

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 3960/2010 & CM APPL 7911/2010

Reserved on: April 7, 2011

Decision on: April 26, 2011

A. DHANWANTI CHANDELA Petitioner
Through Mr. Rakesh Kumar Khanna, Senior Advocate
with Mr. Rajbir Bansal, Ms. Seema Rao, Mr. Vishal
Panwar and Mr. Rajiv Ranjan Mishra, Advocates.

versus

BALBIR TYAGI AND ORS Respondents
Through Mr. Rajesh Yadav with
Ms. Ruchir V. Arora, Advocates for R-1.
Mr. Naveen Grover with
Mr. Raj Kumar, Advocates for R-4.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the order? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the order should be reported in Digest? Yes

JUDGMENT
26 .04.2011

1. Aggrieved by the dismissal of her election petition CS (OS) No. 44 of 2007 challenging the election of Respondent No. 1, Mr. Balbir Tyagi, to the Municipal Ward No. 116, Vikas Puri, New Delhi by the impugned judgment dated 3rd April 2010 of the learned Additional District Judge

(‘ADJ’), the Petitioner A. Dhanwanti Chandela has filed the present petition.

2. At the election to Municipal Ward No.116 held on 5th April 2007, the Petitioner was the candidate of the Jharkhand Mukti Morcha (‘JMM’) and Respondent No. 1 Balbir Tyagi was the candidate of the Bharatiya Janata Party (‘BJP’). Respondent No. 4 was the other contesting candidate. In the election petition filed on 24th April 2007 the Petitioner stated that subsequent to the declaration of results she came to know through various sources that Respondent No. 1 had not complied with the rules and the notification issued by the State Election Commission as regards the maintenance of accounts and expenses. It was averred that Respondent No. 1 had appointed one Mr. Raj Pal who was a permanent employee of the Municipal Corporation of Delhi (‘MCD’) as his polling agent at the polling station No. 107 in Ward No. 116 on the election date, i.e. 5th April 2007. It was further averred that Respondent No. 1, with a view to alluring voters, had got a full page advertisement inserted in the issues of *Jan Manas Weekly* dated 18th -24th March 2006, 25th-31st March 2007 and 1st-6th April 2007 and had paid a sum of Rs. 24,000/- for each publication. The expenses towards the said advertisement had not been shown in the statement of expenses incurred by Respondent No. 1 on the election. Further, it was stated that Respondent No. 1 appointed Mr. Rohtash, who

was a permanent employee of the Delhi Transport Corporation ('DTC'), as polling agent at polling station No. 106 and this amounted to corrupt practice in terms of Section 17 (1) (b) of the Delhi Municipal Corporation Act, 1957 ('DMC Act'). The Petitioner claimed that she got the second highest number of votes after Respondent No. 1 and should be declared elected.

3. In the written statement filed by Respondent No. 1, it was stated in para 9 that the Petitioner did not verify the petition in terms of Section 15 (4) (c) of the DMC Act. Respondent No. 1 stated that Mr. Davinder Chadha was the only polling agent appointed by him. He denied having appointed Mr. Raj Pal as a polling agent. It was alleged that the name 'Raj Pal' had been inserted in the form for appointment of polling agent for polling station No. 107 in a different handwriting and at a later stage. Neither his parentage nor his address was mentioned in the said form which on the face of it appeared to be "a forged and fabricated document, so far as mentioning of name of Rajpal as a polling agent is concerned." Further it was averred that there could not possibly be a nomination of more than one polling agent in one form. Such a form or a form with incomplete particulars would not be accepted by the Returning Officer (R.O)/Presiding Officer (P.O). Respondent No. 1 denied that he had not maintained the accounts and expenses or the vouchers for the expenses incurred. He further denied that

he got full page advertisements published in the *Jan Manas Weekly*. It was stated that there was no such newspaper at least not in the area where Respondent No. 1 resided or had contested the elections. It is further averred that on verification, it was found that there was no such newspaper published from the said address. In fact from that address another newspaper '*Nai*' ["Newspaper Association of India"] was being published. It is submitted that the three receipts of Rs. 24,000/- each were forged and fabricated. No such money was ever paid and no advertisement published. It was further denied that Respondent No. 1 had appointed Mr. Rohtash as his polling agent. It is stated that the document does not bear the signature of Mr. Rohtash. It is averred that "it seems that somebody has manipulated some blank signed paper pertaining to appointment of Polling Agent by the answering Respondent and the blanks in the same were filled in at a later stage."

4. On 18th May 2009 the learned ADJ framed the following issues:

"1. Whether Raj Pal an employee of Horticulture Department of MCD had been appointed as an election agent of the Respondent No. 1? If yes, its effect. (OPP)

2. Whether Rohtash an employee of DTC had been appointed as an election agent of the Respondent No. 1? If yes, its effect. (OPP)

3. Whether the Respondent No.1 has failed to submit the details of expenses as required under Chapter 5 (A) of the DMC (Election of Councillors) Rules? If yes, its effect. (OPP)

4. Whether the Respondent No. 1 has exceeded the prescribed expenses? If yes, its effect. (OPP)

5. Whether the petition has not been properly verified as required and there has been a violation of Section 15 of the DMC Act? (OPR-1).

6. Whether the election of Respondent No. 1 from Ward No. 116, Vikaspuri (East), New Delhi – 18 is liable to be declared void? (OPP)

7. In case if the aforesaid issue is decided in affirmative, whether the election petition is liable to be declared as elected from Ward No. 116, Vikas pur (East), New Delhi – 18? (OPP)

8. Relief.”

5. The Petitioner examined eight witnesses and Respondent No. 1 examined nine witnesses.

6. As regards Issue No. 1 it was held by the learned ADJ that no explanation was forthcoming for the different ink and the handwriting on Form 8-B. Further, the P.O. had inserted the name of Raj Pal in the same

form whereas according to the R.O. it should have been done in a separate form. These factors raised a doubt which the Petitioner had not been able to clear and therefore, the case of Respondent No. 1 that the name of Raj Pal was “surreptitiously added at a later stage by interpolation cannot be unfounded.” Issue No.1 was accordingly decided against the election Petitioner.

7. Mr. Rakesh Kumar Khanna, learned Senior counsel appearing for the Petitioner assailed the above finding by referring first to Rule 22-A of the Delhi Municipal Corporation (Election of Councillors), Rules 1970 (‘DMC Rules’) and submitted that a candidate could in terms of the above provision appoint two reliever agents in addition to the polling agent and that Mr. Raj Pal was in fact appointed as a reliever for the polling agent Mr. Davinder Chadha. Mr. Khanna then referred the evidence of PW-7 Mr. K.P.S. Chauhan, the P.O., who admitted that he had inserted the name of Mr. Raj Pal at the instructions of Mr. Balbir Tyagi and Mr. Raj Pal had signed his name in the presence of the P.O. Mr. Khanna referred to the evidence of Mr. Raj Pal who admitted his signature on the Form 8-B. He referred to the attendance report maintained at the Horticulture Department of the MCD and submitted that the signatures of Mr. Raj Pal thereon for 5th April 2007 to 7th April 2007 appeared to have been made on the same day. Further, the said attendance sheet did not necessarily mean that Mr. Raj Pal

was continuously present on duty on 5th April 2007 from 9 am to 5 pm. He submitted that the learned ADJ had overruled the objection of the learned counsel for Respondent No. 1 and held that Form 8-B had been duly proved by PW-7 and that Mr. Raj Pal had identified his signature. Mr. Khanna submitted that procuring the assistance of an employee of the MCD was a corrupt practice within the meaning of Section 17 (1) (b) of the DMC Act read with Rule 92 (a) of the DMC Rules.

8. In reply it is submitted by Mr. Rajesh Yadav, learned counsel appearing for Respondent No. 1 that Mr. Raj Pal in his cross-examination stated that he never met Respondent No. 1 at any point in time. The mere oral evidence to prove a corrupt practice was not sufficient. It had to be substantiated by documentary evidence. Mr. Yadav referred to a number of judgments including *Pradip Buragohain v. Pranati Phukan JT 2010 (6) SC 614*, *Sudarsha Avasthi v. Shiv Pal Singh (2008) 7 SCC 604*, *Borgaram Deuri v. Premodhar Bora (2004) 2 SCC 227*, *Regu Mahesh @ Regu Maheswar Rao v. Rajendra Pratap Bhanj Dev (2004) 1 SCC 46*, *Mahender Pratap v. Krishan Pal (2003) 1 SCC 390* and *Kamal Nath v. Sudesh Verma (2002) 2 SCC 410*.

9. In order to appreciate the above submissions, the relevant statutory provisions may be referred to. Section 17 (1) (b) of the DMC Act states that

the election of the returned candidate can be declared void on the ground of commission of any corrupt practice by the returned candidate or his agent. A set of corrupt practices have been listed out in Section 22 of the DMC Act. Rule 92 of the DMC Rules lists out further corrupt practices. Rule 92 (a) of the DMC Rules states that “the obtaining or abetting or attempting to obtain or procure by a candidate or his agent, or by any other person with the consent of candidate any assistance (other than the giving of vote) for the prospect of that candidate’s election from any person in the service of the Corporation” shall be deemed to be a corrupt practice. The case of the Petitioner is that Respondent No.1 engaged Mr. Raj Pal, an employee of the MCD, as his reliever agent, in contravention of Rule 92 (a) DMC Rules. That a reliever agent can be engaged is plain from Rule 22 A of the DMC Rules which reads as under:

“22-A. Appointment of polling agents - (1) A contesting candidate may appoint one agent and two relief agents to act as polling agents of such candidate at each polling station and every such appointment shall be made in Form 8-B and shall be made over to the polling agent for production at the polling station.

(2) No polling agent shall be admitted into the polling station unless he has delivered to the Presiding Officer the instrument of his appointment under sub-rule (1) after duty completing and signing before the Presiding Officer the declaration contained therein.”

10. The P.O. was examined as PW 7, a witness of the Petitioner. He deposed as under:

“I have brought the summoned record. On 5th April 2007, I was posted as Presiding Officer in Ward No. 116, Polling Station No. 107 at Prerna Public School, Vikas Puri in the elections of corporation for the year 2007. The documents already exhibited as PW 1/7 which is the attested copy of the original form 8-B which I have brought today and this document Ex.PW-1/7 was signed in my presence by Sh. Devender Chaddha and Sh. Raj Pal over the polling agents at polling station No. 107 of Ward No. 116 and they were the polling agents of Sh. Balbir Tyagi.

Xxx by Ld. counsel Sh. Rohtash Sharma, Advocate for the Respondent No. 1.

Before appointment of Presiding Officer, training was given. It is correct that one form is meant for one agent. Another agent was appointed as a reliever which I am otherwise empowered to appoint.

Court Question:

The reliever was appointed by me on the request made by the candidate and the name of the reliever had been given to me by Mr. Balbir Tyagi, the candidate to the election. I did not ask the reliever the

name of his father and his address. Vol.: I had only seen his election ID card on the basis of which I was satisfied and I appointed the agent. I am not aware if Rajpal was on duty on the date of election. **It is incorrect to suggest that Rajpal was not present before me and was on his duty as a Maali.** I cannot tell whether Rajpal is a resident of Haryana. **Vol., the person was present before me along with the identity card. I did not obtain the voter identity card of Rajpal.** I am not aware if a separate form is required to be filed up for a reliever Polling Agent. It is incorrect to suggest that the name of the Rajpal has been inserted, added, interpolated by me later on with the connivance of the Petitioner after the form has been sent out and it is for this reason that the ink is different. It is incorrect to suggest that I have connived with other candidate and deliberately added the name of Rajpal. (emphasis supplied)

Court Question:

As per the established procedure, who fills up the Form 8-B.

Ans. The Form 8-B is given to the candidate and is filled up by the candidate or his agents. There is no separate form for reliever polling agent.

It is correct that there is no indication in the entire form that Rajpal was a reliever. I have not seen any other form with two polling agents. I was not the Presiding Officer in polling booth No. 108. Vol., I was the Presiding Officer

in Polling Booth No. 107. No reliever for any other candidate had been appointed since there was no request. It is incorrect to suggest that I am deposing falsely.”

11. The salient feature of the above evidence is that PW-7 categorically stated that “the reliever was appointed by me on the request made by the candidate **and the name of the reliever had been given to me by Sh. Balbir Tyagi, the candidate to the election.**” The cross-examination by counsel for Respondent No.1 was about the established procedure and the fact that there is usually no separate form for the reliever polling agent. It is also evident from the cross-examination that “there is no indication in the entire form that Rajpal was a reliever.” The remaining answers are in reply to the questions by the court. Mr. Rajesh Yadav submitted that this may not have been correctly recorded as these questions were also by counsel for Respondent No.1. Be that as it may, PW-7 remained unshaken about the fact that he added the name of Raj Pal at the instance of Respondent No.1 and that Raj Pal signed his name in the presence of PW-7. The suggestions that he was deposing falsely were denied by him.

12. PW-7 asserted that “the person was present before me along with the identity card. I did not obtain the voter identity card of Rajpal.” This Court is unable to accept the contention of Mr. Rajesh Yadav that PW-7 had acted in connivance with the Petitioner and gave contradictory answers. He

saw Raj Pal's identity card. It makes little difference that he did not obtain the voter identity card of Mr. Raj Pal. PW-7 only had to satisfy himself of Raj Pal's identity. His evidence shows that he did. The suggestion to him in cross-examination that "the name of the Rajpal has been inserted, added, interpolated by me later on with the connivance of the Petitioner" was, of course, denied by him. The significant aspect of the evidence of PW-7 is that in his chief-examination PW-7 clearly stated that "this document Ex.PW-1/7 was signed in my presence by Sh. Devender Chadha and Sh. Rajpal over the polling agents at polling station No. 107 of Ward No. 116 and they were the polling agents of Sh. Balbir Tyagi." Nothing was elicited from him in the cross-examination to contradict the said assertion. PW-7 effectively negated the case of Respondent No. 1 that the name of Mr. Raj Pal had been interpolated in the form and that Mr. Raj Pal was never present before the P.O. and did not sign the Form 8-B.

13. Another significant feature is that Mr. Raj Pal was examined as RW-4, in other words as a witness of Respondent No.1. He was expected to support the case of Respondent No.1. His evidence shows otherwise:

"I am working in MCD as Mali in Horticulture Department posted at J Block, Vikas Puri, New Delhi. I was on duty on 5th April 2007 starting from 9 am to 5 pm.

Xxxxx by Sh. B.D. Kaushik, counsel for the Plaintiff.

I know Sh. Balbir Tyagi who is Respondent No. 1 in the present case, since my childhood. He is not related to me. I know Balbir Tyagi as I am working nearby his residence. I visited his house once prior to about 10 to 12 years. I am working in Horticulture Department of MCD since 1981 and was regularized in the year 1983. **It is correct that document Ex.RW4/PX1 bears my signatures at points A and B (objected to by the counsel for the Respondent No. 1 on the point of putting the photocopy of the document to the witness).**” (emphasis supplied)

14. What is significant is that Mr. Raj Pal did not deny that his signature was on Form 8-B. If in fact he had not signed the form he should have said so in reply to this question. The learned ADJ in fact found no merit in the objection raised by counsel for Respondent No.1 on the ground that he was shown the signatures on the photocopy. The precise finding of the learned ADJ is under:

“I find no merit in the objection raised since the said Form 8-B has been duly proved by PW-7 and the witness Rajpal being the executant of the same has identified his signatures on the photocopy and now at the final stage the original Form 8-B bearing the signatures of Raj Pal has also been placed on record.”

15. Clearly on this crucial aspect Mr. Raj Pal, as a witness of Respondent

No. 1, did not support the case of Respondent No.1.

16. Also significant is that no attempt was made to have the signature of Mr. Raj Pal on the Form 8-B verified by a handwriting expert although this was got done as far as the other polling agent Mr. Rohtash is concerned. The evidence of PW-7 and RW-4 effectively proved that it was Respondent No.1 who gave the P.O. the name of Raj Pal for addition as his reliever polling agent; the P.O. then inserted the name of Raj Pal in Form 8-B and in the presence of the P.O. Mr. Raj Pal signed the form. Also it stands proved that Mr. Raj Pal was an employee of the MCD.

17. The argument of Respondent No. 1 that Form 8-B is for a single polling agent and could not have been accepted with Mr. Raj Pal's name also being inserted there is neither here nor there. Merely because a separate form was not used for the purpose of the nomination of Mr. Raj Pal as a reliever polling agent, does not falsify the case of the Petitioner that Respondent No. 1 had, in fact, appointed Mr. Raj Pal as a reliever agent. In the course of the arguments, learned counsel for Respondent No. 1 put forth another line of defence by suggesting that Mr. Raj Pal had, in fact, acted on behalf of the Petitioner herself, who had earlier been a Councillor in the area and could have influenced Mr. Raj Pal to come to sign the Form 8-B. This argument overlooks that Mr. Raj Pal was examined as RW-4, a witness of

Respondent No. 4. No attempt was made to declare Mr. Raj Pal hostile. No question was put to him that he acted at the behest of the Petitioner.

18. Once the Form 8-B was produced in the Court and was duly proved by PW-7 who was the P.O., the Petitioner had discharged the burden to show that Respondent No. 1 had appointed Mr. Raj Pal, an employee of the MCD, as his reliever polling agent. The burden then shifted to Respondent No. 1 to prove that the P.O. connived with the Petitioner and forged the Form 8-B. This Respondent No. 1 failed to do. The reasoning of the learned ADJ and the conclusion in favour of Respondent No. 1 on this aspect does not square with the evidence. The conclusion also contradicted the finding of the learned ADJ to the following effect:

“I find no merit in the objection raised since the said Form 8-B has been duly proved by PW-7 and the witness Rajpal being the executant of the same has identified his signatures on the photocopy and now at the final stage the original Form 8-B bearing the signatures of Raj Pal has also been placed on record.”

19. The subsequent conclusion of the learned ADJ that the argument of Respondent No. 1 that the name of Raj Pal was “surreptitiously added at a later stage by interpolation cannot be unfounded” is based on surmise and is unsustainable in law. In the considered view of this Court, in the light of the evidence led by the parties, Issue No. 1 had to be answered in favour of

the Petitioner. In terms of Rule 92 (a) of the DMC Rules read with Section 17 (1) (b) of the DMC Act the election of Respondent No. 1 had to be declared void.

20. On Issue No. 2 the learned ADJ held against the Petitioner on the ground that the Petitioner failed to place on record any notification to show that employees of the DTC were covered under the prohibited category. Consequently it mattered little whether Mr. Rohtash was in fact appointed as a polling agent of Respondent No.1 in regard to polling booth No.108. In the view of this Court, this finding does not call for interference. However what is interesting is that Mr. Rohtash denied the signatures in the Form 8-B which was produced and marked as Ex.PW-5/2. In this regard the Petitioner relied on the evidence of PW-8 Mr. R.G. Meena who asserted that Mr. Rohtash Singh had signed his name in the presence of Mr. Meena, at Ex.PW-8/A. Again, a series of suggestions were made to Mr. Meena that Mr. Rohtash Singh had never acted as a polling agent of Respondent No. 1 and that in connivance with the Petitioner, Mr. Meena had manipulated the records. The learned ADJ directed an expert opinion to be obtained on the signatures in the said Form 8-B. By a detailed report dated 15th March 2010 the expert concluded that the sample signatures of Mr. Rohtash taken in the Court matched the signatures on Form 8-B. The Petitioner therefore succeeded in proving that Respondent No. 1 had taken a false defence as

regards Mr. Rohtash Singh who appeared as RW-3 and denied his signatures on Form 8-B. Although the finding of the learned ADJ on Issue No. 2 does not call for interference, the false defence taken by Respondent No. 1 was not without consequence as far as the Petitioner was concerned.

21. It was submitted on behalf of Respondent No.1 that the Petitioner had falsely alleged that Respondent No. 1 had inserted full-page advertisements in a local newspaper and had produced fabricated receipts to prove it. This was serious enough to invite the dismissal of the election petition. In response, it is submitted by Mr. Khanna that the Petitioner did summon the publisher of the said newspaper but the latter did not appear despite summons.

22. On Issue No. 4 this Court concurs with the learned ADJ that the Petitioner was not able to establish that Respondent No.1 exceeded the prescribed expenses. However, the ADJ's further observation that there was the possibility of some other person inserting the advertisement in *Jan Manas Weekly* "only for creating a ground in the election petition at a later stage" was based on surmise and unwarranted.

23. Mr. Rajesh Yadav then argued that there was no proper verification of the election petition and that this was decided against Respondent No. 1

and in favour of Petitioner. Respondent No. 1 was not precluded from raising this ground in this writ petition. Reliance was placed on the decisions in *Anil Kumar Gupta v. MCD (2000) 1 SCC 128* and *Ravinder Kumar Sharma v. State of Assam (1999) 7 SCC 435*. On the above issue No. 5 learned ADJ found that the affidavit in support of the petition had been properly verified and signed and therefore, there was no substance in this objection. This Court does not find any legal infirmity in the said finding.

24. As regards Issue No. 6, in view of the conclusions reached hereinbefore, this Court sets aside the finding of the learned ADJ and holds that the election of Respondent No.1 is liable to be declared void. However, on issue No. 7, this Court concurs with the learned ADJ that there was no occasion for declaring the Petitioner to be elected. Although the Petitioner obtained the next highest number of votes, in view of the judgment of the Division Bench of this Court in *Satish Kumar v. Vikas 177 (2011) DLT 1*, it is not possible to accept the submission of the Petitioner that she should be declared to be elected.

25. Consequently, this Court sets aside the impugned order dated 3rd April 2010 of the learned ADJ in respect of Issue Nos. 1 and 6 and declares the election of Respondent No. 1 to Municipal Ward No. 116 void on the

ground that Respondent No.1 appointed Mr. Raj Pal an employee of the MCD as his reliever polling agent thus attracting the provisions relating to corrupt practice as contained in Section 17 (1) (b) of the DMC Act read with Rule 92 (a) of the DMC Rules. The consequent vacancy in Municipal Ward No. 116, Vikas Puri will be filled up by a fresh election being held in accordance with law.

26. The petition is allowed in the above terms, with costs of Rs. 5,000/- which will be paid by Respondent No. 1 to the Petitioner within a period of four weeks from today.

27. The petition and the pending application are disposed of.

S. MURALIDHAR, J

APRIL 26, 2011
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