

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 5, 2010

Decision on: April 13, 2010

W.P.(C) No. 4603 of 2008

VIKAS

..... Petitioner

Through: Mr. M. N. Krishnamani, Senior
Advocate with Mr. Tarique Siddiqui,
Advocate.

versus

SATISH KUMAR & ORS.

..... Respondents

Through: Mr. P.D. Gupta with
Mr. Abhishek Gupta and
Mr. Kamal Gupta, Advocates for R-1.
Mr. Deepak Chopra, Advocate for R-2.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed
to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the digest? Yes

J U D G M E N T

W.P.(C) No. 4603 of 2008 & CM No. 8862 of 2008 (for stay)

1. The challenge in this petition under Article 226 of the Constitution is to a judgment dated 4th June 2008 passed by the Additional District Judge (‘ADJ’) declaring the election of the Petitioner, Vikas of the Indian National Congress (INC), to the Ward No. 78 i.e. Majnu-Ka-Tila of the Municipal Corporation of Delhi (‘MCD’) to be null and void. By the impugned judgment, learned ADJ also held that as a consequence in terms of Section 19 (1)(c) of the Delhi Municipal Corporation Act, 1957 (‘DMC Act’) Respondent No.1 Shri Satish

Kumar of the Bharatiya Janata Party (BJP) should be declared elected as Councillor of the said Ward No.78.

Petitioner's nomination paper not accompanied by Forms A and B

2. The first issue framed by the learned ADJ on the basis of the pleadings was whether the nomination papers of the elected candidate i.e. the Petitioner herein, being the duly authorised substitute candidate of the INC, were filed in time along with Form A and B of the nomination papers? The issue was answered in the negative i.e. against the Petitioner herein.

3. In terms of Clause 5(a) of the Municipal Corporation of Delhi Election Symbols (Reservation & Allotment) Order 2007 ('MCD Election Symbols Order') a candidate is deemed to have been set up by a political party if and only if the candidate has made a declaration to that effect in the nomination paper filed by him. Under Clause 5(c) "a notice in Form B of setting up the candidate has to be delivered "not later than 3 pm on the last date of filing nomination, in writing, to the Returning Officer ('RO') of the ward to which the candidate is contesting and State Election Commission ('SEC') of NCT Delhi by the party concerned." Under Clause 5(d), the notice in Form B has to be signed by a person "authorised in Form A by the President or Secretary of the party, in ink." It is stated therein that even a photostat or cyclostyled copy of that form is acceptable "if the same is signed by the authorised person of the National/State Political Party in ink/ball pen." Under Clause 5(e), the name and specimen signature of

such authorised person in Form A should be communicated to the RO concerned as well as the SEC of the NCT of Delhi “not later than 3 pm on the last date fixed for filing nominations.” Under Clause 5(f) any subsequent authorization by a National or State Party cancelling or substituting the earlier authorization in Form B should be sent to the RO as well as the SEC so as to be received by them “not later than 3 pm on the last date for making nomination.” Further, the subsequent authorization in Form B has to be signed by the person authorised in Form A and “has to be intimated in Form A and is to be unambiguous and clearly showing that it either cancels or substitutes the earlier authorization as the case may be.” Under Clause 5(g), if more than one notice in Form B are received by the RO/SEC in respect of two or more candidates in a Ward from the same political party and that political party fails to indicate in such notices in Form B that one of these notices is cancelled or supersedes all other previous notices, the RO shall accept the notice in Form B in respect of that candidate whose nomination paper was first delivered to him, and the remaining candidates shall not be treated as candidates set up by such political party and their nominations shall also be rejected. Appended to the aforementioned Order in Schedule 2 are the proforma of Form A and Form B.

4. In the present case, the Petitioner claimed to be a substitute candidate for Shri Charan Dass the official candidate of the INC for Ward No. 78. Shri Charan Dass filed his nomination papers on 17th March 2007. The nomination form of Shri Charan Dass was

accompanied by the Form A and B. The Form A which was enclosed with the nomination form of Shri Charan Dass was marked as Exhibit CW1/11. The said Form A was signed by Shri Ashok Gehlot, General Secretary of the INC and is dated 10th March 2007. Thereunder Shri Ram Babu Sharma, President of the Delhi Pradesh Congress Committee, New Delhi was authorised to intimate the names of the candidates proposed to be set up by the party for Ward No.78. The said Form A contained the specimen signatures of Shri Ram Babu Sharma. The Form B which was enclosed with the nomination form of Shri Charan Dass was exhibited as Ex. CW1/4. It shows the name of Shri Charan Dass in Column 2. Column 5 is titled 'name of the substitute candidate' (who will step in the event of the official candidate's nomination paper being rejected on scrutiny). That column is left blank. It is plain from the above documents that on the date nomination papers were filed by Shri Charan Dass i.e. 17th March 2007, the INC had not identified any substitute candidate.

5. As far as Shri Satish Kumar Respondent No.1 is concerned, his nomination papers were accompanied by a Form A signed by Shri Rajnath Singh of the BJP authorising Dr. Harshvardhan President of the Delhi Pradesh BJP to intimate to the SEC the name of the candidate. Form B was signed by Dr. Harshvardhan. In Column 5 of the said Form B the name of the substitute candidate was shown as Shri Sukhdev. If indeed Shri Vikas was the substitute candidate for Shri Charan Dass, his name should have figured in Column 5 of the Form B filed by Shri Charan Dass. However, that was not the case.

No explanation is forthcoming from the Petitioner in this regard.

6. The learned ADJ has by the impugned judgment, after examining the record, accepted the case of Respondent No.1 that the nomination papers of the Petitioner Shri Vikas was not accompanied by Form A and Form B issued in his favour as required by the MCD Election Symbols Order extracted hereinbefore. The evidence relied upon for this purpose is that of CW-1 Shri K.R. Kishore, the Secretary to the SEC. Pursuant to a complaint made by one Sohan Lal, Advocate, the record was summoned from the RO who was examined as CW-2. The record CW1/1 was handed over to Shri Kishore vide acknowledgment (Ex.CW1/2) which is a check list and which did not show that the nomination form of the Petitioner herein was accompanied by Forms A and B.

7. In his examination before the court, CW-1 Kishore categorically stated:

“Pursuant to the receipt of the complaint from one Sohan Lal and record with regard to nomination of the candidate Vikas and Charan Dass was summoned by the State Election Commissioner on 20th April 2007. The Returning Officer R.K. Sharma placed all the documents before the State Election Commission but not the Form A and B in favour of Vikas. The said record of nomination of the candidate Vikas is Ex.CW1/5 (collectively running into 10 pages including affidavit, photocopy of the I-card, photocopy of the caste certificate and photocopy of electoral roll).”

8. The cross-examination of the above witness by learned counsel for the Petitioner herein did not bring out any contradiction to the effect that such Form A and Form B had in fact been enclosed with the nomination paper of the Petitioner. More importantly, this witness was recalled at a later date for further cross-examination as regards the furnishing of the security deposit by the Petitioner. On this aspect the witness has stated as under:

“As per the nomination papers received from the candidate Vikas which is already Ex.CW1/5, the ARO is reported to have received the same on 2:56 pm on 17.03.2007 which I say on the basis of the endorsement made at point encircled X1. The said nomination paper was placed before the Returning Officer/Scrutinizing Officer by him on 19.3.2007 which I say on the basis of the endorsement made at point X2 on Ex.CW1/5. Further, an endorsement has been made by the ARO regarding submission of the said documents to the RO R.K. Sharma at 10:00 pm on 19.3.2007 which is evident from the endorsement made by the ARO in his own handwriting at point X3. Further, there is another hand written note by the ARO Sh. H.L. Duggal that the nomination in respect of Vikas S/o Shri Kishan R/o J-1, DDA Flats, Sarai Phoos, Tis Hazari Delhi as covered candidate of Charan Dass a nominated candidate of INC was received by him on 17.3.2007 but the same was left in his file unintentionally and was brought to his notice by the RO Sh. R.K. Sharma at 10 pm on 19.3.2007 for which he apologies and feels sorry. The said document is Ex.CW1/11.”

9. The cross-examination at this juncture for the Petitioner herein was limited and was to the following effect:

“It is correct that apart from the five nominations as mentioned in Form B the record submitted by the RO to the State Election Commission shows that the nomination papers of Vikas has also been filed but there is no nomination of Sukhdev S/o Sh. Chet Ram. It is wrong to suggest that Sukhdev had also filed the nomination as a covering candidate.”

8. The obvious inference from the above evidence is that Forms A and B did not accompany the nomination papers of the Petitioner herein. Mr. M. N. Krishnamani, learned Senior counsel appearing for the Petitioner placed considerable reliance on the evidence of the Assistant Returning Officer (‘ARO’) Mr. Hira Lal Duggal who stated in his evidence that “along with nomination of Vikas Forms A and B were also submitted.” The above evidence is not really helpful to the Petitioner inasmuch as there is nothing in the record to show that there was any such Form A or Form B in respect of the Petitioner’s nomination.

9. The case of the Petitioner is that during the subsequent inspection of the record by Respondent No.1 and Sohan Lal, they had removed Forms A and B which were there on the file at that point in time. Reliance is placed on the following reply given by Respondent No.1 in his cross-examination.

“We inspected the file probably on 18 or 24-04-2007. The date may be 19.04.2007 also. It is correct that application for obtaining certified copy

was given, a copy whereof is Ex.PW1/R-1. The same is my reply to Ex.PW1/R-1A, B, and C. Immediately on learning about the nomination of Vikas having been accepted, I approached the RO who informed me that nothing can be done now. I did not make any complaint in writing. It is correct that I inspected the file after the election was over. It is absolutely incorrect to suggest that the file contained the Form A and B in respect of nomination of Vikas when I inspected the file. It is further incorrect to suggest that I removed Form A and B of Vikas. Vol. Since there was no such form on record the question of obtaining/delivering certified copy thereof does not arise.”

10. The above reply, if taken as a whole, does not in any way help the Petitioner. It is only the word of the Petitioner as against that of Respondent No.1 that Forms A and B were in fact enclosed with the nomination papers of the Petitioner. There was no cross-examination on this aspect of the official witness of the SEC i.e. CW-1 who was in fact meant to preserve the records. The Petitioner has not been able to make a case that there were Forms A and B accompanying his nomination paper which were then surreptitiously removed by Respondent No.1.

11. The learned ADJ rightly concluded that mere fact that the number of pages of which Respondent No.1 had certified copies exceeded the number of pages placed before the Court, was not a ground to presume that the said Forms A and B were removed. Respondent No.1 was able to explain satisfactorily that in some of the pages the

contents of the reverse of the document had also been certified. There also appears to have been a mistake in counting of the certified copies by the staff of the office of the SEC.

12. The evidence on record, which has been referred to by the learned ADJ, also indicates that there was a manipulation of the receipt of the security deposit purportedly received from the Petitioner. In Ex.RW 1/1 (the original of which is Ex. CW1/P1) the Ward number 78 is not mentioned whereas in the carbon copy/counter foil Ex. PW1/3 the figure 78 has been written. The said receipt was issued by CW-2 Hira Lal Duggal who gave a long and improbable explanation that “sometimes the pen does not flow on the main copy as a result of which only on the carbon copy the words occur.” This Court has perused the record. The learned ADJ’s observation that “there is no imprint of Ex. RW1/1 showing that the word 78 was ever written, in the considered view of this Court, is correct. Consequently, the conclusion arrived at by the learned ADJ that “the receipt of the Respondent No.1 (Vikas) seems to have been hurriedly prepared which is evident from the fact that the security deposit receipt which was for a sum of Rs. 1,500/- had the words written Rs. Fifteen at one place and Rs. One Thousand five hundred at another place”, is also correct.

13. Then we come to Form No.3 which is the list of candidates required to be mandatorily maintained by the RO in terms of Rule 17 of the Delhi Municipal Corporation (Election of Councillors Rules)

(‘DMCEC Rules’). On this aspect it is sought to be contended that only the names of the main candidates are given and not that of covering candidates and that is why Form 3 contains neither the name of the Petitioner, who was the cover candidate for Charan Dass nor Sukhdev who was the cover candidate for Respondent No.1 Satish Kumar. Secondly, it is submitted that the mistake, if any, in not including the Petitioner’s name in Form 3 was that of the RO. Thirdly, it is submitted that, at best, this was an irregularity which can be condoned in terms of Section 36(4) of the Representation of People’s Act, 1951.

14. This Court finds the above explanation not acceptable in view of the evidence placed on record to show that same RO in respect of other constituencies, when filling up Form 3 included more than 3 names on the same page. If indeed the nomination papers of the Petitioner had been received by 3 pm on 17th March 2007, his name should have been included in the said Form 3 released for that date. The absence of the Petitioner’s name casts a doubt on whether such nomination paper was in fact received by 3 pm on 17th March 2007. This Court agrees with the view expressed by the learned ADJ that the filling up of Form 3 was not merely a formality since it is required to be put up on the notice board for being made known to other candidates as well as to the electors. The other contesting candidates and the electors can then scrutinize the form and raise objections.

15. Then we come to Form 4 which shows the name of all contesting

candidates whose nomination papers were found in order on scrutiny. The names of all candidates are usually filled up in one page as was done by the RO in respect of Ward Nos. 77 and 79 which were also under his control. Nevertheless, he has mentioned only 3 names on the first page of Form 4 and in a separate appended sheet has mentioned the name of the Petitioner. The learned ADJ has, after perusing the entire record, come to the conclusion that the words “page 2” were written on the second page whereas the first page does not contain the words “page 1”. Further, it was found by the ADJ that in Ex.CW3P-2 the words ‘continued’ had been written in one flow which is different from Ex. CW1/P-8. On examination of the two sets of documents i.e. one produced in the court and the other sent to the SEC, they were also found to be different. The learned ADJ observed:

“No explanation is forthcoming as to why two sets of Form 4 were prepared of which one was sent to the Secretary to State Election Commission which he has produced in the Court and another was retained by the Returning Officer which he has now produced. Also, no explanation is forthcoming for the reason why the name of Respondent No. 1 Vikas was not mentioned on 1st page of Form 4 despite there being sufficient space for mentioning the names of as many as 6 candidates as has been done in the case of other wards.”

16. This Court concurs with the conclusion of the learned ADJ that the name of the Petitioner “was added on a separate page which was apparently done in the late night hours since it is the admitted case of

the RO that the said nomination paper has been placed by the ARO for the first time only at 10 pm on the date of scrutiny i.e. 19th March 2007.” On the basis of the above evidence on Issue No.1, the learned ADJ concluded that Form A and Form B did not accompany nomination papers of the Petitioner. Having perused the record and having considered the submissions of learned Senior counsel appearing for the Petitioner, this Court concurs with the above findings of the learned ADJ and rejects the arguments of the Petitioner herein. This Court accordingly holds that the first Issue was correctly answered by the learned ADJ in the negative, and against the Petitioner herein.

The nomination paper of the petitioner was null and void

17. The second issue was “whether the election of the Petitioner herein was liable to be declared null and void and set aside?” On the basis of the above evidence, it was held by the learned ADJ that Respondent No.1 herein had proved by documentary and oral evidence that the nomination papers of the Petitioner herein were illegally accepted by the RO on the date of scrutiny i.e. on 19th March 2007 at 10 pm. This Court, on perusal of the record as well as the evidence, concurs with the above conclusion arrived at by the learned ADJ.

18. An elaborate story was put forth by the ARO that he had forgotten about the nomination papers filed by the Petitioner and had placed it in the top drawer of his table; that on 19th March 2007 after the

nomination paper of the official candidate Shri Charan Dass was rejected at around 10 pm he suddenly remembered that the Petitioner's nomination papers were with him and thereafter he handed them over to the RO. The evidence of CW-2, the ARO, does not inspire confidence.

19. The RO's evidence also raises serious doubts on their conduct. In his evidence he states:

“It was only at 10:00 pm that Mr. Duggal had come along with the nomination papers of Vikas and prior to that I had already rejected the nomination of Charan Dasss. Since the nomination of Vikas was never placed before me prior to 19.3.2007 I orally asked my ARO Mr. Duggal to furnish an explanation in writing as to why this nomination form was not put before me earlier on which he furnished the said explanation by way of a written note Ex.CW1/11 and his remarks on Ex.CW1/5 at point mark X3. I was not convinced earlier but after seeing the security deposit receipt and acknowledgement I was convinced and I considered the nomination of Vikas. I did not convey in writing to the State Election Commission the fact that Mr. Duggal the ARO had not placed the nomination of Vikas before me on time nor he had made any entry in Form 3.”

20. This Court finds the conduct of these two witnesses unacceptable. Their evidence is untrustworthy. Their conduct has had the inevitable effect of vitiating the election process.

21. Mr. Krishnamani referred to the decisions in *Bhanu Kumar Shastri v. Mohan Lal Sukhadia* (1971) 1 SCC 370, *Ram Singh v. Col. Ram Singh* AIR 1986 SC 3 and *D. Venkata Reddy v. R. Sultan*

(1976) 2 SCC 455 and contended that the verdict of the people at the polls must be given due respect and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. In the considered view of this Court the Respondent No.1 herein has adduced cogent and convincing evidence to set aside the election of the Petitioner. Therefore the requirements of law explained in the above decisions that an election Petitioner should “make out a strong case for setting aside the election” stands satisfied in the present case. Consequently, no advantage can be taken by the Petitioner of the observations of the Supreme Court in *Narender Singh v. Mala Ram* (1999) 8 SCC 198 to the effect that in border line cases the benefit of doubt should go to the returning candidate. For the same reason, this Court also does not find the observations in *Rahim Khan v. Khurshid Ahmed* AIR 1975 SC 290 and *Thakur Sen Negi v. Dev Raj Negi* 1993 Supp (3) SCC 645 to be helpful to the Petitioner.

22. This Court has already rejected the contention that the lapses committed by the ARO and RO in the present case are mere irregularities. In the considered view of this Court, the said lapses go to the very root of the matter and the mandatory requirement of the nomination paper of the Petitioner having to be accompanied by Forms A and B has not been met.

23. Relying upon the judgments in *Durga Shankar Mehta v. Thakur Raghuraj Singh* 1955 SCR 267 and *J.H. Patel v. Subhan Khan* AIR

1996 SC 3439 it is sought to be contended that Respondent No.1 ought to have raised an objection to the validity of the nomination paper of the Petitioner herein at the relevant time. This Court is unable to agree with the above submission for the simple reason that till 10 pm on 19th March 2007, even according to the evidence of the RO and ARO, the nomination paper of the Petitioner had not seen the light of the day. Also, the statement of the ARO that representatives of all the political parties were present when the nomination paper of the Petitioner was scrutinized between 10 pm and midnight on 19th March 2007, is not convincing at all. Even assuming that the representatives of all the parties were present, whether they had sufficient time to scrutinize the nomination paper and its defects is not known. In any event, the defect of the nomination paper, not being accompanied by Forms A and B as mandatorily required by law, is so serious that in the considered view of this Court the mere failure to raise objections at the time of scrutiny of such nomination paper cannot cure its illegality.

24. Reliance is placed by Mr. Krishnamani upon certain observations in *Vashist Narain Sharma v. Dev Chandra SCR 509*, *Samant N. Balakrishna v. George Fernandez AIR 1969 SC 1201*, *Abdul Hussain Mir v. Shamsul Huda (1975) 4 SCC 533* and *State of NCT of Delhi v. Sanjeev (2005) 5 SCC 181* to submit that in cases where there are allegations of *malafides* against the ARO or the RO, proof beyond reasonable doubt should be required. In the present case, Respondent No.1 has been able to prove convincingly the connivance

of the ARO with the Petitioner herein in getting the RO to erroneously accept the Petitioner's nomination paper.

25. This Court accordingly holds that the second issue has also been rightly answered by the learned ADJ. The election of the petitioner has been rightly declared to be null and void.

Does Respondent No.1 get declared to be elected as a consequence?

26. This brings us to the last aspect of the matter, whether Respondent No.1 Satish Kumar was eligible to be declared elected as Councillor. The learned ADJ answered the above issue in the affirmative by relying upon Section 19(1)(c) of the DMC Act. However, this Court finds that the learned ADJ has extracted only Section 19(1)(c) and proceeded on that footing. The entire Section 19 which is relevant for the present case reads as under:

“(1) At the conclusion of the trial of an election petition, the court of the district judge shall make an order-

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner and any other candidates to have been duly elected.

(2) If any person who has filed an election petition has, in addition to calling in question the election of the returned candidate, claimed declaration that he himself or any other candidate has been duly

elected and the court of the district judge is of the opinion--

(a) that in fact the petitioner or such other candidate received a majority of the valid votes, or

(b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes, the court 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.”

27. The learned ADJ has not undertaken any discussion of the requirement of the above provision of law probably because the learned ADJ did not set out the entire provision. A perusal of the above provision would show that the consequence of the declaration of an election as void does not automatically result in the declaration of the challenger as elected. Section 19(2)(a) requires the learned ADJ to form an opinion whether after the election of the successful candidate is set aside, the challenger would have received a majority of the valid votes, or under Section 19(2)(b) “that but for the votes obtained by the returned candidate the Petitioner or the returned candidate would have obtained a majority of the valid votes.”

28. In a multi-cornered contest like the present one, this obviously is not a simple exercise. There has to be evidence led to show that if the elected candidate is out of the fray as on the date of the poll, then the challenger would have obtained majority of the votes. This is neither practical nor feasible since that would require the examination of a

large sample of voters to ascertain how they may have voted on the polling date if the elected candidate is kept out of the fray. In the considered view of this Court, the correct way of interpreting the requirement of Section 19(2) is to limit it to one particular circumstance which takes colour from the words “valid votes”. It must straightway be noticed that Section 19(2) is on the lines of Section 101 of the Representation of the People Act, 1951. If there are only two candidates in the fray, it might be possible after excluding all the invalid votes to determine if the majority of the valid votes, after declaring the election of the elected candidate to be void, are that of the contesting candidate. However, in a situation like the present one, there is no evidence at all to come to the conclusion that if the Petitioner had been kept out of the fray by rejecting his nomination paper, a majority of the electors would have voted for Respondent No.1. In the absence of any such evidence, it was not possible for the learned ADJ to have concluded that Respondent No.1 should be declared as the elected candidate.

29. Consequently, this Court sets aside the finding of the learned ADJ on Issue No.3 above.

30. In conclusion, this Court affirms the impugned judgment of the learned ADJ in so far as it holds the election of the Petitioner herein to be null and void on the ground that the nomination papers of the Petitioner were not accompanied by Forms A and B as mandatorily required under the MCD (Election Symbols Order). This Court,

however, sets aside the finding in the impugned judgment to the effect that as a consequence of setting aside of the election of the Petitioner, Respondent No.1 should be declared as elected.

31. As a consequence, the SEC will take immediate steps to have Ward No. 78 declared vacant as on the date of the impugned judgment.

32. Consequent upon the impugned judgment, as recorded by this Court in its order dated 27th June 2008, Respondent No. 1 took oath on 27th June 2008 and has been functioning as a Councillor till date. He will forthwith cease to function as a Councillor. However, since he was functioning as Councillor in terms of the impugned judgment, the relevant portion of which has been set aside only today, he need not be asked to reimburse any monetary benefit he might have enjoyed during this period. However, he will forthwith cease to receive any benefit as a Councillor with immediate effect.

33. The writ petition is disposed of in the above terms but with no order as to costs. The application is disposed of.

S.MURALIDHAR, J

APRIL 13, 2010
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