

A

NAYINI NARASIMHA REDDY

v

DR. K. LAXMAN AND ORS.

MAY 5, 2006

B

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

C

D

Representation of the People Act, 1951—Section 94—Secrecy of voting—Election petition—Application for issue of summons to the witnesses—Whether issuance of such summons violative of the rights of secrecy of voting—Held: Issuing of such summons is not violative of rights of secrecy—The Court cannot refuse to exercise its jurisdiction under Order XVI Rule 1(2) CPC only on the ground that by reason thereof the privilege of a voter may be violated—The privilege under the provision by the witness is matter of volition—A prospective witness or some other person cannot raise such an issue in anticipation of an apprehended breach of privilege — Code of Civil Procedure, 1908—Order XVI Rule 1(2).

E

In an election petition an application was filed by the defeated candidate praying for issuance of summons to some witnesses apart from those whose names had been mentioned in the petition. The application was objected to by the returned candidate contending that in view of Section 94 of Representation of the People Act, 1951, summons could not be issued. The contention was rejected by High Court. Hence the present appeal.

F

Appellant—returned candidate contended that as the concept of ‘secrecy of votes’ goes to the root of democracy, any summons taken out to compel a witness to depose before the Court, would be invalid in law, as no witness can be asked to disclose as to in whose favour he had cast his votes.

G

H

Dismissing the appeal, the Court

HELD: (*Per S.B. Sinha, J.*) 1. Section 94 of Representation of the People Act does not provide for a total embargo on a party to an election petition to cite a voter as a witness. What is prohibited is that he cannot be required to state for whom he had *voted* at an election. Secrecy of ballots indisputably goes to the root of democracy, but the same may not itself be a ground to refuse issue of summons to the witnesses. Section 94 merely confers a privilege

upon a voter. He may even waive his right. It is not in dispute that any person can be produced as a witness by the parties to an election petition. Witnesses so produced on behalf of the parties without any summons being issued would be at liberty to disclose in the court as to in whose favour he had exercised his right of franchise. It is, therefore, evident that the question as to whether a witness will exercise his right/privilege conferred in terms of Section 94 is a matter of volition. [907-E-G]

2. It is one thing to say that the civil court while issuing a summon must exercise its jurisdiction in terms of Order XVI Rule 1(2) CPC but it is another thing to say that the court would refuse to summon the witness only because a question as regard exercise of the privilege of the witness may arise. The court may not refuse to exercise its jurisdiction only on the ground that by reason thereof the privilege of a voter may be violated. [907-H; 908-A]

3. The statute lays down that a witness would not be required to answer a question to disclose as to in whose favour he had exercised his right of franchise either before a court of law or before an authority, but he can exercise the said right only as a witness. He, therefore, must appear before the court, or before an election tribunal either as a witness of a party whether summoned or not. It is not in dispute that the witness may or may not exercise his right. It is furthermore not in dispute that he may waive the said right. If that be so, it is beyond comprehension of the Court as to how the right of a party to the lis to summon a witness can be denied only on the ground that the issuance of summons by the court itself would be violative of Section 94. [908-D-F]

4. Secrecy of ballots was necessary for ensuring free and fair elections, but by reason thereof the concept of purity of election cannot be given a go by. [911-C-D]

S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors., [1980] Supp. SCC 53 and *A. Neelathithadasan Nadar v. George Mascrene and Ors.*, [1994] Supp. 2 SCC 619, relied on.

Per P.K. Balasubramanyan, J. (concurring) :

1. Neither the privilege against self-incrimination nor the secrecy of the election process stand in the way of a voter being summoned as a witness in an election petition. The power of the Court under Order XIV CPC on application by the parties or *suo moto* to summon any person for his attendance in Court and its power to summon any person to produce any

A document remains unaffected by Section 94 of Representation of the People Act, 1951, The power of the Court to summon a witness is one thing, the privilege of a witness not to answer a question put to him is another. The witness would be free to claim privilege under Section 94 and can refuse to reveal for whom he has voted. However, if he is willing to disclose his electoral preference he is entitled to do so. [913-E-G]

B 2. The Privilege against self-incrimination is to be claimed by the witness. The right becomes available only after the witness has taken the stand and a question that offends the privilege is put to him. A prospective witness or some other person cannot raise such an issue in anticipation of an apprehended breach of privilege against self-incrimination. Section 94 only confers a privilege on the witness and that he would be at liberty to waive it and give evidence on his electoral preference. The appellant cannot thrust the privilege under Section 94 on the prospective witness. The appellant cannot deprive the witness of the right to take his own decision in the matter as and when he takes the witness stand and a question on his electoral preference is put to him. [912-C; 912-G-H; 913-A-B]

Blunt v. Park Lane Hotel, (1942)2 K.B. 253, referred to.

E 3. The purity of the election process is more important than the privilege conferred by Section 94. The secrecy of voting could be breached to subserve a larger public good, namely, to prevent a fraud on the election process. [913-C]

S. Raghbir Singh Gill v. S. Gurcharm Singh Tohra and Ors., [1980] Supp, SCC 53 and *A. Neelalohithadasmi Nadar v. George Mascrene and Ors.*, [1994] Supp. 2 SCC 619, relied on.

F 4. The arguments based on Section 94 are not being raised by the prospective witness but by a third person. The stage at which the plea is raised i.e. even before the witness has actually taken the witness stand is also significant. The appellant cannot seek to prevent the witness from taking the stand. He cannot also seek to curb the power of the Court to summon the witness. [913-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2475 of 2006.

From the Judgment and Order dated 11.3.2005 of the High Court of Andhra Pradesh at Hyderabad in E.A. No. 146 of 2005 in E.P. No. 4 of 2004.

H Harish N. Salve, Jaideep Gupta, R. Santhan Krishnan, Praveen K. Pandey,

P. Vijay Kumar and D. Mahesh Babu for the Appellant.

A

L. Nageshwar Rao, G. Ramakrishna Prasad, Dr. K.P. Kyalasanath, Mohd. Wasay Khan, Suyodhan Byrapaneni and Venkat Subramaniam for the Respondents.

The Judgment of the Court was delivered by

B

S.B. SINHA, J. Leave granted.

Interpretation of Section 94 of the Representation of the People Act, 1951 (for short, 'the Act') is in question in this appeal which arises out of a judgment and order dated 11.03.2005 passed by a learned Single Judge of the High Court of Andhra Pradesh.

C

An election was held in Musheerabad Assembly Constituency on or about 20.04.2004. For conducting the said election electronic voting machines were used. Whereas the appellant contested as a candidate of 'Telangana Rashtra Samiti', the first respondent contested the said election as a candidate of 'Bharatiya Janata Party'. Whereas the appellant herein polled 53553 votes; the first respondent polled 53313 votes. The first respondent, thus, lost the election by a margin of 240 votes. An election petition was filed by the first respondent assailing the said election before the High Court of Andhra Pradesh at Hyderabad, which was numbered as Election Petition No. 4 of 2004. In the said election petition, it was *inter alia*, contended :

D

E

"The Petitioner submits that P.S. No. 91 was located adjacent to the Central Election Office of the Petitioner. As already stated several of the party workers and sympathizers reside in that area. All those persons have cast their vote in favour of the Petitioner. To establish the fact that the Petitioner could not have polled zero votes in P.S. No. 91...."

F

In the said election petition names and identity card numbers of various persons mentioned in the voter list by way of example were mentioned. One of the grounds taken in the election petition was misalignment of the machine; asserting that whereas both the parties polled nil votes from a particular booth, the independent candidates polled a high number of votes.

G

In the said election petition an application was filed by the first respondent praying for issuance of summons to some witnesses apart from those whose names had been mentioned in the election petition, *inter alia*,

H

A stating :

B “I humbly submit that a list of witnesses that are to be examined
 on my behalf was filed on 17.1.2005. However, the names of certain
 of the voters in P.S. No. 91 who had agreed to give evidence could
 not be included in the said list of witnesses as there was very strong
 likelihood of threat and intimidation. In that view of the matter, a
 Memo dated 17.1.2005 was filed into Court humbly craving the leave
 of the Hon’ble Court to produce the said witnesses at a later date by
 filing an appropriate application. It is respectfully submitted that non-
 disclosure of the names of the said witnesses in the list already filed
 was only having regard to their safety. I submit that their evidence is
 essential for establishing my case as it is specifically contended by
 me in the Election Petition that I could not have secured zero votes
 in P.S. No. 91, Polling Station being located in a BJP stronghold and
 several BJP workers, sympathizers including the wife, mother, sister-
 in-law and other female relatives of my polling agent are listed as
 voters in P.S. No. 91, which is exclusively reserved for female voters.”

A memo was also filed before the High Court on 17.01.2005, stating :

E “The Petitioner humbly submits that at the time of preparing the
 Election Petition certain of the voters in P.S. No.91 had agreed to give
 evidence. The Petitioner has been informed by the aforesaid persons
 that they apprehend threat and intimidation. In view of this petitioners
 humbly crave leave of this Honourable Court not to disclose their
 names in the list of witnesses having regard to their safety and prays
 that the Honourable Court permits production of such witnesses
 during the trial as per the calendar fixed by this Honourable Court.
 F The petitioner undertakes to file the necessary application for
 permission to produce the aforesaid witnesses as contemplated under
 law and procedure. Hence this Memo.”

G A contention at the hearing of the said application for issuance of
 summons as to whether having regard to the provision of Section 94 of the
 Act, providing for “no witness or other person shall be required to state for
 whom he has voted in an election”, summons could be issued by the Appellant
 before the High Court.

H The said contention was rejected by the High Court by reason of the
 impugned judgment.

Mr. Harish Salve, the learned Senior Counsel appearing on behalf of the appellant, submitted that as the concept of 'secrecy of votes' goes to the root of democracy, any summons taken out to compel a witness to depose before the Court, would be invalid in law, as no witness can be asked to disclose as to in whose favour he had cast his vote. Strong reliance in this behalf has been placed on *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, [1980] Supp. SCC 53.

Mr. L. Nageshwar Rao, the learned Senior Counsel appearing on behalf of the first respondent, on the other hand, *inter alia*, contended that the voters merely enjoy a privilege in terms of Section 94 of the Act; but the same would not mean that the courts cannot be asked to issue any summons therefor. Drawing our attention to the fact that in the application for summoning some witnesses, it was contended that the same was filed in support of the grounds taken in the election petition and as such it would not be correct to contend that the summons on the witnesses were sought to be served only for the purpose of obtaining disclosures from them as to in whose favour they had voted in the election.

Section 94 of the Act reads as under :

"Secrecy of voting not to be infringed.—No witness or other person shall be required to state for whom he has voted at an election.

Section 94 does not provide for a total embargo on a party to an election petition to cite a voter as a witness. What is prohibited is that he cannot be required to state for whom he had voted at an election.

Secrecy of ballots indisputably goes to the root of democracy, but the same in our opinion may not itself be a ground to refuse issue of summons to the witnesses, Section 94 of the Act merely confers a privilege upon a voter. He may even waive his right. It is not in dispute that any person can be produced as a witness by the parties to an election petition. Witnesses so produced on behalf of the parties without any summons being issued would be at liberty to disclose in the court as to in whose favour he had exercised his right of franchise. It is, therefore, evident that the question as to whether a witness will exercise his right/privilege conferred in terms of Section 94 of the Act is a matter of volition.

It is one thing to say that the civil court while issuing a summon must exercise its jurisdiction in terms of sub-rule (2) of Rule 1 of Order XVI of the

- A Code of Civil Procedure but it is another thing to say that the court would refuse to summon the witness only because a question as regard exercise of the privilege of the witness may arise. The court may not refuse to exercise its jurisdiction only on the ground that by reason thereof the privilege of a voter may be violated.
- B It is, therefore, necessary to notice the nature and extent of such a right. Section 94 of the Act merely states that no witness or other person shall be required to state for whom he has voted at an election. When questioned, Mr. Salve did not dispute that if a witness is summoned for proving or disproving one or the other grounds taken in the election petition, or the defence raised by the elected candidate, summons may be issued and while examining the said witness in court, a question may also be put to him as to for whom he had voted at an election. If such a question is put to him, indisputably, he may exercise his right not to answer the same. The court shall evidently inform him about the said right but by reason thereof no conclusion can be arrived at that the jurisdiction of the court in the matter of issuance of summons itself stands abrogated or restricted. The statute lays down that a witness would not be required to answer a question to disclose as to in whose favour he had exercised his right of franchise either before a court of law or before an authority; but he can exercise the said right only as a witness. He, therefore, must appear before the court, or before an election tribunal either as a witness of a party whether summoned or not. It is not in dispute that the witness may or may not exercise his right. It is furthermore not in dispute that he may waive the said right. If that be so, it is beyond our comprehension as to how the right of a party to the *lis* to summon a witness can be denied only on the ground that the issuance of summons by the court itself would be violative of Section 94 of the Act.
- F Sub Rule 2 of Rule 1 of Order XVI of the Code of Civil Procedure indisputably require the party to file an application for obtaining any summons for the attendance of any person stating therein the purpose therefor; but the same would not mean that the court would refuse to exercise its jurisdiction only because one of the purposes disclosed may be that the witness may be asked a question as to in whose favour he had exercised his right of franchise. The purpose which is required to be disclosed in such an application for summoning a witness is only with a view to apprise the court as to whether the evidence which may be adduced, would be relevant for the purpose of determining the issues and not for any other purpose.

H

It may be true that if a person to whom summons is issued appears in the court, the Court may require him to give evidence or produce any document in his possession or power, as envisaged under Order XVI of the Code of Civil Procedure; but the same again would not mean that if thereby a mere possibility exists that the secrecy of voting thereby may be infringed, the summons would not be issued at all. We, for the aforementioned reasons, do not agree with the contention of Mr. Salve.

In *S. Raghubir Singh Gill* (supra), this Court laid down the law in the following terms :

“14. The marginal note of Section 94 says “*secrecy of voting not to be infringed*”. Section 128 of the Act casts an obligation on every officer, clerk, agent or other person to maintain and aid in maintaining secrecy of the voting and they shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy. Rule 23(3) of the Conduct of Election Rules, 1961 (“Rules” for short) imposes a duty to conceal the serial number of the ballot paper effectively before it is issued at election in any local authorities constituency or by Assembly members. Similarly, Rules 23(5)(a) and (b) of the Rules provide for effectively maintaining the secrecy of the postal ballot papers in the manner prescribed therein. Rules 31(2), 38(4), 39(1), (5), (6) & (8), 40(1) second proviso, 38-A(4), 39-A(1) & (2) and similar other rules provide for maintaining secrecy of ballot. It cannot be gainsaid that various provisions referred to above ensure secrecy of ballot and even Section 94 has been enacted to relieve a person from a situation where he may be obliged to divulge for whom he has voted under testimonial compulsion. Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy.”

A A question was posed as to whether Section 94 of the Act creates an absolute prohibition and it was answered in the following terms:

B “18. It was said that Section 94 lends itself open to one construction
 C alone. It is cast in negative language which usually is treated as
 D absolute. Proceeding further it was said that this negative provision
 admits of, no exception and enacts an absolute prohibition. Provisions
 cast in negative words are generally treated as absolute admitting of
 no exception. But this is not a universal rule. The words “negative”
 and “affirmative” statutes mean nothing in particular. The question is,
 what was the intendment? Emphasis is more easily demonstrated
 when statute is negative than when it is affirmative but the question
 is one of intendment (see *Mayor of London v. R.*⁶). If language is open
 to two constructions one must ascertain the intendment, the mischief
 sought to be remedied and the remedy provided to cure the mischief
 (see *Victoria Sporting Club Ltd. v. Hannan*⁷). And in such a situation
 the court must escalate in favour of that construction which carries
 out the intendment behind enactment and accords with reason and
 fair play.

E 19. Two possible constructions are, firstly, that the section casts
 an absolute prohibition and seals the mouth of the voter permanently
 and admits of no exception in which he can divulge his vote, and
 secondly, that it is a privilege of the voter to disclose his vote if he
 voluntarily chooses to do so but he cannot be compelled by court or
 any other authority to divulge his vote. Which of the two constructions
 advances the object of enactment?

F 20. If Section 94 is interpreted to mean to be a privilege of the
 voter to divulge or not to divulge how he voted and if he chooses
 not to divulge, Section 94 protects him inasmuch as he cannot be
 compelled to divulge that information, then it does not stand in
 conflict with the other important principle of free and fair elections to
 sustain parliamentary democracy. When it is said that no witness or
 other person shall be required to state for whom he has voted at an
 G election, it only means that both in the court when a person is styled
 as a witness and outside the court when he may be questioned about
 how he voted though he would not have the character or the
 qualification of a witness yet in either situation he is free to refuse
 to answer the question without incurring any penalty or forfeiture.

H

That guarantees the vital principle behind secrecy of ballot in that the voter would be able to vote uninhibited by fear. But if he chooses to open his lips of his own free-will without direct or indirect compulsion and waive the privilege, nothing prevents him from disclosing how he voted. No provision was brought to our notice which would expose him to any penalty if a voter voluntarily chooses to disclose how he voted or for whom he voted. Section 128 has nothing to do with the voter disclosing for whom he voted. It casts an obligation of secrecy on those connected with the process of election and not on the voter.”

The said decision, therefore, does not support the contention of Mr. Salve.

Secrecy of ballots was necessary for ensuring free and fair elections; but by reason thereof the concept of purity of election cannot be given a go by.

This Court in *A. Neelalohithadasan Nadar v. George Mascrene and Ors.*, [1994] Supp. 2 SCC 619, emphasized on the principle of purity of elections holding that Section 94 of the Act cannot be pressed into service to suppress a wrong coming to light and to protect a fraud on the election process. Therein this Court followed *S. Raghbir Singh Gill* (supra).

For the reasons aforementioned, we are of the opinion that there is no merit in this appeal, which is dismissed accordingly. No costs.

P.K. BALASUBRAMANYAN, J. 1. I respectfully agree with the reasoning and conclusion in the judgment just pronounced by my learned brother.

2. Section 94 of the Representation of the People Act, 1951 (for short, the Act) provides that a voter in an election, when summoned as a witness in an election petition, cannot be compelled to disclose for whom he has voted. The words, “shall be required” place a bar on any such compulsion. The Court, as of right or by authority, cannot compel the voter summoned as a witness, to disclose his preference. The sub-heading to Section 94 of the Act indicates that the bar is intended to preserve the secrecy of the ballot.

3. The rule against testimonial compulsion, in a case governed by Section 94 of the Act, will have to be approached from two angles. The initial question is whether the witness would have to incriminate himself while

A giving evidence. The privilege against self-incrimination in the words of Lord Goddard L.J. is that:

B “No one is bound to answer any question in civil or criminal proceedings if the answer thereto would in the opinion of the judge have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for”

(See *Blunt v. Park Lane Hotel*, (1942) 2 K.B. 253 at page 257)

C 4. The privilege against self-incrimination is to be claimed by the witness. The right becomes available only after the witness has taken the stand and a question that offends the privilege is put to him. A prospective witness or some other person (as in the present case) cannot raise such an issue in anticipation of an apprehended breach of privilege against self-incrimination. Phipson referring to a number of authorities on the point states:

D “It may be taken by the witness in refusing to answer a question; the witness cannot refuse to go into the witness box: he can only claim privilege after he has gone into the witness box and been sworn and the question put. The court must determine from the circumstances of the case and the nature of the evidence the witness is called to give whether there are grounds for the privilege being invoked and grounds to “apprehend danger.” The mere fact that a party swears that his answer would tend to criminate him is not conclusive. Once the danger is made apparent great latitude should be allowed to a witness asked questions in giving evidence in judging for himself of the effect of any particular question.

F The privilege must, unlike other forms of privilege, be claimed on oath by the person asserting it on his own behalf, not his solicitor. Nevertheless, it might be necessary for evidence to be led from others to support the claim. It is not necessary to explain precisely why the evidence would incriminate, as that might undermine the privilege.”

G [Phipson on Evidence, 15th Edn., page 564]

H It is clear that Section 94 of the Act only confers a privilege on the witness and that he would be at liberty to waive it and give evidence on his electoral preference. The argument based on Section 94, at the instance of the appellant, on the ground of a perceived threat of self-incrimination of the prospective

witness, is misconceived. The appellant cannot thrust the privilege under Section 94 of the Act on the prospective witness. The appellant cannot deprive the witness of the right to take his own decision in the matter as and when he takes the witness stand and a question on his electoral preference is put to him. A

5. The second question is whether, the evidence of the witness would breach the secrecy of the election process. It has been held by this Court in *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, [1980] Supp. SCC 53 and *A. Neelalohithadasan Nadar v. George Mascrene and Ors.*, [1994] Supp. 2 SCC 619 that the purity of the election process is more important than the privilege conferred by Section 94 of the Act. This Court has recognized that the secrecy of voting could be breached to subserve a larger public good, namely, to prevent a fraud on the election process. My learned brother has dealt with this aspect and I am in agreement with him. B C

6. In the present case, we must also note two incidental aspects that stand in the way of accepting the plea of the appellant. The arguments based on Section 94 of the Act are not being raised by the prospective witness but by a third person. The stage at which the plea is raised i.e. even before the witness has actually taken the witness stand is also significant. The appellant cannot seek to prevent the witness from taking the stand. He cannot also seek to curb the power of the Court to summon the witness. D E

7. In the above situation, neither the privilege against self-incrimination nor the secrecy of the election process stand in the way of a voter being summoned as a witness in an election petition. The power of the Court under Order XIV of the Code of Civil Procedure, 1908, on application by the parties or suo moto to summon any person for his attendance in Court and its power to summon any person to produce any document remains unaffected by Section 94 of the Act. The power of the Court to summon a witness is one thing, the privilege of a witness not to answer a question put to him is another. The witness would be free to claim privilege under Section 94 of the Act and can refuse to reveal for whom he has voted. However, if he is willing to disclose his electoral preference he is entitled to do so. F G

8. Hence, I too would dismiss the appeal.

K.K.T.

Appeal dismissed.