by the High Court on the ground that the appellant had filed his written statement much beyond the time fixed for that purpose. The appellant did not pay the costs as directed by the High Court and since the payment of costs was a condition precedent to the acceptance of his written statement, the High Court passed orders declining to take the written statement on record. The High Court, however, E allowed the appellant's counsel to cross-examine the witnesses examined by the election-petitioner and by respondent 9, limiting the cross-examination to the statements made by the witnesses in their examination-in-chief. The appellant was further permitted by the High Court F to lead evidence by way of rebuttal and to submit arguments on the evidence in the case.

G On the basis of the averments contained in the election petition filed by respondent 18 and those contained in the written statement and the recriminatory petition filed by respondent 9, the High Court framed 5 issues for determination :

"1. Is the election petition, as framed, maintainable ?

H 2. Did the Returning Officer at the time of counting of votes illegally and wrongly reject three, with first preference, votes validly polled in favour of the petitioner ? If so, has the result of election been materially affected on that account?

3. Did the Returning Officer at the time of counting of votes illegally and wrongly reject two votes with first preference and one vote with second preference validly polled in favour of respondent No. 9? If so, has the result of the election been materially affected thereby?

4. Whether the petitioner has received majority of the valid votes and is entitled to be declared elected, as claimed?

5. To what relief, if any, is the petitioner entitled in this election petition?"

Since the decision of issues 4 and 5 depended upon the answers to issues 1 to 3, the High Court, by consent of the contesting parties, took up issues 1 to 3 for consideration in the first instance. By its judgment dated February 28, 1975 it rejected the contention that the election petition was defective and held on issue No. 1 that the petition was maintainable. It held on issue No. 2 that the 3 disputed ballot papers (Exhibits 4, 4/a and 4/b) did not contain any identifying marks within the meaning of rule 73(2)(d) and therefore the Returning Officer was in error in rejecting those ballot papers as invalid. It was not disputed before the High Court at that stage that the election petitioner (respondent 18) was eliminated in the seventh round of counting because of his failure to receive the required quota of 2551 votes and that if the 3 First Preference votes contained in Exhibits 4, 4/a and 4/b had been counted in his favour, he would have been declared as duly elected. Consequently, the High Court recorded the finding that the election of the election-petitioner was materially affected by the rejection of the 3 ballot papers. On the 3rd issue, the question for consideration of the High Court was whether 3 other ballot papers (Exhibits B, B/1 and B/2) were rightly rejected by the Returning Officer. The High Court held that the Returning Officer had rejected the 3 ballot papers wrongly and that the votes cast therein in favour of respondent 9 had to be taken into account. The wrong rejection of these 3 ballot papers had materially affected the result of the election *qua* respondent 9 in the sense that if the votes cast in his favour in the 3 ballot papers were taken into account, he would have been declared elected in the very first round of counting and would not have been required to trail behind until the sixth round. The High Court recorded its finding on issue No. 3 accordingly.

The appellant filed a petition for special leave in this Court against the aforesaid judgment of the High Court dated February 28, 1975 but that petition was rejected.

Thereafter the High Court proceeded with the election petition and tried the remaining issues, 4 and 5. By consent of parties it appointed Shri R. N. Thacore, Ex-Deputy Secretary of the Bihar Legislative Council, to recount the votes on the basis of the findings recorded on issues Nos. 2 and 3. Shri Thacore was expertly conversant with the complicated mechanism of counting votes under the system of proportional representation by single transferable vote. Learned counsel who appeared in the High Court for the election petitioner and for respondent 10 would appear to have been familiar with the particular

**A** procedure and they agreed to assist Shri Thacore. Respondent 9 agreed that counsel for the election petitioner may deputise for him. Accordingly, the votes were recounted by Shri Thacore in the presence of the parties and their counsel. A fair copy of the result sheet was thereafter prepared by Shri Thacore in the presence of counsel for the parties who affixed their signature thereon in token of its correctness.

**B** The Returning Officer had declared the result of the election on the basis that only 306 ballot papers were valid. The High Court by its judgment of February 28, 1975 held that six ballot papers were wrongly rejected by the Returning Officer with the result that the number of valid ballot papers rose from 306 to 312. The minimum quota consequently rose from 2551 to 2601. On the basis of the recounting of votes done by Shri Thacore, the High Court allowed the election petition and declared respondents 1 to 10 and respondent 18 (the election petitioner) as the successful candidates. The appellant, Anirudh Prasad, who was respondent 10 in the High Court and who had been declared elected by the Returning Officer was found, on a recount of the votes, to have secured 2500 votes as against 2579 votes secured by respondent 18. The High Court set aside the election of the appellant who had secured the smallest number of votes. This appeal by special leave is directed against the judgment of the High Court dated April 18, 1975.

**C** After the preliminary finding of the High Court that the six ballot papers were wrongly rejected by the Returning Officer and that those ballot papers were valid, the appellant made an application in the High Court that since respondent 8, Janardan Prasad Varma, had not filed any recrimination, the 1st preference vote cast in his favour under the ballot paper Ex. B/2 and the 7th preference cast in his favour under Exhibits B and B/1 should not be counted in his favour. By an order dated April 14, 1975 the High Court rejected that application and directed that all the votes contained in and cast under the ballot papers which were held to be valid should be counted in favour of the candidates concerned according to the relevant rules.

**D** Mr. Pramod Swaroop, who appears on behalf of the appellant, made a fervent plea that since respondent 8 had not filed a recriminatory petition, he had disentitled himself from claiming any benefit under the ballot papers which were initially rejected by the Returning Officer but which were accepted by the High Court as valid. It may be recalled that the election-petitioner had asked for the scrutiny and acceptance of three ballot papers only (Ex. 4, 4/a and 4/b), wherein he had secured 1st preference votes. Respondent 9 filed a recrimination under section 97 of the Act asking that two other ballot papers, Exhibits B and B/1, wherein he had secured 1st preference votes and the ballot paper, Ex. B/2, wherein he had secured a 2nd preference vote should be re-scrutinised and accepted. These six ballot papers which were rejected by the Returning Officer were accepted by the High Court as valid. Apart from the emphasis on the failure of respondent 8 to file a recrimination, the grievance of the appellant is this : Ex. B/2 which contains a 1st preference vote for respondent

8 was not even considered for counting the votes secured by respondent 9 who had filed his recrimination and at whose instance Ex. B/2 was held valid; because, in order to get elected it was enough for respondent 9 to rely on the 1st preference votes cast in his favour under Exhibits B and B/1. The second preference vote cast in his favour under Ex. B/2 was superfluous for his election. According to the appellants, it is anomalous that respondent 8 who had taken no part in the proceedings before the High Court should get the benefit of the 1st preference vote cast in his favour under Ex. B/2 when he asked for no such relief, especially when respondent 9 at whose instance the particular ballot paper was treated as valid did not require for his election the addition of the 2nd preference vote cast in his favour thereunder.

This argument is founded on the provisions contained in section 97 of the Act, which has been the subject-matter of several decisions of this Court. That section provides :

“97. Recrimination when seat claimed.—(1) 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.

Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and the further security referred to in section 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.”

An election-petitioner may either ask for the relief under section 100 of the Act that the election of the returned candidate be declared void or he may ask for the additional relief under section 101 that he or any other candidate may be declared as elected. It is only if such a composite claim is made that section 97 is attracted. The returned candidate can then recriminate against the person in whose favour a declaration is claimed under section 101. The recriminatory plea is in truth and substance not so much a plea in defence of one's own election, though that be its ultimate purpose and effect, as a plea of attack by which the successful candidate assumes the role of a counter-petitioner and contends that the election of the candidate in whose favour the declaration is claimed would have been void if he had been the returned candidate and a petition had been presented calling his election in question. Since respondent 18 who filed the election petition had asked for a composite relief that the election of the successful candidates or of that candidate who was found to have secured the

- A** least number of votes should be set aside and that he himself should be declared as a successful candidate, the conditions necessary for attracting section 97 were undoubtedly present. But that does not mean that every contention made by any of the successful candidates or other parties is barred unless a recriminatory petition is filed. The plea of recrimination goes under section 97 to the claim of the election-petitioner that he or any person other than the successful candidate
- B** may be declared elected, the plea of the recriminator being that the election of the person in whose favour the declaration is claimed would have been void if he had been the returned candidate and a petition were filed to challenge his election. For example, any of the successful candidates can contend by a recriminatory petition that the election of the election-petitioner, were he successful, suffered from defects by reason of which it would be void. Such a challenge can be made only
- C** by a recriminatory petition and unless such a petition is filed in compliance with section 97, it is not open to the successful candidate or any other party to challenge the additional claim made by the election petitioner.

- D** The contention of the appellant before us is altogether of a different kind. It is argued that respondent 8 cannot take advantage of the 1st preference vote cast in his favour under Ex. B/2 without a recriminatory petition. This contention is outside the scope of section 97 because, in claiming the 1st preference vote under Ex. B/2, respondent 8 is not in any manner challenging the validity of any of the votes cast and counted in favour of the election-petitioner or any step taken by or on behalf of the election-petitioner in furtherance of his election. In fact, respondent 8 made no contention and wanted to make none in regard to the claim of the election-petitioner that he should be declared elected. The election involved a contest to 11 seats and the claim of respondent 8 to the 1st preference vote in Ex. B/2 was not in derogation of any of the rights of the election-petitioner who claimed the composite relief. The very fact that the election-petitioner succeeded in the High Court despite the counting of the 1st preference vote in favour of respondent 8 shows that there was no conflict of interest between the election-petitioner and respondent 8 on the question whether the particular vote should be counted in favour of the latter. Respondent 8's claim to the 1st preference vote contained in Ex. B/2 did not have the effect, directly or indirectly, of invalidating any of the votes counted originally in favour of the election-petitioner. It may bear repetition that respondent 8, like the appellant, was one of the successful candidates and it is respondent 18 who was declared unsuccessful in the election, who filed the election petition. The appellant's contention comes to this that one successful candidate must file a recrimination against another successful candidate if an unsuccessful candidate files an election-petition asking for a composite relief. We see no justification for this contention on the language and intendment of section 97.

- H** It is also necessary to bear in mind that the election to the Legislative Council was held by the system of proportional representation by a single transferable vote. Nineteen candidates contested

the election for 11 seats. Rules 76 to 85 of the Conduct of Election Rules, 1961 provide an elaborate procedure for counting of votes when more than one seat is to be filled. By rule 76, every valid ballot paper is deemed to be of the value of 100 and putting it simply, the quota sufficient to secure the return of a candidate is determined by multiplying the number of valid ballot papers by 100, dividing the total by one more than the number of vacancies to be filled and adding one to the quotient. Initially, 306 ballot papers were accepted as valid by the Returning Officer. The minimum quota was accordingly fixed at 2551 :  $(306 \times 100 = 30600 \div 11 + 1 = 2550 + 1 = 2551)$ . The High Court held that 6 ballot papers were wrongly rejected by the Returning Officer as a result of which the number of valid ballot papers rose to 312. The minimum quota correspondingly rose to 2601 :  $(312 \times 100 = 31200 \div 12 = 2600 + 1 = 2601)$ . The minimum quota which is fixed primarily on the basis of valid ballot papers is the key-point of counting and transfer of surplus votes. 'Surplus votes' means votes in excess of the minimum quota and it is such surplus votes that are transferred to other candidates left in the field. The various rules and their working as illustrated in the Schedule to the Rules show that the system of proportional representation by a single transferable vote involves a progressive inter-linked method of counting votes. It is therefore difficult to accept the appellant's argument that a ballot paper may be treated as valid for fixation of the minimum quota but should be ruled out for purposes of counting the votes cast therein in favour of any candidate. If the ballot paper Ex. B/2 is valid, it must be treated as valid for all purposes and therefore the 1st preference vote contained therein in favour of respondent 8 must be counted in his favour. This would be so especially when the process can involve no recrimination between respondent 8 and the appellant, both of whom were successful candidates. Nor indeed does such counting involve any recrimination between respondent 8 and the election-petitioner who, as stated earlier, was declared successful by the High Court despite the counting of the 1st preference vote in favour of respondent 8.

On the facts of the case it is clear that originally, respondent 8 had secured 2611 votes as against 2500 votes secured by the appellant. That was without counting the 1st preference vote cast in favour of respondent 8 under Ex. B/2. On that footing also the appellant cannot claim priority over respondent 8 and his grievance that he, instead of respondent 8, should be declared elected is without any substance.

Great reliance was placed by counsel for the appellant on the decision of this Court in *Jabar Singh v. Genda Lal*<sup>(1)</sup>, in support of the contention that respondent 8 cannot claim the benefit of the 1st preference vote cast in his favour under Ex. B/2 without a recriminatory petition.

That was a typical case in which the contention sought to be raised by the successful candidate could not have been raised without a recriminatory petition under section 97 of the Act. The respondent

(1) [1964] 6 S. C. R. 54.

- A** therein challenged the election of the appellant on the ground of improper reception of votes in favour of the appellant and improper rejection of votes in regard to himself. The respondent prayed that the appellant's election should be declared void and he himself should be declared to have been duly elected. The appellant urged before the tribunal that there had been improper rejection of the votes and improper acceptance of the votes in favour of this respondent.
- B** The respondent objected to this course and that objection was upheld by this Court on the ground that in the absence of recriminations it was not open to the appellant to take up the particular plea. As we have shown earlier respondent 8 did not contend that there was any improper reception of votes in favour of the election petitioner or for the matter of that in favour of any other candidate. There was therefore no question of his filing a recrimination under section 97.
- C** Secondly, the voting in that case was not by the system of proportional representation by a single transferable vote and the complications which arise by reason of the peculiar system of counting which is required to be adopted in the instant case had no place in the scheme of counting in that case. In view of this position it seems unnecessary to discuss the other decisions cited on behalf of the appellant which are reported in *Dhara Singh v. District Judge, Meerut & Anr.*(<sup>1</sup>); *P. Malaichami v. M. Andi Ambalam & Ors.*(<sup>2</sup>) and the decision in Civil Appeal No. 83 of 1975 decided July 31, 1975. These decisions are distinguishable for the same reason for which *Jabar Singh's* case has no application to the facts of the instant case.
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For these reasons we dismiss the appeal and confirm the judgment of the High Court but there will be no order as to costs.

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*Appeal dismissed.*

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(1) [1968] 1 S. C. R. 213.

(2) [1973] 3 S. C. R. 1616.