

WILFRED D'SOUZA

v.

FRANCIS MENINO JESUS FERRAO

October 26, 1976

B [H. R. KHANNA AND JASWANT SINGH, JJ.]

Conduct of Election Rules, 1961, rr. 42 and 56(6)—Tendered ballot paper, what is and use of.

C Rule 42, Conduct of Election Rules, 1961, shows that the occasion for marking tendered ballot paper would arise if a person representing himself to be a particular elector applies for a ballot paper after another person has already voted as such elector. The person so applying, would then be questioned by the presiding officer regarding his identity, and in case he gives a satisfactory answer, he would be supplied a tendered ballot paper which would then be marked by such person. He has to sign his name against the entry relating to him in a list in Form 15, prescribed under the Rules. The tendered ballot paper shall be the same as other ballot papers used at the polling, except that it would be serially the last in the bundle of ballot papers issued for use at the polling station. The words 'tendered ballot paper' have to be endorsed on the back of the tendered ballot paper and its counterfoil by the presiding officer in his own hand and has to be signed by him. The tendered ballot paper is not to be put in the ballot box, but is to be kept in a separate cover. According to r. 56(6) no cover containing tendered ballot papers shall be opened or counted at the time of the counting of the votes. But even though the tendered ballot papers are thus excluded at the time of counting they can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided, (1) the person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number; (2) it was such genuine voter who marked the tendered ballot paper; and (3) the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that difference being wiped out and the result of the election being materially affected. In such a case, the Court would exclude the vote initially cast from the number of votes of the candidate in whose favour it was cast; and take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked.

F In the present case, the appellant and respondent were two candidates for election to a Legislative Assembly, and the respondent was declared elected having secured just two votes more than the appellant. The appellant challenged the respondent's election, and contended that there were ten tendered votes and that they should be counted, after removing the votes initially and improperly cast.

G At the trial of the election petition, the appellant examined on his behalf two witnesses, who had, according to the appellant, marked tendered ballot papers at the time of the polling. The trial court however, took the view that the evidence of the two witnesses did not relate to tendered ballot papers but related to ordinary ballot papers, and dismissed the election petition.

Allowing the appeal to this Court, and remanding the case to the trial Court,

H HELD: (1) The evidence of the two witnesses of the appellant is sufficient to prove that their evidence relates to tendered ballot papers. Even though some of the formalities which were required to be observed in connection with the tendered ballot papers were not complied with by the presiding officer, as for example, he did not note on the back of the counterfoil of the tendered ballot paper that it related to tendered ballot paper, the parties cannot

be made to suffer for such an omission. The evidence of the two witnesses cannot also be discarded on the ground that they have not deposed about their having affixed two thumb impression instead of one. [948 F-G]

(2) In view of the fact that the appellant has adduced *prima facie* proof in respect of the two tendered ballot papers the trial court should now call upon the respondent to adduce his evidence. The respondent's evidence need not be confined to the two tendered ballot papers but may relate to some or all of the other eight tendered ballot papers in respect of which the appellant has not adduced evidence. The trial court should thereafter decide the matter in the light of the legal position. [949 D]

Borough of St. Andrews (4 Orielly & Hardcastle 32), *The Stepney Division of the Borough of Tower Hamlets* (4 Orielly & Hardcastle 34), *Kalicharan Singh v. Ramcharitar Raj Yadava & Ors.* (5 ELR 98) and *A. K. Subharava Gounder v. G. Palanisami Gounder & Ors.* (11 ELR 251) referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 154 of 1976.

(From the Judgment and Order dated 16-12-1975 of the Judicial Commissioner's Court, Goa, Daman and Diu in Election petition No. 2/74).

V. M. Tarkunde and *Shri Narain* for the Appellant.

Hardayal Hardy, S. K. Mehta and *P. N. Puri* for the Respondent.

The Judgment of the Court was delivered by

KHANNA, J.—This appeal by Dr. Wilfred D'Souza is against the judgment of learned Judicial Commissioner Goa whereby he dismissed election petition filed by the appellant to declare the election of Francis Menino Jesus Ferrao respondent to the Goa Legislative Assembly to be void and to declare instead the appellant to be duly elected.

The appellant and the respondent were the two candidates who sought election to the Goa Legislative Assembly from Benaullim Assembly constituency in the by-election caused by the death of Vassudev Garmalkar. Polling took place on June 9, 1974 and the counting of votes on June 10, 1974. After the first count, the Returning Officer found that the total number of valid votes cast in favour of the appellant was 4,656 and of those cast in favour of the respondent was 4,654. 234 ballot papers were rejected. The respondent then applied for re-counting of the votes and the said application was granted. As a result of re-counting, it was found that the appellant had secured 4,651 valid votes, while the respondent had secured 4,652 valid votes. Seven ballot papers were rejected. It may be mentioned that at the time of re-counting 234 votes which had been earlier rejected in the first count were not taken into account. Soon after the re-count the appellant made an application for a second re-count. This application was granted and the re-count took place on the following day, i.e., June 11, 1974. As a result of the second re-count the appellant was found to have secured 4,650 valid votes while the respondent was found to have secured 4,652 votes. One ballot paper was rejected. At the time of second re-count the ballot papers which had been rejected at the time of the initial counting and the first re-count were not taken into account. In the result the respondent was declared elected. The appellant thereafter filed the present petition on July 15, 1974.

A Besides the ground with which we are concerned in this appeal, the appellant challenged the election of the respondent on the following two grounds :

- B “(1) that in the first and second re-count the Returning Officer illegally accepted in favour of the returned candidate, some votes which he ought to have rejected, and rejected some votes in favour of the appellant which he ought to have accepted under law;
- (2) that the failure of the Returning Officer to re-scrutinize the rejected votes in the first and second re-counts is illegal.”

C In respect of the above two grounds, objection was taken by the respondent that there was non-compliance with the statutory requirements of section 83(1)(a) of the Representation of the People Act, 1951 (hereinafter referred to as the Act) inasmuch as the appellant had not set out the material facts regarding those allegations. Learned Judicial Commissioner as per order dated March 22, 1975 held that the appellant had failed to give material particulars in respect of the said two grounds. The petition in that respect was held to have not disclosed a cause of action. It was also held that the appellant was not entitled to an order of the court for re-counting the polled votes. The appellant, it may be stated, filed a petition seeking special leave of this Court against the above order but that petition was dismissed on July 31, 1975.

E The only ground which survives and with which we are concerned in this appeal is given in para 9 of the petition. The same reads as under :

F “The petitioner further submits that the scrutiny and counting of the tendered votes is absolutely necessary in this case, considering the fact that the respondent has been declared the returned candidate after securing in his favour only 2 votes more than the petitioner and the fact that the tendered votes are 10, and that the non-counting of such votes may materially affect the result of the election, in so far as it concerns the respondent, by the improper reception of votes originally polled by persons other than those who tendered their votes. The petitioner, therefore, submits that the votes initially and improperly received should be removed and the tendered votes should be accepted and counted instead.”

G The appellant accordingly asserted that the result of the election of the respondent had been materially affected by the improper reception, refusal and rejection of votes. Prayer made by the appellant was that the election of the respondent be declared void and the appellant be declared to be duly elected.

H The petition was resisted by the respondent, and in reply to para 9 of the petition the respondent submitted that no re-count was justified

or required in law merely because of the returned candidate having secured only two votes more than the defeated candidate. The respondent denied that the tendered votes were cast by genuine voters. A

Issue No. 7 which is the only issue relating to the allegation in para 9 reads as under :

“Whether the petitioner proves that the vote or votes were initially improperly received, and should be removed and in their place tendered vote or votes should be taken into account.” E

The Judicial Commissioner in his order dated March 22, 1975, while holding that no material particulars had been given in the petition in respect of the other two grounds of the election petition, found that regarding the allegation about tendered votes material facts had been given and a cause of action had been disclosed. C

An application was filed on April 4, 1975 after the above order on behalf of the appellant praying for a direction to the District Election Officer to send all the papers mentioned in rule 92 of the Conduct of Election Rules, 1961 to the court. In reply to that application the respondent stated that the court should, before sending for the said papers, call upon the appellant “to make out a *prima facie* case by undertaking to examine all the persons who have cast the tendered votes and producing some of them and proving that they had cast the tendered votes and that they are the true votes.” Learned Judicial Commissioner after referring to the case of *Rameshwara Nand v. Madho Ram*(¹) and some other cases, passed order dated September 11, 1975, the material part of which reads as under : D

“In the present case the tendered votes are only ten and I see no reason why the petitioner should be allowed to break the principle of secrecy, particularly because the necessity of knowing for whom the voters have cast their vote does not arise now. The petitioner will have to establish his case before he succeeds in this petition. He will have, therefore, to produce all his evidence before the counting is done. E F

I therefore order that the petitioner shall produce before the Court all the evidence on which he relies. I also order that the District Election Officer be asked to produce the election papers mentioned in rule 92(2) of the Conduct of Election Rules, 1961 before this Court.” G

The appellant thereafter examined two witnesses, Joaquine Rodrigues (PW 1) and Vina Farnandes (PW 2). These two witnesses, according to the appellant, had marked tendered ballot papers at the time of polling. Trunks containing election papers were also sent to the court by the Election Registration Officer. As the keys of these trunks were not available, those trunks were broken open in the presence of the parties. A Panchnama of the packets contained in those H

(1) A.I.R. 19 68 Punjab 173.

A trunks was then prepared. Some of the packets having connection with the tendered ballot papers were opened after the conclusion of the evidence of the two witnesses examined by the appellant.

The case was thereafter argued and the election petition was dismissed.

B In the judgment under appeal, learned Judicial Commissioner examined the evidence of the two witnesses produced by the appellant. According to the testimony of these two witnesses, when they went to the polling booth, they were told that someone else had already cast their votes. When these witnesses stated that they had not voted, they were each given a paper for marking in favour of the candidate of their choice. They then marked that paper and handed over that paper to the persons present there. Learned Judicial Commissioner took the view that the evidence of these witnesses did not relate to tendered ballot papers but to the ordinary ballot papers. The appellant as such was held to have failed to prove his case. In the result, the election petition was dismissed.

D In appeal before us, Mr. Tarkunde on behalf of the appellant has argued that the evidence of the two witnesses examined on behalf of the appellant relates to the tendered ballot papers marked by them and that the finding of the Judicial Commissioner to the contrary is not correct. As against that, Mr. Hardy on behalf of the respondent has canvassed for the correctness of the view taken by the Judicial Commissioner.

E Before dealing with this aspect of the matter, we think it opposite to deal with the legal position relating to tendered votes.

Rule 42 of the Conduct of Election Rules, 1961 relates to tendered votes and reads as under :

F "42. Tendered votes.—(1) If a person representing himself to be a particular elector applies for a ballot paper after another person has already voted as such elector, he shall, on satisfactorily answering such questions relating to his identity as the presiding officer may ask, be entitled, subject to the following provisions of this rule, to mark a ballot paper (hereinafter in these rules referred to as a 'tendered ballot paper') in the same manner as any other elector.

G (2) Every such person shall, before being supplied with a tendered ballot paper, sign his name against the entry relating to him in a list in Form 15.

(3) A tendered ballot paper shall be the same as the other ballot papers used at the polling except that—

H (a) such tendered ballot paper shall be serially the last in the bundle of ballot papers issued for use at the polling station; and

(b) such tendered ballot paper and its counterfoil shall be endorsed on the back with the words 'tendered ballot paper' by the presiding officer in his own hand and signed by him.

(4) The elector, after marking a tendered ballot paper in the voting compartment and folding it, shall, instead of putting it into the ballot box, give it to the presiding officer, who shall place it in a cover specially kept for the purpose."

Perusal of the above rule makes it clear that the occasion for marking tendered ballot paper would arise if a person representing himself to be a particular elector applies for a ballot paper after another person has already voted as such elector. The person so applying would then be questioned regarding his identity by the presiding officer and, in case he gives satisfactory answer, he would be supplied a tendered ballot paper which would then be marked by the aforesaid person. Such person is also required to sign his name against the entry relating to him a list in form 16. The tendered ballot papers shall be the same as other ballot papers used at the polling, except that it would be serially the last in the bundle of ballot papers issued for used at the polling station. The words "tendered ballot paper" have to be endorsed on the back of the tendered ballot paper and its counterfoil by the presiding officer in his own hand and has to be signed by him. The tendered ballot paper, it is further provided, is not to be put in the ballot box but is to be kept in a separate cover. According to clause (6) of rule 56 of the Conduct of Election Rules, no cover containing tendered ballot papers shall be opened at the time of the counting of the votes and no such tendered ballot papers shall be counted. The Representation of the People Act, 1951 as well as the above rules are, however, silent on the point as to what use would be made of the tendered ballot papers and how they would affect the result of the election.

Learned counsel for the parties are, however, agreed that such tendered ballot papers, even though excluded from consideration at the time of counting of votes after the poll, can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided certain conditions are fulfilled. We agree with the learned counsel for the parties in this respect, and find that this position of law is supported by two English decisions, *Borough of St. Andrews*⁽¹⁾ and *The Stepney Division of the Borough of Tower Hamlets*⁽²⁾ as also by two Indian decisions, *Kalicharan Singh v. Ramcharitar Rai Yadava & Ors*⁽³⁾ and *A. K. Subbarava Gounder v. G. Palanisami Gounder & Ors*.⁽⁴⁾ Before, however, a tendered ballot paper can be taken into account during the proceedings of election petition, evidence would have to be led on the following two points :

(1) The person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number.

(1) 4 Omelley & Hardcastle 32.

(2) Omelley & Hardcastle 34.

(3) 5 E.L.R. 98.

(4) 11 E.L.R. 251.

- A (2) It was such genuine voter who marked the tendered ballot paper.

So far as the first point is concerned, the evidence of the genuine voter that he had not cast such initial vote would normally and in the absence of any circumstance casting doubt regarding its veracity be sufficient. Once the above two points are proved, the following consequences would follow :

- B (a) The court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidate in whose favour it was cast ; and
- C (b) The court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked.

D It may also be mentioned that the proper occasion for scrutinising tendered ballot papers would normally arise only when the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that difference being wiped out and the result of election being thus materially affected if the court takes into account the tendered ballot papers and excludes from consideration the corresponding votes which were cast by persons other than the genuine voters.

The present election petition would have to be decided in the light of the legal position set out above.

E We have been taken through the evidence on record and are of the view that the evidence of the two witnesses examined by the appellant is sufficient to prove that their evidence relates to tendered ballot papers. Each of these witnesses has deposed that when she arrived at the polling booth, she was told that someone else had cast her vote. When these witnesses persisted that they had not cast their votes, each of them was supplied with a paper which she marked. Both the witnesses were emphatic that they had not put their votes in the ballot box and that they handed them over to the persons present at the polling booth. A very significant circumstance which shows that the evidence of these witnesses relates to tendered ballot papers and not to the ordinary ballot paper is the fact that there is actual reference to them in Form No. 15 which relates to list of tendered votes. The packet containing Form No. 15, it needs to be mentioned, was opened after the close of the evidence of these two witnesses. The name of Joaquina Rodrigues is mentioned in Form No. 15. The fact that the name mentioned in the electoral roll is Rodrigues Joaquina Domingos and not Joaquina Rodrigues is not very material because the name of the father of the witness is Domingos. So far as Vina Fernandes (PW 2) is concerned, Form No. 15 does not mention her name but only gives the serial number of the tendered ballot paper. The counterfoil of the tendered ballot paper however, makes it clear that it relates to serial No. 244 of electoral roll, part No. 12. The said serial number of the electoral roll pertains to Vina Fernandes. It

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appears that some of the formalities which were required to be observed in connection with tendered ballot papers were not complied with by the presiding officer, e.g., he did not note on the back of the counterfoil of the tendered ballot paper that it related to tendered ballot paper. The parties, however, cannot be made to suffer because of any such omission on the part of the presiding officer. The evidence of the two witnesses examined on behalf of the appellant can also not be discarded on the ground that they have not deposed about their having affixed two thumb impressions instead of one thumb impression. As mentioned above, the reference to those two voters in Form No. 15 relating to tendered ballot papers goes a long way to show that it were these two witnesses who marked the tendered ballot papers. Their evidence also shows that they did not cast the initial votes which were cast in their names.

Learned Judicial Commissioner in this case did not record any evidence on behalf of the respondents and proceeded to decide the case after the evidence of the witnesses of the appellant had been recorded and after the box containing the relevant necessary papers had been opened and those papers were examined. In view of the fact that the appellant has adduced *prima facie* proof in respect of two of the tendered ballot papers, the Judicial Commissioner, in our opinion, should now call upon the respondent to adduce his evidence. The evidence of the respondent would be confined not merely to the two tendered ballot papers in respect of which the appellant has adduced evidence but can also relate to some or all of the other eight tendered ballot papers in respect of which the appellant has not adduced any evidence. After the said evidence is examined, learned Judicial Commissioner would decide the matter in the light of the legal position relating to tendered ballot papers as set out above.

We accordingly accept the appeal, set aside the judgment of the learned Judicial Commissioner and remand the case to him for fresh decision after recording the evidence of the respondent in accordance with law as explained above. The parties in the circumstances shall bear their own costs of the appeal.

We are conscious of the fact that the election matters should be disposed of as soon as possible and that the remand of the case would have the effect of further prolonging the matter, yet looking to the facts of the case, we find no escape from the conclusion of remand. Learned Judicial Commissioner, we are sure, would try to expedite the disposal of the case.

V.P.S.

Appeal allowed.